Backlash: Legislative Responses to Entertainment Industry Initiatives in the 107th Congress

By Masanobu Katoh and Jonathan Band[1]

During 2002, the second session of the 107th Congress, Congressional champions of the entertainment industry introduced a series of bills intended to combat the perceived threat of Internet copyright infringement. These bills included: the Hollings bill, S. 2048, which would have authorized the Federal Communications Commission to establish a "security system standard" with which all "digital media devices" would have to comply; the Berman bill, H.R. 5211, which would have authorized copyright owners to launch denial of service attacks against peer-to-peer file traders; and the Biden bill, S. 2395, which would have undermined exceptions to the Copyright Act by prohibiting the reproduction of digital watermarks. Additionally, the Federal Communications Commission began a rulemaking proceeding to determine whether to require digital television receivers to respond to a "broadcast flag"by preventing the uploading of the broadcast signals onto the Internet.[2]

Perhaps proving Newton's third law of motion that for every action there is an equal and opposite reaction, at the end of the 107th Congress, several pieces of legislation were introduced that attempted to push copyright in the other direction – towards end users and creators relying on existing works. The sponsors of these bills believed that copyright law had tilted too far towards the content producers, and that Congress needed

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[2] Digital Broadcast Copy Protection, 67 Fed. Reg. 53903 (August 20, 2002).

to restore the appropriate balance. This article reviews these pieces of legislation and discusses their prospects in the recently convened 108th Congress.

1. The Boucher-Doolittle Bill

On October 3, 2002, Congressmen Boucher and Doolittle introduced the Digital Media Consumers' Rights Act of 2002, H.R. 5544, which contained two major provisions. First, the bill would have required record companies to label CDs that were copy protected or that would not play on certain devices such as the CD drives of a personal computers. During 2002, record companies started to use various forms of copy protections on their CDs without notifying consumers. Consumers bought the CDs, and when the consumers couldn't play the CDs on their computers or burn copies of them, the consumers assumed that either the CDs or the computers were malfunctioning. The labeling requirement in the Boucher-Doolittle bill was intended to prevent this form of customer confusion.

Second, the Boucher-Doolittle bill would have amended the U.S. implementation of the WIPO treaties. Section 1201(a)(1) prohibits the circumvention of access controls, even if done for a non-infringing purpose, unless the circumvention is specifically permitted by one of the exceptions contained in Section 1201. Likewise, Section 1201(a)(2) and 1201(b) prohibit the manufacture and distribution of circumvention devices, even if they are intended to be used for non-infringing purposes, unless the devices fall within Section 1201's specific exceptions. In other words, Section 1201 prohibits circumvention activity and devices, regardless of whether the circumvention results in infringement.[3]

In introducing their bill, Congressmen Boucher and Doolittle recognized that by divorcing circumvention from infringement, Section 1201 had the effect of prohibiting

[3] For a more detailed discussion of Section 1201's provisions, *see* Jonathan Band & Taro Isshiki, *The New Anti-Circumvention Provisions in the Copyright Act: A Flawed First Step*, Cyberspace Lawyer at 2 (Feb. 1999).

lawful uses of copyrighted works. Thus, although Section 1201(c)(1) provided that Section 1201 did not affect defenses to copyright infringement, including fair use, fair use was not a defense to a circumvention offense.[4] Accordingly, Congressmen Boucher and Doolittle proposed amendments that would make noninfringement a defense to circumvention liability.

Specifically, their bill would have amended Section 1201(c)(1) to provide that "it is not a violation of this section to circumvent a technological measure in connection with access to, or the use of, a work if such circumvention does not result in an infringement of the copyright in the work." Likewise, the bill created a new section 1201(c)(5) that provided that "[i]t shall not be a violation of this title to manufacture, distribute, or make a noninfringing use of a hardware or software product capable of enabling significant noninfringing use of a copyrighted work." This provision borrowed the "substantial noninfringing use standard" for contributory infringement from *Sony Corp.of America v. Universal City Studios, Inc*., 464 U.S. 417 (1984), and applied it to the circumvention context.

Further, the Boucher-Doolittle bill created an exception to the prohibition on the manufacture and distribution of circumvention devices when "the person is acting solely in furtherance of scientific research into technological protection measures." This provision codified an argument made by the U.S. Department of Justice during the declaratory judgement action brought by Princeton University Professor Felten against the Recording Industry Association of America.[5] Felten sought a judicial declaration that his

[4] *See Universal City Studios, Inc., v. Corley*, 273 F.3d 429 (2nd Cir. 2001). For a critical discussion of the application of Section 1201 since enactment, *see Unintended Consequences: Four Years Under the DMCA* at www.eff.org.IP/DMCA/20030103_dmca_consequences.pdf.

[5] *Felten v. Recording Industry Ass'n of America, Inc.*, Case No. 01-CV-2669, Defendant John Ashcroft's Memorandum in Support of Motion to Dismiss at 15 - 18, filed September 25, 2001 (D.N.J.), available at http://www.eff.org/IP/DMCA/Felten_v_RIAA/20010925_doj_mtd_memo.pdf.

encryption research was lawful, and the RIAA responded that the case was moot because the RIAA had withdrawn its objections to his research. The Justice Department filed a brief in support of the RIAA that argued *inter alia* that Felten's research was plainly permitted by the DMCA. In particular, the Justice Department argued that since Felten developed his software tools for research purposes, he obviously did not develop them "for the purpose of circumventing a technological measure that effectively controls access to a work protected by this title." 17 U.S.C. §1201(a)(2)(A). In other words, even though Felten's tool circumvented a technological measure, the actual purpose of the tool was research, not circumvention.

Shortly after the introduction of the Boucher-Doolittle bill, companies such as Intel, Philips, Sun Microsystems, Verizon, and Gateway announced their support, along with associations such as the American Library Association, Consumers Union, and the Electronic Frontier Foundation. The content providers condemned the bill, asserting that the new exceptions would swallow the circumvention prohibition.[6]

Importantly, soon after the introduction of the Boucher-Doolittle bill, Richard Clarke, the head of the White House Office of Cyber Security, stated that the DMCA needed amendment to permit the research of security flaws in software. He termed threats against academic researchers as a misuse of the law, and said that "I think a lot of people didn't realize that it would have this potential chilling effect on vulnerability research."[7]

2. The Lofgren Bill

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[6] *Capitol Hill*, Washington Internet Daily, November 19, 2002.

[7] Hiawatha Bray, *Cyber Chief Speaks on Data Network Security*," Boston Globe, Oct. 17, 2002, at C2.

On October 2, 2002, Congresswoman Lofgren also introduced a bill directed at Section 1201 of the DMCA – the Digital Choice and Freedom Act of 2002, H.R. 5522. The Lofgren bill, however, took a somewhat narrower approach than the Boucher-Doolittle bill. Under the Lofgren approach, a person could circumvent an access control if the circumvention was "necessary to make a noninfringing use of the work" and "the copyright owner fails to make publicly available the necessary means to make such noninfringing use without additional cost or burden to such person." Similarly, a person may manufacture and distribute the means to circumvent a technological measure if the "means are necessary to make a noninfringing use"; the means are "designed, produced, and marketed to make a noninfringing use"; and "the copyright owner fails to make available the necessary means…." The Lofgren bill did not detail how this extra step of the copyright owner failing to make available the means of circumventing would operate.

The Lofgren bill contained several other provisions unrelated to circumvention. The general thrust of these provisions was to preserve in the digital environment exceptions that exist in the analog environment. Thus, the bill would have created a new Section 123 to the Copyright Act that would have permitted a person who lawfully obtained a copy of a digital work "to reproduce, store, adapt, or access the digital work … for archival purposes … and … in order to perform or display the work, or an adaptation of the work, on a digital media device, if such performance or display is not public." This provision codified the practice of "time-shifting" and "space-shifting" practiced by many consumers.

Additionally, the new Section 123 would have provided that "[w]hen a digital work is distributed to the public subject to nonnegotiable license terms, such terms shall not be enforceable … to the extent that they restrict or limit any of the limitations on exclusive rights…." This provision was intended to invalidate shrink-wrap or click-on

license terms that restrict fair use and other privileges Congress has granted to consumers. Significantly, section 123 would not apply to software, which was excluded from the definition of "digital works."

This provision appeared to be Congresswoman Lofgren's response to the Uniform Computer Information Transactions Act (UCITA) which would render shrink-wrap and click-on licenses enforceable under state contract law. Opponents of UCITA argued that under it, the private law of contract would supercede the public law of copyright. Accordingly, UCITA's opponents sought, with limited success, provisions within UCITA that would preclude the enforceability of contract terms inconsistent with fair use and other copyright exceptions and limitations.[8] This provision of the Lofgren bill addressed this issue at the federal level.

Finally, the Lofgren bill would update the first sale doctrine for the digital age. A person could transmit a work to another person provided that he deleted his copy of the work.

3. The Cox-Wyden Resolution

The week after the introduction of the Boucher-Doolittle and Lofgren Bills, Congressman Cox and Senator Wyden respectively introduced House Joint Resolution 116 and Senate Joint Resolution 51. The resolution creates a "Consumer Technology Bill of Rights" which "sets forth the rights of all Americans to personal control of information and entertainment content that they have lawfully acquired and from which they do not intend to profit." The Consumer Technology Bill of Rights sets forth six separate rights: the right to time-shift; the right to space-shift; the right to make back-up copies; the right to use content on different electronic platforms; the right to translate content into

[8] For a more detailed discussion of UCITA, *see* Jonathan Band, *Closing the Interoperability Gap: NCCUSL's Adoption Of a Reverse Engineering Exception in UCITA*, The Computer & Internet Lawyer at 1 (May 2002).

comparable formats; and the right to use technology in order to achieve the other five rights.

The Consumer Technology Bill of Rights would not have actually create any rights in a legal sense. A joint resolution does not establish law; rather, it is an expression of the "sense of Congress." In essence, a joint resolution is a political statement. Here, if adopted, the resolution would have expressed Congress's belief that "consumers who legally acquire copyrighted and non-copyrighted works should be free to use these works in non-commercial ways." Presumably Congressman Cox hoped that the adoption of the resolution would place political pressure on members of Congress who would otherwise be tempted to introduce legislation that would contravene the Consumer Technology Bill of Rights. Additionally, the Consumer Technology Bill of Rights might influence courts in their interpretation of the copyright law generally and the fair use doctrine in particular. Because the Consumer Technology Bill of Rights was a resolution rather than a law, it would have had less impact than Congresswoman Lofgren's proposed Section 123.

4. The 108th Congress

Because both bills and the joint resolution discussed above were introduced so late in the session, no action could be taken on them before Congress adjourned for the 2002 elections. However, at the beginning of the 108th Congress, in early January 2003, Congressmen Boucher and Doolittle reintroduced their bill.[9] The bill was designated H.R. 107, an intentional allusion to Section 107 of the Copyright Act, which codifies the fair use doctrine.

Just days after the reintroduction of the Boucher-Doolittle bill, three major trade associations, the Business Software Alliance, the Computer Systems Policy Project, and the Recording Industry Association of America jointly issued policy principles.[10] These broadly worded principles stated that "technical protection measures dictated by the government … are not practical." They further stated that "[l]egislation should not limit the use or the effectiveness of [technical protection] measures" and that "consumer expectations" concerning music and technology "should not be legislated or regulated." The press described these policy principles as a "détente" between competing trade associations[11] – that the RIAA would not support legislation like the Hollings

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[9] They were joined by Congressmen Kennedy and Bauchus as original co-sponsors.

10 *Technology and Record Company Policy Principles Issued Jointly by the Business Software Association, Computer Systems Policy Project, and Recording Industry Association of America*, January 14, 2003, available at http://www.bsa.org/usa/policyres/7_principles.pdf; *Recording, Technology Industries Reach Groundbreaking Agreement on Approach to Digital Content Issues*; Business Software Association Press Release, January 14, 2003, available at http://www.bsa.org/usa/press/newsreleases//2003-01-14.1418.phtml.

[11] Mike Snyder, *Alliance Formed for Piracy Battle*, USA Today, January 15, 2003, at 6D; Frank James, *Industries Reach Deal on Digital Music Fight*, Chicago Tribune, January 15, 2003, at 1; Steve Alexander, *Truce in Battle Over Music Piracy*, Star Tribune, January 15, 2003, at 1D; *Intel, MPAA, CEA Not Part of Accord Between RIAA and Tech Groups*, Washington Internet Daily, January 15, 2003.

technological mandate bill in exchange for CSPP and BSA agreeing not to support the Boucher-Doolittle or Lofgren bills or the Cox-Wyden Resolution.[12]

Arguably there is less to this "détente" than meets the eye, because in the 107th Congress the RIAA had never publicly supported the Hollings bill, and CSPP and BSA had never supported the Boucher-Doolittle, Lofgren, or Cox-Wyden. The groups that actually supported these various pieces of legislation were not part of the agreement. Moreover, the policy principles are so broadly worded that the trade associations are not actually locked into any position. For example, at the press conference announcing the policy principles, the executive director of CSPP refused to state that CSPP opposed adoption of the Boucher-Doolittle bill.

Nonetheless, the perception in Washington is that RIAA's apparent opposition to technical mandates has seriously wounded the prospects of legislation similar to the Hollings bill. Certain entities probably supported Boucher-Doolittle for tactical reasons – as a counterattack to the Hollings bill. For these entities, the policy principles and the subsequent crippling of Hollings-like legislation represents a victory. They may well be indifferent to further progress by the Boucher-Doolittle bill.

Many other entities, however, remain committed to the reform of the DMCA and thus to the passage of Boucher-Doolittle. The recent filing of two lawsuits alleging DMCA violations has underscored the need for reform. Lexmark, the manufacturer of computer printers, is attempting to use the DMCA to prevent the manufacture of competing toner cartridges. Lexmark claims that a chip embedded in a toner cartridge that mimics the authentication sequence of a Lexmark chip in a Lexmark cartridge violates the DMCA.[13] Similarly, Chamberlain, a garage-door opener company, has

[12] *Landmark Agreement Reached in Approach to Digital Piracy*, TV Meets the Web (January 14, 2003).

[13] Declan McCullagh, *Lexmark Invokes DMCA in Toner Suit*, News.com, January 8, 2002, available at http://news.com.com/2102-1023-979791.html; *Lexmark Int'l, Inc. v.*

leveled a DMCA claim against a company that makes universal garage-door openers.[14] These cases are far removed from the stated goal of the DMCA: to limit copyright infringement on the Internet.

Because of the provisions dealing with the labeling of copy-protected CDs, the Boucher-Doolittle bill has been referred to the House Energy and Commerce Committee, with only a sequential referral to the House Judiciary Committee. This referral by the House Parliamentarian is significant: it means that Boucher-Doolittle will receive its primary consideration in the Energy and Commerce Committee, which historically is more supportive of balanced intellectual protection than the Judiciary Committee, which typically has sympathized with the entertainment industry. Had the Parliamentarian reversed the order – a referral to the Judiciary Committee with a sequential referral to the Energy and Commerce Committee – then the Boucher-Doolittle bill probably would have remained bottled up in the Judiciary Committee for the entire 108th Congress without a hearing or any other action.

The Boucher-Doolittle bill obviously still has a long way to go before enactment. However, the primary referral to the Energy and Commerce Committee significantly increases the chances that the bill will receive a hearing, will be reported out of Committee, and will be considered on the floor of the House of Representatives.[15]

Static Control Components, Inc., Case No. 02-571, Complaint, filed December 30, 2002 (E.D. Ky.), available at http://www.eff.org/IP/DMCA/20030108_lexmark_v_static_control_components.pdf.

[14] *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, Civil Action No. 02-C-6376, Amended Complaint, filed October 16, 2002 (N.D. Ill), available at http://www.eff.org/IP/DMCA/20030114_chamerberlain_v_skylink_amd_complaint.pdf.

[15] Under the House Rules, the Judiciary Committee will receive a limited time to consider the bill after it is reported out of the Energy and Commerce Committee. Regardless of what the Judiciary Committee does, including taking no action, the bill as passed by the Energy and Commerce Committee would be ripe for consideration by the full House – assuming that the Rules Committee and the Republican leadership allows it to proceed.