

THE DMCA REVISITED: WHAT'S FAIR?

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The focus of this ICAC session is the pendency of H.R. 107, the Digital Consumers' Rights Act. This bill provides that that "it is not a violation . . . 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" and that "it shall not be a violation . . . to manufacture, distribute, or make noninfringing use of a hardware or software product capable of enabling significant noninfringing use of a copyrighted work."

Public statements of supporters of H.R.107 downplay its importance, presenting the bill as if it were a minor tweaking intended to correct a few glitches that have arisen in the protection of "fair use."

The actual effect of the bill would be quite revolutionary, because it would legalize the mass distribution over the Internet or in retail stores of programs capable of cracking Digital Rights Management Systems. All the developer of such a program would need to do is attach a notice saying: "Be sure and use this program only for legitimate purposes, such as time shifting, as allowed by the *Sony* decision (Wink, Wink)," and the distribution would become legal. It would, of course, then be used in totally unrestricted fashion for any and all purposes, whether the use was fair or foul.

The result would be destruction of the current promising efforts to develop new business models for distributing digital content that are dependent on the use of technological protection measures.

It is difficult to see how the content industries would survive, especially after high-speed Internet connections become generally available. Movies, for example, once the initial theatrical release window was over, would have no way to collect revenues. If a DVD were released, a few copies would be sold, which would then be run through the now-ubiquitous cracking programs, and everyone would acquire it for free.

It is possible to favor the destruction of the present system for supporting creative products and replacing it with system of government subsidies combined with free distribution. Many academic and "public interest" organizations seem to take this view.

But if Congress is to make this decision, it should be made openly and avowedly, with acknowledgement that this is the desired outcome.

An additional effect would be to legalize devices and programs that steal service from telecom providers. One can readily think of "fair uses" for the material that is protected by scrambling systems. (For example, suppose I want to write parodies of material delivered by cable TV.) Since H.R. 107 refers to both hardware and software, it is difficult to think of an argument that it would not cover devices or programs designed to circumvent such protections.

For further information, see the series of WebJournal entries at www.IPcentral.info
[<http://www.ipcentral.info/blog/index.shtml>]