



Institute For Policy Innovation

ISSUE BRIEF

STILL “BAD”: A CRITIQUE OF THE LATEST ATTEMPT TO GUT THE DMCA

by Lee A. Hollaar, Ph.D.

Synopsis: Congressman Rick Boucher’s latest proposal to make significant changes to the Digital Millennium Copyright Act (DMCA) would make substantial and unwise changes to U.S. copyright law based on nonexistent problems, and would put the United States in violation of our trade treaties, all in order to relieve copyright infringers of legal liability. It’s still a bad idea.

In the near-decade since Congress passed the Digital Millennium Copyright Act (DMCA),¹ none of the dire predictions of its opponents have come to pass.² But that hasn’t stopped Rep. Rick Boucher (D-VA-9) from introducing bills to address essentially nonexistent problems in a way that could undercut hard-fought trade treaties important to businesses.³

In October 2002, Boucher included his DMCA attack as an “other purpose” of H.R. 5544, a bill touted as protecting consumers from rights-protected CDs that aren’t clearly labeled. He tried the same thing the next year in the 108th Congress, getting bill number 107 as a cute play on the section of the copyright statute covering fair use (although the bill had little to do with fair use), and in the 109th Congress, this time getting bill number 1201, this time as a play on the section of the DMCA that he tries to repeal by making it a subset of another section.

This Congress, Boucher has dropped the pretext of protecting consumers from rights-protected media, perhaps because he has realized that it hasn’t been the problem DRM-haters felt it would be.

Boucher has again been able to get his clever bill number, H.R. 1201, and this year coupled it with an equally clever title – the “Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007” (or “FAIR USE Act”). But the act has little to do with “freedom,” “innovation,” “revitalizing entrepreneurship,” or even “fair use” as traditionally viewed.

STATUTORY DAMAGES FOR CONSUMERS, NOT INDUCERS OR CONTRIBUTORS

The first of the bill’s ways of “promoting freedom and innovation” is found in Sec. 2(a), which remits (a nicer word than blocks) statutory damages

for those found to have materially contributed to copyright infringement, actively induced others to infringe, or have benefited from the infringement under their control (the three forms of secondary copyright infringement: contributory, inducement, and vicarious). This is called a “Statutory Damages Adjustment.” It certainly doesn’t reward the innovation or entrepreneurship of the people whose copyrights are being infringed by the help of, and maybe the benefit of, those protected by this bill.

This is special-interest legislation of the worst kind, protecting those who encourage others to infringe copyrights, while ignoring the real problems with statutory damages in today’s world. The problem with statutory damages is not confined to secondary infringement, but is a poor fit for every aspect of “file sharing.”⁴ At the time the Copyright Act of 1978 was being enacted, the most likely infringement, and the one most damaging, was of a small number of works with a large number of copies. There was an overhead associated with infringing each work, such as the setup costs of a printing run, and the effect of that overhead could be minimized only by producing many infringing copies of one or a few works.

In contrast, there is little difference to an infringer between *many* downloads of a *few* works and a *few* downloads of *many* works. Today people making large collections of songs available to the world is the norm. But the consequences in terms of statutory damages of these two different models of infringement is dramatic, because statutory damages are measured by the number of works that are infringed, not the number of infringements.⁵ Statutory damages run from \$750 to \$30,000 per work, and up to \$150,000 per work if the infringement is willful. Even if the infringer had no reason to believe that he or she were infringing, the minimum statutory damages are \$200 per work.⁶

Even the copyright owners recognize that this is a problem, and while they may sue someone “sharing” a thousand or more songs, they only claim infringement of a couple dozen, lest damages of \$750 times a thousand repulse the courts into finding a way around such liability.

But the solution is *not* to give contributors and inducers a free pass and continue the potentially-draconian penalties for their customers. That would be especially

reprehensible in the case of some “file sharing” systems that may be tricking users into sharing a vast number of files,⁷ so that the users’ statutory damage liability can bankrupt them. Yet this bill would let a company that deliberately designs and distributes a system causing that undesired sharing avoid statutory damages completely.

Rather than take the approach of H.R. 1201, which protects only a special interest group (and thus ends their advocating for their customers who face the same problem because “they’ve got theirs”), Congress should revisit the statutory damages provision to make it workable in the era of people infringing a large number of works a few times each, while continuing to provide a deterrent to copyright infringement.

CODIFYING SUPREME COURT PRECEDENTS

It’s unfortunate that secondary liability was not codified in the Copyright Act of 1976, but was rather left to the courts. You are only sure of whether you are liable if you are “on all fours” with a Supreme Court decision. All the rest is guessing from dicta. But, again, this bill doesn’t do the job. Instead, it codifies only the *Sony*⁸ exception for supplying a device:

No person shall be liable for copyright infringement based on the design, manufacture, or distribution of a hardware device or of a component of the device if the device is capable of substantial, commercially significant noninfringing use.

The copyright statutes provide many exceptions to infringement.⁹ These include:

- Reproducing by libraries in certain circumstances (§108).
- Performing or displaying a work in a classroom or in a telecourse; a religious assembly; to benefit an educational, religious, or charitable organization if performers or promoters are not being paid; in a public place if received on a TV or radio like those found in a home; by a government body or nonprofit agricultural or horticultural organization at a fair or exposition; by a store to promote the sales of the work; in transmissions to the blind; or by veterans or fraternal organizations if the public is not invited (§110).

- Making copies and adaptations of computer programs to use them on a machine and to archive them (§117).
- Reproducing and distributing in specialized formats for the blind or other people with disabilities (§121).

All of these exceptions have very specific requirements (some reading like the tax code), or pertain only to certain types of works, but because of all these statutory exceptions (and fair use) in copyright law, it is hard to conceive of a hardware device for playback or reproduction that wouldn't fall into at least one of the many exceptions, and therefore arguably be "capable of a substantial ... noninfringing use."

And wouldn't any special interest love to have such an immunity from liability, regardless of the foreseeable consequences of their acts? They can build a business off the intellectual property of others, without any consequences. As Justice Kennedy noted about some "file sharing" systems during the *Grokster* oral arguments, what they

want to do is to say that unlawfully expropriated property can be used by the owner of the instrumentality as part of the startup capital for his product. ... just from an economic standpoint and a legal standpoint, that sounds wrong to me.¹⁰

Of course that's wrong, and yet that is what H.R. 1201 would clearly encourage.

If the bill were really trying to codify Supreme Court precedent, rather than provide a free ride for manufacturers and distributors, it would also include liability for inducement of infringement based on the Supreme Court's unanimous *Grokster* decision.¹¹ As I noted in "*Sony Revisited*,"¹² in *Sony's* footnote 19 the Court said that Sony was not an intentional inducer, and so the decision has to be read as addressing the case where there is no inducement. *Grokster* addressed the case when there is inducement. In a memorandum from Justice O'Connor, the swing vote in *Sony*, to Justice Blackmun, at that time writing what was going to be the Court's opinion in the case, she noted that the leading case on secondary liability

seems to indicate that there are two ways to engage in contributory infringement. First, one

may *induce* the infringement. Second, one may *materially contribute* to the infringement. (Emphasis in the original.)

Rep. Boucher ignores the first of these in his purported attempt to codify Supreme Court decisions.

But since H.R. 1201 couldn't blatantly say "designers, manufacturers, and distributors shall not have any secondary liability for copyright infringement from their intentional conduct," it may not provide the easy out from law suits its proponents crave. Does "distribution" cover product advertising or support that promotes infringement? In *Aimster*, Judge Posner found liability despite the *Sony* exception the bill tries to codify because

In explaining how to use the Aimster software, the tutorial gives as its *only* examples of file sharing the sharing of copyrighted music, including copyrighted music that the recording industry had notified Aimster was being infringed by Aimster's users. The tutorial is the invitation to infringement that the Supreme Court found was missing in *Sony*.¹³

The bill's language most likely will shift a secondary infringement claim to determining whether something is distribution or promotion, something that may not be resolvable at the summary judgment stage, instead requiring a full (and expensive) trial.

The revitalization of inducement liability by the Supreme Court rewards virtuous behavior and punishes acts that encourage infringement by others, viewed in light of the entire record and not isolated acts such as design, manufacture, or distribution. If the company has taken steps to stop or reduce the infringement of its customers, that is a strong indication that it is not inducing infringement. But if H.R. 1201 were viewed as taking inducement out of secondary liability for copyright infringement—as its proponents would like because, after all, why is there a need to codify *Sony* after more than three decades if not to cripple *Grokster*—we will go back to the actions a unanimous Supreme Court clearly condemned.

It's been almost three years since *Grokster*. There is little to show that recognizing inducement liability has had a substantial effect on "freedom," "innovation," or "entrepreneurship." Other than to try to save some special interests from the consequences

of their intentional encouragement of copyright infringement, there is no reason not to codify inducement liability at the same time as contributory infringement.

CODIFICATION OF EXEMPTIONS BY THE LIBRARIAN OF CONGRESS

In Section 3(a) the bill tries another approach to provide its backers with a liability shield, this time for circumventing access control systems. It makes the current six three-year exemptions recently granted by the Librarian of Congress¹⁴ permanent. But as I previously noted in *A Bad Trade*,¹⁵ recent trade treaties such as CAFTA restrict the exemptions that can be made to the anticircumvention legislation mandated for all parties to those treaties.

It's not surprising that Rep. Boucher doesn't mind creating problems with our trade treaties. After all, he was against CAFTA when it passed the House 217-215. But that doesn't explain the ten current Republican co-sponsors of H.R. 1201 who voted for CAFTA and yet seem willing to put it in jeopardy with this bill.¹⁶

Even though the other parties to the treaties did not push for (and probably didn't want) the DMCA provisions, they would certainly use the United States' violation of the provision limiting DMCA exceptions against us if we were to press for their compliance of other provisions important to our industries. CAFTA and our other trade treaties have sections that specifically benefit electronic commerce, particularly in digital products. Their intellectual property sections not only required legislation like the DMCA, but patent cooperation, trademark protection (including criminal penalties), dispute resolution for Internet domain names, stopping counterfeit goods, and limited liability for ISPs. These are things that are important to innovators and entrepreneurs in the United States, and may be lost if this bill becomes law.

But even if codification of the current exemptions didn't create a problem with the trade treaties, it is not a good idea to codify them. Looking at the history of the exemptions, we see that the language of both the exemptions in the first rulemaking was refined in the second rulemaking. And in the third rulemaking, two of the exemptions from the second rulemaking were revised, one was dropped completely, and three new ones were added. It should

be clear that the rulemaking was never intended to be cast in stone (or statute), but to be refined as knowledge is gained about their effects.

But there is a problem with the current rulemaking system—it works on a fixed three-year cycle, so it can't respond promptly to problems. Because the rulemaking takes about a year, an abuser can misuse a protection scheme for as long as four years.¹⁷ It would be far better if the rulemaking would be ongoing, both to address new problems and to correct problems with exemptions in force (as we have seen for most of them).

BUT WAIT, THERE'S MORE...

Having tried to justify his amendments to the DMCA by casting them as a simple codification of the current rules, in Section 3(b) of the bill Rep. Boucher goes on to add a new subparagraph¹⁸ with six more broad exceptions to liability for circumvention to access, misleadingly called "Extension to Determinations of Librarian of Congress." But unlike the careful work of the Copyright Office, this bill does not bother to determine if there is a real problem (rather than just something hypothetical) and narrowly craft an exception to address only the real problems.

Like the codification of the current rulemaking, adopting the six new exceptions would most likely violate trade treaty obligations. And yet, in the almost-ten-year history of the DMCA, there is no record of any person held liable for any of the acts in this section. It hardly seems worth the risk.

The new exceptions are amazingly broad, certainly much broader than the balanced ones determined during the Copyright Office rulemaking proceedings. Even the one that tries to look like fair use ("(v) an act of circumvention that is carried out to gain access to a work of substantial public interest solely for purposes of criticism, comment, news reporting, scholarship, or research") ignores the statutory four-factor balancing test. Instead, it quotes some of the examples that the fair use statute says are not infringement if the use is fair, none of which are automatically a fair use. If this bill passes, we'll likely see lots of copies of movies that include a "This is really good" comment, claiming that it is criticism or commentary, to justify breaking the copy protection scheme.

Another new exception allows circumvention to put something on a home network. Its only limita-

tion appears to apply only to things that “prevent uploading” (whatever that means), not circumventing the legitimate protection found on a DVD. And that limitation only applies to protection systems that only prevent “uploading to the Internet for mass, indiscriminate redistribution.” Presumably, you would get to circumvent any scheme that allows uploading as long as there is some discrimination in to whom you send the movies or songs.

Other exceptions go well beyond the fair use of a work. For example, it gives an absolute right to circumvent the protection mechanism of DVDs in order to make a compilation for classroom use. But that’s needed only for the convenience of the instructor, who could always play the desired parts of each movie on a regular DVD player, albeit with some delay as the scene is queued up. While that might require the help of a teaching assistant or multiple DVD players, it is clear that the DVD protection mechanism does not have to be circumvented to show movie scenes in a classroom. As one of the leading copyright courts, the Second Circuit, observed:

We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original. ... Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.¹⁹

The new exceptions also confuse purpose and effect. The purpose of my circumventing a DVD protection may be to include it in a classroom compilation, which would be legal under the bill, but doesn’t also mean that I won’t later “share” it with the world.

ONLY AN ILLUSORY SAFE HARBOR FOR TRAFFICKERS

But the circumventors given all these new exceptions from liability will have to be clever enough to do it all by themselves. Even with all these new carve-outs gutting who can be found liable for circumvention of a legitimate protection technique to access copyrighted material, the bill does not provide the safe harbor against liability that the manufacturers and distributors of circumvention devices likely expect if the bill were to pass.

Sections 1201(a)(2) and (b) state the prohibition against manufacturing or providing circumvention

technology or services, and neither are affected by this bill:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

Note that it does not provide any exception for devices that have legal as well as illegal purposes. As the Senate noted in its report on the DMCA:

Legislation prohibiting circumvention devices is not unprecedented. The Copyright Act in section 1002(c) already protects sound recordings and musical works by prohibiting devices which circumvent any program or circuit that implements a serial copy management system or similar system included in digital audio recording devices and digital audio interface devices. The Communications Act in section 605(e)(4) prohibits devices that are “primarily of assistance in the unauthorized decryption of satellite cable programming.”²⁰

In the case of the DMCA, as well as the two examples mentioned above, Congress determined that the harm of trafficking in devices that most likely would be used for illegal purposes warranted a complete ban on such devices. But because legitimate devices or computer programs, such as a debugging program, could possibly be used to circumvent a protection scheme, Congress required that circumvention be a primary purpose of the device or computer program.

AGAIN, IS IT WORTH IT?

In *A Bad Trade*, looking at whether it was worth violating our trade treaties to address problems that are essentially hypothetical, I concluded that:

H.R. 1201 should not be the mechanism for putting the United States in violation of its trade agreements. If such a far-reaching decision is to be made, it should be after careful debate based on an understanding of the anticircumvention provisions. It should not happen by the passage of a misleading bill that repeals the provisions through stealth.

Although that was a different H.R. 1201, the conclusion is the same. Changes to the DMCA (and other copyright provisions, such as statutory damages and secondary liability) should be made carefully, so as not to cause future problems just to give backers of the bill a free-ride from liability for their help with copyright infringement.

ENDNOTES

1. Pub. L. No. 105-304, 112 Stat. 2860, enacted October 28, 1998.
2. As I noted in *Mountains Out of Molehills: How Believing the Worst Makes Technologists Ineffective, And What They Can Do About It*, IPI Issue Brief, April 26, 2007:

The real “unintended consequence” of the EFF paper is to illustrate how little real harm the DMCA has caused. The first version of the paper, which covered the first three years under the DMCA, reported eighteen different episodes, or six per year. ...

The next year, six new episodes are noted, half of them people concerned about the DMCA even though nobody was actually threatening them. During year five, five new episodes are noted, including an ex-contractor sued for unauthorized access to a company’s computers and two students who broke open a college’s debit card reader. In years six and seven, nine new episodes are reported, or 4.5 per year, continuing the downward yearly trend despite the EFF trying to include anything even distantly related to the DMCA. At least half of those were businesses trying to use the DMCA in disputes with their competitors.
3. I previously discussed this in *A Bad Trade: Will Congress Unwittingly Repeal the Digital Millennium Copyright Act and Violate Our Trade Treaties?*, IPI Issue Brief, June 23, 2006.
4. This is not the only instance where the copyright statutes, which are based on physical objects (“tangible medium of expression”) are a poor fit with the digital world. See “Copyright Laws are a Bad Fit,” in my treatise *Legal Protection of Digital Information*. <http://digital-law-online.info/lpdi1.0/treatise30.html#secI.B>.
5. Statutory damages are “with respect to any one work.” 17 U.S.C. 504(c)(1). If the work is a compilation, such as a record album, all the songs on the album may be considered as a single work. *UMG Recordings v. MP3.com*, 109 F.Supp2d 223, 56 USPQ2d 1374 (SD NY, 2000).
6. The only time when the court does not have to assess these minimum statutory damages is when the infringer had reasonable grounds for believing there was no infringement, such as it clearly being a fair use, and was working for a nonprofit educational institution, library, or archive, or a public broadcasting station. See 17 U.S.C. §504(c).
7. This is discussed in the USPTO report, *Filesharing Programs and ‘Technological Features to Induce Users to Share*, http://www.uspto.gov/web/offices/dcom/olia/copyright/oir_report_on_inadvertent_sharing_v1012.pdf. This was also the topic of the July 24, 2007, hearing by the House Committee on Oversight and Government Reform, which highlighted not only the copyright infringement being induced, but also the inadvertent “sharing” of personal information such as tax returns. See <http://oversight.house.gov/story.asp?ID=1424>.
8. *Sony v. Universal City Studios*, 464 U.S. 417 (1984).
9. See 17 U.S.C. §108 through §122.
10. Transcript of oral arguments, *MGM v. Grokster*, No. 04-480, March 29, 2005, at 36.
11. It’s interesting to note that when the electronics industry’s intellectual

- property was being taken by companies copying integrated circuit masks, the remedial legislation they proposed included explicit secondary liability for inducement. See 17 U.S.C. §905(3).
12. <http://digital-law-online.info/papers/lah/sony-revisited.htm>.
 13. *In re Aimster Copyright Litigation*, 334 F.3d 643, 651 (7th Cir. 2003).
 14. See <http://www.copyright.gov/1201/>.
 15. See footnote 3.
 16. Reps. Akin (MO-2), Bishop (UT-1), Burton (IN-5), Doolittle (CA-4), Franks (AZ-2), Gohmert (TX-1), Kline (MN-2), Souder (IN-3), Tiahrt (KS-4), and Weldon (FL-15). Three Republicans who supported CAFTA were co-sponsors but have withdrawn that support: Reps. Boozman (AR-3), Pickering (MS-3), and Pitts (PA-16).
 17. During the second rulemaking cycle, Static Control Components just missed the proposal cutoff, but was still given a chance to make their request. They were concerned about the DMCA being used to force people to buy printer cartridges from Lexmark.
 18. For unknown reasons, he adds this as subparagraph (G) even though the last subparagraph in 17 U.S.C 1201(a)(1) is (E). It’s not clear whether this is a placeholder for more mischief, a reflection of Rep. Boucher not having read the DMCA, or trying to avoid the grade that this legislation should receive.
 19. *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001).
 20. Sen.Rep. 105–190, at 11.

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