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Copyright Law: Digital Rights Management Legislation in the 107th Congress

Robin Jeweler
Legislative Attorney
American Law Division

Summary

Digital Rights Management (DRM) refers to the technology that copyright owners use to protect digital media. This report surveys several of the DRM bills introduced in the 107th Congress. Three bills, S. 2048, S. 2395, and H.R. 5211, are directed towards enhanced anti-piracy protection. Other bills have focused on fair use access to protected media. They include H.R. 5522 and H.R. 5544. Although none of these bills were enacted during the 107th Congress, the underlying policy issues considered are likely to be revisited during the 108th Congress.

Background. Digital technology has radically altered the landscape of copyright law. The potential for unauthorized but near perfect replication of digital media poses new challenges to copyright owners. Copyright law gives a copyright holder the exclusive right to reproduce, adapt, distribute, perform publicly and display protected material for a limited term.[1] Historically, technology (or lack thereof) presented an obstacle to wide-spread piracy. For example, repeated copying of analog video or audio tapes could result in a degradation of the quality of the reproduction; packaging and transportation for distribution could be cumbersome. There are no comparable impediments to copying and distributing media in a digital format.

The legal basis for protecting copyright has traditionally been through the initiation of a civil proceeding by the copyright holder against the infringer for injunctive relief and/or money damages.[2] The efficacy of this remedy is also diminished in a digital environment where distribution may be decentralized, instantaneous, and global. Unauthorized peer-to- peer (P2P) file sharing of music illustrates this problem. Instituting a civil suit against, for example, ten thousand individual college students for *each* unauthorized download is simply not feasible. Copyright owners believe that *prevention*

[1] 17 U.S.C. § 106.

[2] *Id.* at §§ 501- 505. There are criminal sanctions for copyright infringement as well, but the means by which a copyright holder protects his or her exclusive rights is through a civil suit.

of piracy is preferable. The technology-based approaches and mechanisms that copyright owners utilize to protect digital media are referred to as digital rights management (DRM).

Congress has enacted two laws to date which facilitate DRM to enhance copyright protection. The Audio Home Recording Act (AHRA) of 1992 effects a technology-based regulatory program for consumer goods designed to copy analog and digital musical recordings.[3] It requires manufacturers and distributors of audio recording devices to employ copy control technology. However, a "digital musical recording" is defined as a "material object" that does *not* include "one or more computer programs."[4] Hence, the AHRA does not cover songs fixed on computer hard drives and extends only to recordings from the material objects in which songs are otherwise normally fixed, such as recorded compact discs (CDs), digital audio tapes, audio cassettes, long-playing albums, digital compact cassettes, and mini-discs.[5]

The Act requires consumer goods manufacturers to incorporate the Serial Copyright Management System (SCMS) into digital audio recording devices. SCMS is technology that sends, receives, and acts upon information about the generation and copyright status of the files that it plays. It allows copies to be made from an authorized recording, but prevents the SCMS-equipped machine from making copies of copies. The AHRA prohibits circumvention of the SCMS system as well. In consideration for permission to facilitate consumer copying of music recordings, manufacturers are required to pay music royalties based on sales of the devices. And, as a consequence of and in consideration for the technology-limited copying and royalty payments program, manufacturers, importers, and distributors of audio recording devices, and consumers who use them for noncommercial use, are protected from suit for copyright infringement.

A more recent – and more controversial – DRM law is the Digital Millennium Copyright Act (DMCA) of 1998. This law added a new chapter 12 to the Copyright Act entitled "Copyright Protection and Management Systems."[6] Subject to relatively narrow exceptions, this law makes it illegal to circumvent a technological copyright-control measure. This includes activity to descramble a scrambled work, to decrypt an encrypted work, or to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.[7] In contrast to copyright infringement, which prohibits unauthorized or unexcused *use* of copyrighted material, the anti-circumvention provisions of the DMCA prohibit the design, manufacture, import, offer to the public, or trafficking in technology produced to circumvent copyright encryption programs, regardless of the actual existence or absence of copyright infringement. Even though the

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[3] 17 U.S.C. §§ 1001 - 1010.

[4] 17 U.S.C. § 1001(5).

[5] *See,* Recording Industry Ass'n of America v. Diamond Multimedia Sys., Inc., 180 F.3d 1073 (9th Cir. 1999).

[6] 17 U.S.C. § 1201 *et seq.*

[7] *Id.* at § 1201(a)(3)(A).

anticircumvention provisions of the DMCA have, to date, been upheld by the courts,[8] critics argue that they have a chilling effect on rights of free speech and that their implementation will thwart the public's ability to access copyrighted works, which is ultimately necessary in order to exercise "fair use."

Fair Use. The doctrine of "fair use" is a limitation upon a copyright holder's exclusive rights. It permits the public to use a copyrighted work for limited purposes, such as criticism, comment, news reporting, teaching, scholarship or research.[9] And, although the concept of "personal use," *i.e.,* copying lawfully acquired copyrighted materials for one's personal use, is not expressly protected by statute, it is widely-accepted and judicially sanctioned.[10] Fair use protects the public interest in a free exchange of ideas and discourse.

The ever-changing state of technology and DRM laws raise many issues, several of which paradoxically confound one another. To the extent that copyrighted digital material is not encrypted, it may be subject to piracy on a massive scale. But, as digital material is increasingly encrypted to protect against piracy, the public is in jeopardy of losing its right to fair use access. And, some observers assert that protection controls give copyright holders more exclusive control over their creations than the copyright law intends.[11] Content owners, however, argue that allowing *limited* circumvention only to facilitate fair use, including personal use, is impracticable; once the circumvention technology becomes publicly available, its protective value is compromised.

Members of 107th Congress responded by introducing bills which address two sides of the issue – piracy prevention and fair use access. Legislative proposals would have mandated government-sponsored encryption technology and enhanced content owners' abilities to fight P2P piracy over the Internet. Other bills were intended to clarify and expand content users' fair use, including personal use, access to digital media. While none of these bills were enacted during the 107th Congress, the underlying policy issues considered are likely to be revisited during the 108th Congress. This report surveys several of the DRM bills introduced in the 107th Congress.

Bills promoting enhanced DRM anti-piracy protection.

S. 2395 107th Cong., 2d Sess. (2002), the "Anticounterfeiting Amendments of 2002". This bill was introduced by Senator Biden on April 30, 2002. It was reported out of the Senate Judiciary Committee with an amendment in the nature of a substitute on July 18, 2002. Among its findings, the bill notes that the American intellectual property sector has invested millions of dollars to develop sophisticated authentication features, but counterfeiters nonetheless traffic in and tamper with them.

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[8] *See,* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

[9] 17 U.S.C. § 107.

[10] *See* Sony Corp. v. Universal Studios, Inc., 464 U.S. 417 (1984)(authorizing consumer use of home videocassette recorders to "time-shift" television broadcasts) .

[11] *See, e.g.,* Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act,* 87 VA. L. REV. 813 (2001).

This bill's approach was to amend federal law to provide greater civil and criminal penalties to combat tampering activities that facilitate counterfeiting.

The bill would have amended 18 U.S.C. § 2318 to broaden criminal sanctions for trafficking in counterfeit "authentication features," which would include holograms, watermarks, symbols, code, and number and letter sequences which are used by a copyright owner to verify copyright legitimacy. The statute currently covers counterfeit labeling, packaging , and documentation. It would have added a new subparagraph 2318(f) which created civil remedies for counterfeiting violations enforceable by copyright owners. Remedies would have included impoundment, actual damages, or statutory damages.

S. 2048, 107th Cong., 2d Sess. (2002), the "Consumer Broadband and Digital Television Promotion Act". This bill, introduced on March 21, 2002 by Senator Hollings, would direct digital media device manufacturers, consumer groups, and copyright owners to attempt to reach an agreement on security system standards for use in digital media devices and encoding rules within a year after enactment. If parties were unable to agree on acceptable standards, the Federal Communications Commission, in consultation with the Copyright Office, would do so. With respect to prospective encoding rules, the bill stipulated that the rules "shall take into account the limitations on the exclusive rights of copyright owners, including the fair use doctrine." It further provided that "[n]o person may apply a security measure that uses a standard security technology to prevent a lawful recipient from making a personal copy for lawful use... ."[12]

The bill would have implemented the standards by requiring interactive computer services to incorporate security measures associated with standard security technologies and by requiring manufacturers, importers and sellers of digital media devices to include the security technologies. It would have prohibited removal or alteration of the technology from the devices. How fair use access and the security technology would interface was not expressly addressed.

H.R. 5211, 107th Cong., 2d Sess. (2002), a bill "to limit the liability of copyright owners for protecting their works on peer-to-peer networks" . Sponsored by Representative Berman, this bill was designed to create "a safe harbor from liability so that copyright owners could use technological means to prevent the unauthorized distribution of that owner's copyrighted works via a P2P network."[13] It would add a new section to the Copyright Act, 17 U.S.C. § 514, which would exempt copyright owners from liability under state and federal law for

> disabling, interfering with, blocking, diverting, or otherwise impairing the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network, if such impairment does not, without authorization, alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader.[14]

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[12] S. 2048, § 3(e).

[13] Introductory statement of Rep. Berman, 148 CONG. REC. E1395 (daily ed. July 25, 2002).

[14] H.R. 5211at § 514(a).

The bill included exceptions to the safe harbor for copyright owners, and required them to notify the Department of Justice before employing specific blocking technologies. It created a new cause of action, in addition to existing ones, for file traders to deter harassment or abuse of P2P networks by copyright owners.

Because the bill aimed to allow the prevention of unauthorized file trading over decentralized P2P networks, its sponsors suggested that it would not adversely impact consumers' fair use of digital media.[15]

Bills Addressing Digital Fair Use Access. In addition to the bills noted below, Senator Wyden and Representative Cox introduced, respectively, Senate and House joint resolutions entitled the "Consumer Technology Bill of Rights."[16] They were reportedly based upon a proposal of the same name by the advocacy group, DigitalConsumer.org.[17] Their premise was that copyright law should not curtail consumers' fair use rights with respect to digital and electronic entertainment media. The resolutions' enumeration of consumer rights included the right to use technology for

- "time-shifting," *i.e.,* recording legally acquired audio or video for later viewing;
- "space-shifting," *i.e.,* using legally acquired content in different places;
- making backup or archival copies;
- using legally acquired content on the electronic platform or device of choice; and,
- translating legally acquired content into comparable formats.

Discussed below are two bills addressing digital fair use which were introduced in the latter part of the 107th Congress.

H.R. 5522, 107th Cong., 2d Sess. (2002), the "Digital Choice and Freedom Act". On Oct. 2, 2002, Representative Zoe Lofgren introduced this bill. Among its findings is the observation that "[D]igital technology threatens the rights of copyright holders. Perfect digital copies of songs and movies can be publicly transmitted without authorization to thousands of people at little or no cost. On the other hand, technological control measures give copyright holders the capacity to limit non-public performances and threaten society's interest in the free flow of ideas, information and commerce."[18]

In order to recalibrate the balance between the copyright interests of authors and society, H.R. 5522 would have amended the Copyright Act to effect three goals:

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[15] Note 13, *supra.* ("Because its scope is limited to unauthorized distribution, display, performance or reproduction of copyrighted works on publicly accessible P2P systems, the legislation only authorizes self-help measures taken to deal with clear copyright infringements. Thus, the legislation does not authorize any interdiction actions to stop fair or authorized uses of copyrighted works ... or any interdiction of public domain works.")

[16] S.J. Res. 51, 107th Cong., 2d Sess. (2002) and H.R.J. Res. 116, 107th Cong. 2d Sess. (2002).

[17] *Wyden Offers Digital Fair Use Resolution,* 64 BNA Patent, Trademark & Copyright J. 585 (Oct. 25, 2002).

[18] H.R. 5522 at § 2(5).

- To expressly provide that it is not a copyright infringement for a person who lawfully possesses or receives a transmission of a digital work to reproduce, store, adapt or access it for archival purposes or to transfer it to a preferred digital media device in order to effect a non-public performance or display;
- To amend 17 U.S.C. § 109,[19] to allow one who lawfully possesses a digital work to sell or otherwise dispose of it by means of a transmission to a single recipient, provided that the owner does not retain his or her copy; and
- To amend the DMCA, 17 U.S.C. § 1201, to permit circumvention of copyright encryption technology, including the manufacture and import of, and trafficking in technology, if it is necessary to enable a non-infringing use and the copyright owner fails to make available the necessary means for circumvention.

H.R. 5544, 107th Cong., 2d Sess. (2002), the "Digital Media Consumers' Rights Act of 2002". Introduced on Oct. 4, 2002 by Representatives Boucher and Doolittle, the Digital Media Consumers' Rights Act addresses copy-protected (*i.e*, non-standard) audio CDs through consumer disclosure via labeling requirements. Specifically, the bill would have amended the Federal Trade Commission Act by adding a new section entitled "Inadequately Labeled Copy-Protected Compact Discs." The new labeling requirements were intended to notify consumers when a non-standard CD has copy-protection measures which could preclude playing on and/or copying to a computer hard drive or other consumer electronic devices. The Federal Trade Commission would be empowered to engage in rulemaking regarding audio CD labeling to prevent consumer confusion about playability and recordability.

The bill, in a vein similar to H.R. 5522, would have amended the DMCA to broaden the exemption for scientific research from the anti-circumvention rule; to permit circumvention for non-infringing uses; and, to permit the manufacture and sale of circumvention software capable of a significant non-infringing use.

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[19] 17 U.S.C. § 109. This provision, known as the "first sale" doctrine, permits the owner of a copyrighted book or record to sell or otherwise dispose of it without violating copyright holder's right to control distribution.