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WILL CONGRESS CIRCUMVENT THE DMCA?

By Richard A. Epstein

One constant theme of the consumer rights movement is that firms should make full disclosure of the terms on which they sell their wares. That theme is central to understanding H.R. 1201, the "Digital Media Consumers' Rights Act of 2005."

The problem is that H.R. 1201 itself doesn't engage in full disclosure when it claims to address "mislabeled copy-protected music" and "*other purposes*." It turns out that those unnamed purposes are no small add-on, but could eviscerate the already inadequate protection that federal law provides against copyright piracy.

PIRACY, PIRACY EVERYWHERE.

As is well known today, copyright piracy is rampant. The source of the problem is easy to identify, but hard to solve. It is so cheap, and so tempting, to make copies of protected music that millions do it, with scarcely a tinge of guilt or regret. There is at present no effective remedy against these systematic violations, which probably amount to a healthy majority of all copies made today of copyrighted works.

But there are two legal approaches to this problem that have had at least some role in stemming the piracy tide.

THE ROLE OF SECONDARY LIABILITY.

In copyright law there are the twin doctrines of secondary liability. One deals with deliberate inducement of copyright violation; the second tackles contributory infringement. Both doctrines start from the common premise that it is very costly for copyright owners to attack countless acts of copyright piracy on a case-by-case basis.

The use of *inducement* and *contribution* in tandem generally allows the copyright holder some challenge to any third party whose activities either purposively *induces* or substantially *contributes* to mass copyright infringement.

The unassailable logic behind these two doctrines is that one action against a key third party might stop multiple individual acts of infringement. The recent *Grokster* decision was, in the end, won on a purposive inducement theory when it was shown that Grokster had orchestrated huge peer-to-peer exchanges to facilitate illegal copying from which it gained, indirectly, advertising revenues.

IS THERE AN INTENT TO INFRINGE?

Inducement, an intentional tort, is generally easy to defend. The contribution side of the equation is more difficult to deal with because there are all sorts of technologies that contribute to copyright infringement, for which this form of secondary liability looks inappropriate.

This level of piracy could not take place without the Internet, and yet we don't hold liable all companies that supply the equipment and services that make the Web hum. The simple explanation is that this blunderbuss approach would cut too deeply into legitimate activities.

The Supreme Court, in its 1984 *Betamax* decision, set the initial balance strongly in favor of device producers when it held that Sony Corporation did not infringe with its Betamax technology so long as it was "capable of a substantial noninfringing use." There are genuine differences of opinion as to whether this test is a bit too forgiving to hardware producers or whether it has it about right. I have not heard anyone say that it is too tough on contributory infringers.

In the *Grokster* situation, there is no reason to chase after any supplier or servers when the obvious target was Grokster, an intentional wrongdoer. So the law here is best understood as resting in an unhappy but not indefensible place.

IS THERE DIRECT INFRINGEMENT?

The second line of defense of copyrighted material is found in the 1998 Digital Millennium Copyright Act. Rather than punish acts of copyright infringement directly, the DMCA targets those individuals who take steps that "circumvent a technological measure that effectively controls access to a [copyrighted] work." (Copyright Act, § 1201 (a)). It then backs up that provision with an additional prohibition that makes it illegal for any person to "manufacture, import . . . or otherwise traffic" in such technologies. (CA § 1201(a)). This one/two punch backstops the Copyright Law by making it illegal for anyone to take actions that either disable encryption devices, or provide equipment that allow others to do so.

Other provisions of the DMCA create narrow exceptions such as the exception to allow reverse engineering to ensure interop-

erability of software programs, though even this exception can be precluded by end user license agreements.

Why Fix What Isn't Broken?

So if there isn't much of a case for law reform in either of these two areas, why is the deceptively labeled Consumers' Rights Act so troublesome? Hidden at the end of the bill are two short provisions that are intended to amend section 1201(c) of the Act. The first of these picks up in Subsection 1, by adding this caveat: "and it is not a violation of this section to circumvent a technological measure in order to obtain access to the work for purposes of making noninfringing use of the work."

The second change, which is added at the end of § 1201(c), reads in its entirety: "(5) Except in instances of direct infringement, it shall not be a violation of the Copyright Act to manufacture or distribute a hardware or software product capable of substantial noninfringing uses."

Big Changes from Small Print.

At one level these two provisions look to be the soul of innocence. Who could possibly object to anyone who wants to gain greater access to copyright materials for the purposes of making suitable "noninfringing uses"?

But means as well as ends matter in the constant struggle to deal with copyright piracy. In looking at the structural problem, the key question is just how much noninfringing use is there relative to the torrent of illegal copying. In answering this question, it's not appropriate to look at the issue of interoperability, because that has already been dealt with first by the DMCA and second by the standard end user licenses. So it is not likely that there is much fair use to worry about.

Once the first of these two provisions is in place, then someone can circumvent the device for the appropriate purpose. But unfortunately H.R. 1201 does not say one word about how the circumvention in question will be limited just to those cases. Nor does it indicate what penalties will be given to individuals who first circumvent for fair use and then proceed, as is likely to be the norm, to circumvent for all other purposes. *So if equipment can be sold for good purposes, then it can be used for bad ones, and the DMCA has lost its teeth.* It is not too much to say that this stealth provision, which is never referred to in the findings of the act could work a comprehensive repeal of the DMCA. Much too much is lost, and very little is gained.

New Subsection (5) fares no better, and indeed if anything it looks worse. As written, it says that manufacturing or distributing a hardware or software product—what other kinds are there?—capable of a noninfringing use it is not a violation of the copyright. The only exception is in cases of direct infringement, which is of course not what manufacturers and distributors do anyhow.

So Just What *Does* It Do?

If the section only means to say that actions for contributory infringement cannot be brought for devices capable of noninfringing uses, then it is just a statutory codification of the *Betamax* rule. Thus read, I would oppose it, because there is enough unhappiness with the rule that we should allow for some case law that contracts its scope in some future case.

But in fact it looks as though this provision may have more bite, although one cannot be sure. Grokster was of course capable of noninfringing uses, and yet it was shut down on the purposive inducement theory. New Subsection (5) purports to say that it is no violation of the Copyright Act *period* to distribute hardware or software that has that power.

The purposive inducement theory is a Copyright Act theory, so it looks as though the decision would give the same protection for purposive inducement that it gives for contributory infringement cases. If so, then *Grokster* is history.

It is the worst form of lawmaking to insert as an addendum to an Act that looks as though it is directed at consumer fraud a provision that could overturn a unanimous decision of the Supreme Court. We need full legislative disclosure.

Conclusion.

Both provisions should be stripped from H.R. 1201 and presented separately and debated on their own merits.

Next, its sponsors ought to explain more clearly what this bill does and why it is needed. Once that is done, I don't think that these provisions are likely to have much of a chance. The current case law under the DMCA and the Copyright Act is not ideal, but it is certainly more nuanced and sensible than this provision.

The problem in this area is that we have too much piracy, not too much piracy prevention. Any reexamination of this issue should start from a clear knowledge of where the greatest dangers lie. If so, these two provisions should be allowed to die a quick and merciful death.

Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, and the Peter and Kirsten Bedford Senior Fellow, the Hoover Institution. He writes frequently on intellectual property issues generally, and for IPI.

Direct all inquiries to:

Institute for Policy Innovation
1660 South Stemmons, Suite 475
Lewisville, TX 75067

(972)874-5139 [voice]
(972)874-5144 [fax]

Email: **ipi@ipi.org**
Website**: www.ipi.org**