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The DMCA Revisited: What's Fair?

As Congress considers amending the DMCA to address consumer rights and innovator freedoms in the digital age, it is essential that certain basic and longstanding values be respected. The Boucher-Doolittle bill (H.R. 107) would help give those values renewed life in the digital age.

These fundamental principles should guide this critical debate as Congress moves forward:

1. The Supreme Court's holding in the "Betamax" case has been essential for new and beneficial technology, products, and services to reach consumers. The manufacture, distribution, and sale of consumer electronics products and components with substantial non-infringing uses should continue to be legal. Congress should affirm this important doctrine by enacting H.R. 107.

2. Fair Use remains vital to consumer welfare in the digital age. For example, consumers should retain the right to engage in private, noncommercial recording of content originating as free terrestrial broadcasts and should be able to move that content freely around their homes.

3. CE and IT manufacturers respect and support the intellectual property rights of content owners. To the extent that manufacturers must constrain product design and performance in favor of such rights, any legally mandated restrictions should be narrowly tailored and construed to protect only the right in question, should not unduly hinder technological innovation, and should foster the availability of content to consumers.

4. Legal restrictions against "circumvention" of technical measures under the DMCA should not be interpreted as design mandates. For example, the DMCA should not be construed to mandate design conformance of a consumer electronics product with any particular technical measure (other than the defined exception specified in section 1201(k) of the Act). By adopting H.R. 107, Congress can reaffirm that section 1201 is a tool to be used by content owners to go after "black boxes," not ordinary consumer devices.

5. Home recording and piracy should not be confused. Home recording practices have nothing to do with commercial retransmission of signals or unauthorized commercial reproduction of content. Nor do they have anything to do with "piracy in China" and the unlawful uploading of movies onto the Internet for mass redistribution.

Given the increasing misuse and abuse of the DMCA since its enactment in 1998, Congress should adopt H.R. 107 to strike the appropriate balance between the rights of content owners and information consumers. That would be both right and fair.