

June 18, 2004

The DMCA Revisited: What's Fair?

The original idea behind the law of copyright was to grant exclusive protections for a period of time to the creator of music, art, books, software or other material. As the legal theory of copyright developed, so did the concept of “fair use” – that is, that there are exceptions to those protections, such as for academic use, social commentary, personal use. “Fair use” has always been a nebulous concept, defined largely by courts on a case-by-case basis.

The Digital Millennium Copyright Act (DMCA) was supposed to extend the traditional copyright framework into a new technological era. While well-intentioned, it has failed, in large part because it left out much of the balance built in to pre-existing copyright law. Instead, the law made it illegal to circumvent digital copy protection for any reason – legitimate or otherwise. That means that without breaking the law, you can't:

- Play the latest Velvet Revolver CD on your iPod.
- Fast-forward through previews and objectionable material on a DVD.
- Play a DVD you bought on a European vacation on your player back home.
- Use your TiVo and VCR.

Others are affected also. National security researchers are hampered in their examination of encryption. Libraries can't make archive copies of digital materials.

It's important to emphasize what changes being suggested to the DMCA to restore fair use through HR 107 (the Boucher-Doolittle bill) will NOT do:

- 1) **The changes will NOT allow piracy:** No one wants piracy and no legitimate organization in the policy arena has proposed to loosen the laws to allow for it. Most don't realize it, but almost everyone owns copyrights. Every time a note or an email is written, a new right is created. Obviously some copyrighted works are more valuable than others, especially those created by new and innovative product manufacturers. Those asking for changes to circumvention law are simply interested innovation and legal uses, not in opening the floodgates to piracy. Proposed bills are narrowly written (such as HR107) to do just that
- 2) **The changes will NOT enable hacking.** What the content industry calls hacking, everyone else calls personal use, research, and innovation. The content-industry solution is: since the secret of how to break a technological lock can never be re-secreted once the lock is broken, we should make it illegal to divulge the secret. But this is the wrong way to run an economy that relies on shared knowledge, creativity, and innovation. Laws are passed everyday that allow a court to look at the intended act of a specific person, instead of limiting all society's freedoms. Traditional copyright law thrives on this principle by examining the reason a person may have infringed another's work. Unfortunately, the DMCA does not allow this in the digital world—a consequence that Congress did not intend.

The changes will restore the rights of consumers, researchers, librarians and others.

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