LIMITING PROGRESS OF SCIENCE AND USEFUL ARTS: LEGISLATING AS A MEANS OF ENHANCING MARKET LEVERAGE

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INTRODUCTION

Under Article I of the U.S. Constitution, Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] By using this power wisely, Congress has indeed promoted both artistic creativity and technological innovation.[2] In recent years, however, Congress increasingly has been asked by copyright owners to use this power to stifle the development of new technology.[3] Over the past two years in

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1. U.S. CONST. art. I, § 8, cl. 8.

2. *See, e.g.*, 17 U.S.C. § 107 (2006) (creating the fair use exception to copyright law); 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 13301, 116 Stat. 1758, 1762 (2002) (creating an educational use exception to copyright law); Consolidated Appropriations Act, Pub. L. No. 106-113, § 1002, 113 Stat. 1501, 1501A-527l (1999) (broadcast signals).

3. *See, e.g.*, *Fair Use: Its Effects on Consumers and Industry: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. 8 (2005) [hereinafter Fair Use Hearings] (statement of Congressman Joe Barton, Chairman, H. Comm. on Energy and Commerce) ("I am concerned that some attempts to protect content may overstep reasonable boundaries and limit the consumer's legal options, particularly in light of the emerging technologies that we are beginning to see in the marketplace."); id. at 3 (statement of Congresswoman Jan Schakowsky, Member, H. Comm. on Energy and Commerce)

> (With the passage of the DMCA [Digital Millennium Copyright Act] in 1998 . . . my colleagues made a significant attempt to contend with the new challenges that digital capabilities introduced to copyright law. . . . Unfortunately, by trying to predict where the ever-evasive nature of technology would take us, the DMCA was drafted with such broad strokes that it swept away the fair use provisions of the copyright law and has been abused by those who want to squelch competition

particular, the legislative process in the copyright field seems principally focused on leveraging private-sector behavior rather than in achieving actual changes to the law.[4]

No doubt my colleagues who have introduced legislation to modify the Copyright Act[5] have done so out of a sincere desire to address concerns raised by content owners. Nonetheless, it increasingly appears that the private-sector interests pushing these initiatives see the legislative process as a mechanism to encourage manufacturers of consumer electronics to "design out" features to which they object, to discourage them from introducing new products, or to leverage them to pay increased royalties as the price for peace. Moreover, they clearly perceive that if the legislation actually were enacted, content owners would gain far greater leverage, and in some instances veto power, over the development of new technology.

We have seen this story before. As technology has evolved over the past century, it has threatened existing business models of content owners, who have responded with wildly exaggerated expressions of fear. With the advent of the player piano, for example, John Philip Sousa said in 1906, "I foresee a marked deterioration in American music . . . and a host of other injuries in its artistic manifestations, by virtue—or rather by vice—of the multiplication of the various music-reproducing machines."[6] When radio emerged two decades later, a record label executive predicted that "[t]he public will not buy songs that it can hear almost at will by a brief manipulation of the radio dials."[7] In that long-ago era, technological changes were significant, but came slowly. In recent years, technology has evolved at exponentially greater speeds, leading to ever-growing and increasingly intense efforts by content owners to preserve their existing business models by turning to Congress for help.

But something has fundamentally changed. For the past two years in particular, the legislation proposed by content owners and introduced by their congressional allies seems principally focused on affecting to their advantage business negotiations between powerful industries.[8] Far more troubling is the attendant trend toward even more extreme measures that would, if enacted into law, severely hobble the pace of technological innovation.[9] To the extent that Congress responds to the entreaties of content owners and effectively pressures device manufacturers through the threat of legislation or actually puts them at

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in areas totally unrelated to copyrights.).

4. *See* Fair Use Hearings, supra note 3.

5. 17 U.S.C. §§ 101-1332 (2006).

6. Posting of Fred von Lohmann to Deep Links, *The Wicked Player Piano*, http://www.eff.org/deeplinks/archives/001355.php (Mar. 31, 2004, 05:59 PM).

7. Posting of Fred von Lohmann to Deep Links, *CEA Defends Home Recording*, http://www.eff.org/deeplinks/archives/004753.php (June 20, 2006, 10:24 AM).

8. *See* discussions of audio flag legislation and Copyright Modernization Act, *infra* Part II.C-D.

9. *See infra* Part II.A-D.

risk through the enactment of legislation, we can expect technological innovation to be stymied and traditional consumer fair use rights to be even further circumscribed.

To put this concern in perspective and to provide context for my ongoing efforts to resist statutory limitations on technology and consumer enjoyment of it, I will first review the evolution of the "fair use" doctrine and the current battles that ultimately hinge on the application of the doctrine to new devices. I will then review four bills introduced during the past two years, all of which appear aimed at leveraging ongoing business relationships. I conclude with a discussion of a bill I introduced to restore balance in our copyright laws and give device manufacturers more freedom to move forward with new products without fear of crippling litigation.

I. HISTORICAL BALANCE IN THE COPYRIGHT ACT

In 1556, under an English Star Chamber Decree, sole control over the printing of all books was vested in a single company.[10] Except by right of royal privilege, only members of the Stationers' Hall could print books.[11] What began as a heavy-handed government effort to censor political expression and to control the dissemination of information evolved over the following generations into an equally burdensome private monopoly, which powerful London booksellers used to discourage competition.[12] Fortunately, in 1710, the first English copyright statute recognized the public interest in access to information, as well as the rights of authors.[13] Although the authors of the statute may not have talked in terms of "balance," they certainly introduced that important concept into the law of copyright.[14]

Just as fortunately, America's Founding Fathers vested in Congress the authority to reward authors for their works while at the same time ensuring that the public could gain access to information.[15] From the beginning, there has been broad agreement that our laws should vest certain rights in the creators of intellectual property as an incentive for the future creation of original works—

10. Decree in Star Chamber concerning Books (1566), http://www.constitution.org/sech/sech_085.htm (citing STRYPE, JOHN, THE LIFE AND ACTS OF MATTHEW PARKER, THE FIRST ARCHBISHOP OF CANTEBURY IN THE REIGN OF QUEEN ELIZABETH (1711)).

11. *See id.* (implying that only the Stationers' Hall has authority to print books).

12. *See* WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 7-8 (2000), *available at* http://digital-law-online.info/patry/patry2.html#sec1.

13. An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned, 8 Ann., c. 19 (1710) (Eng.).

14. *See* PATRY, *supra* note 12, at 10-11.

15. U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

specifically the ability to control for a reasonable period of time specified uses of the work—in order to fairly compensate the author's creativity.[16]

But there has been an equally strong commitment in American law to user rights, including the doctrine of fair use and other exceptions in the law, which properly limit the rights of copyright owners.[17] Few other national copyright laws have anything like them.[18] The beneficiaries of fair use (and other exceptions) include libraries, universities, and museums, as well as consumers and entrepreneurs.[19] As a result of our careful historical balance between the

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16. *See, e.g.*, *Fair Use Hearings*, *supra* note 3, at 8 (statement of Joe Barton, Chairman, H. Comm. on Energy and Commerce)

> ([C]onsumers are allowed to use copyrighted works without permission of the owner under certain limited circumstances. These limited circumstances have been a strength of our system, not a weakness. They allow consumers who pay for works appropriate access to and use of and I want to accentuate appropriate copyrighted works.);

Protecting Innovation and Art While Preventing Piracy: Hearing Before the S. Comm. on the Judiciary, 108th Cong. (2004) [hereinafter *Innovation Hearings*] (testimony of Andrew C. Greenberg, Vice Chairman, Intellectual Property Comm., IEEE-USA), *available at* http://judiciary.senate.gov/testimony.cfm?id=1276&wit_id=3751 (explaining that the U.S. copyright laws

> form an ecosystem for even further creativity and economic growth. The result has been a body of knowledge and culture with breadth and scope unparalleled in the American Experiment, together with tools and devices of unprecedented scope and power with which we may study, distribute and synthesize from those works yet more works, inventions and tools.);

Abraham Lincoln, Lecture on Discoveries and Inventions (Apr. 6, 1858) (explaining that intellectual property laws "added the fuel of interest to the fire of genius"), *available at* http://showcase.netins.net/web/creative/lincoln/speeches/discoveries.htm.

17. The fair use doctrine, which is codified in Section 107 of the Copyright Act, allows the public to use copyrighted works in fair and reasonable ways without the author's prior consent. *See* 17 U.S.C. § 107 (2006); *see also Fair Use Hearings*, *supra* note 3, at 24-29 (prepared statement of Gary J. Shapiro on Behalf of the Consumer Electronics Association and the Home Recording Rights Coalition); *Innovation Hearings*, *supra* note 16 (explaining that Congress "carefully circumscribed the scope and nature of" copyright "[t]o allow the next generation of authors to freely use those ideas, and even to make fair comment and use of their expression").

18. *See, e.g.*, *Fair Use Hearings*, *supra* note 3, at 25 (prepared statement of Gary Shapiro on Behalf of the Consumer Electronics Association and the Home Recording Rights Coalition) ("The concept of fair use is almost uniquely American. In most other societies, unauthorized uses must be the subject of enumerated exceptions to the copyright laws."); *id.* at 19 (prepared statement of Peter Jaszi, Washington College of Law, American University) ("Our fair use doctrine is unique—no other country has anything quite like it."); Thomas J. Froehlich, Copyright and Fair Use: Fair Use as a Right?, *available at* www.ffzg.hr/infoz/lida/lida2001/present/froehlich2.doc (comparing European tradition of moral rights to Anglo-American tradition of fair use).

19. *See, e.g.*, *Fair Use Hearings*, *supra* note 3, at 29 (statement of Prudence S. Adler, Executive Director, Federal Relations and Information Policy, Association of Research Libraries)

> (Fair use is central to our ability to achieve many facets of our library missions. Each day teachers, students learn, researchers advance knowledge, and consumers access copyrighted information due to exceptions in the Copyright Act such as

rights of copyright owners and the users of copyrighted material, both the creative and technological industries of the United States have enjoyed success without parallel in the world. America's content creators have profited not in spite of user rights but in large measure because of them.[20]

Notwithstanding the importance of fair use to creativity, content owners have historically sought to limit the ways in which consumers could use new technologies,[21] even though some fair uses have spurred much greater creativity[22] and prominent creators frequently claim fair uses promote their own business interests.[23]

> fair use. For libraries and for consumers the fair use doctrine is the most important limitation on the rights of the copyright owners. It is the safety valve if you will of the U.S. Copyright Law for consumers.);

id. at 20 (prepared statement of Peter Jaszi, Washington College of Law, American University) ("Although schools and libraries are among the largest purchasers of copyrighted materials in the United States, their most typical and beneficial activities—from classroom teaching to scholarly research—would not be possible without the built-in fairness safeguard that fair use provides.").

20. *Fair Use Hearings*, *supra* note 3, at 17 (statement of Peter Jaszi, Washington College of Law, American University) ("Major industries such as motion pictures, pop[u]lar music, and computer software have prospered in part because innovators have been free to copy important elements of their predecessor's work."); *id.* at 36 (statement of Gigi B. Sohn, President and Founder, Public Knowledge)

> (The ability to access and use copyrighted works for certain limited uses has been a driver of creativity, technological innovation, and the broad dissemination of knowledge. For consumers, fair use has resulted in a greater choice of movies, music, videogames, and computer software, a wider variety of useful and inexpensive gadgets on which to play that content, and the ability to quickly and cheaply create their own contents which is happening more and more these days.).

21. *See, e.g.*, Letter from Gary Shapiro, President and CEO, Consumer Electronics Ass'n, to Rep. Mike Ferguson, at 1 (July 25, 2006) (on file with author) ("[T]he content industry has historically overstated the potential negative impact of virtually every new consumer technology, from the player piano to TiVo and numerous products in between. In each case, their fears proved unfounded.").

22. *See* sources cited *supra* note 20; *see also Fair Use Hearings*, *supra* note 3, at 22-23 (statement of Gary J. Shapiro, President and Chief Executive Officer, Consumer Electronics Association)

> (Without fair use, we would have no VCR's[,] no tape recorders, no DVR's, no iPods, no TiVo's, and no Slingboxes. You would not be able to find information on Google or forward an email. Each of these products and applications allows you to enjoy copyrighted works in ways that no one had anticipated and in ways which copyright holders at least initially did not like and they certainly did not authorize.).

23. *See, e.g.*, Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998) (affirming summary judgment for defendant producer of the movie "Seven" on its claim of fair use of brief images of plaintiff photographer's images, which appear as transparencies on a light table in the apartment of a criminal suspect); Wade Williams Distrib., Inc. v. Am. Broad. Co., 2005 U.S. Dist. LEXIS 5730 (S.D.N.Y. Apr. 5, 2005) (holding that ABC's use of short clips from "B" sci-fi movies in a *Good Morning America* segment on aliens in popular culture constituted fair use); *Fair Use Hearings*, *supra* note 3, at 19 (prepared statement of Peter Jaszi, Washington College of Law, American University) (explaining that fair use "functions as a kind of secret weapon in support of U.S. competitiveness in the

Notwithstanding the benefits of fair use to society as a whole, as technology has changed, content owners have reacted in ways intended to preserve existing business models at the expense of consumer freedom. Perhaps the most famous example of the efforts to limit technology in ways that ultimately would have hurt the content industry was the push by two Hollywood studios to block Sony from selling the Betamax video recorder. In the late 1970s and early 1980s, the courts were presented with the question of whether Sony could be held liable for contributory copyright infringement for selling the Betamax recorder since it could be used to make copies of copyrighted works.[24] The district court got it right: it recognized that the device, although capable of being used for infringing purposes, could also be used to engage in "time shifting," namely, recording a program for viewing at a later time.[25] Nevertheless, the U. S. Court of Appeals for the Ninth Circuit ruled that the potential for some unlawful uses meant that the manufacturer would be liable to the content creator when unlawful copies were made, a ruling which, had it stood, would have kept the product off the market.[26] Fortunately for consumers and particularly for Hollywood, in *Sony Corp. v. Universal City Studios, Inc.* (*Betamax*),[27] the U.S. Supreme Court held that Sony was not liable for contributory copyright infringement because the device was capable of substantial non-infringing uses. As the Court recognized, effectively giving copyright owners the right to dictate and control the design of articles capable of recording would block "the wheels of commerce."[28]

This important principle has stood the test of time—the VCR unleashed the new market for the rental and purchase of movies for home viewing. The demand for VCR tapes exploded, and Hollywood benefited immensely. In fact, from Hollywood's perspective, the "play" button became the far more important function on the device, something that content owners should keep in mind whenever they react in horror to a "record" function on a new device. With every new technology-inhibiting measure that members of Congress propose, we should remind ourselves how close our nation came to outlawing the VCR and the negative effects that banning that device would have had for consumers, technology companies, and movie producers.

It is thus quite remarkable that, for the past two decades, the central holding of that decision has been at the heart of virtually every legislative battle between the consumer electronics industry and information technology industry on the one hand and copyright owners on the other. Content owners have

international competitive marketplace. Fair use helps account for the innovative dynamism that has made our information industries the envy of the world.").

24. Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429 (C.D. Cal. 1979).

25 *Id.* at 436-38.

26. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981).

27. 464 U.S. 417 (1984).

28. *Id.* at 441.

consistently sought to limit what consumers could do with new technologies, and device manufacturers have consistently relied on the Court's holding in bringing new products to market.

II. RECENT EFFORTS TO TILT THE BALANCE

In the past three years, four bills stand out as part of this broader effort to use the legislative process to achieve business objectives by limiting the applicability of the *Betamax* standard.[29] With respect to these proposals, the editorial board of one newspaper that has generally been sympathetic to the content industry has noted:

> Protecting intellectual property is a legitimate goal for Congress—after all, the Constitution called on Congress to give authors and inventors exclusive rights "to promote the progress of science and useful arts." The task has grown more urgent with the emergence of an Internet-fueled global information economy. But what the entertainment industry is seeking in this year's proposals isn't merely protection from piracy; it's after increased leverage to protect its business models.[30]

A quick review of the proposed bills shows how.

A. THE "INDUCE" ACT

In June 2004, a very short bill with very far-reaching implications was introduced in the Senate. The Inducing Infringement of Copyrights Act of 2004 would have made it a new crime for a person to "intentionally induce[]" copyright infringement, defined as an act by which a person "intentionally aids, abets, induces, or procures" infringement, where such intent could "be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability."[31] On its face, the bill appeared to effectively gut the Supreme Court's *Betamax* opinion because a person could be held liable even if the device he or she brought to market was capable of substantial non-infringing uses. But the effect would have been more pernicious than just taking away the *Betamax* defense in a copyright infringement case. The consumer electronics industry certainly understood the

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29. *See* Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. (2006); Platform Equality and Remedies for Rights Holders in Music (Perform) Act of 2006, H.R. 5361, 109th Cong. (2006); Perform Act of 2006, S. 2644, 109th Cong. (2006); Audio Broadcast Flag Licensing Act of 2006, H.R. 4861, 109th Cong. (2006); Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004).

30. *See* Editorial, *We Aren't All Pirates*, L.A. TIMES, July 10, 2006, *available at* http://www.latimes.com/news/opinion/editorials/la-ed-piracy10jul10,0,2000938.story?coll=la-news-comment-editorials.

31. S. 2560, 108th Cong. (2004).

purpose of the legislation: "S. 2560 would have effectively forced anyone hoping to come to market with a product that transmits or stores copyrighted works to negotiate in advance to quiet any of the concerns of any copyright proprietor that has the resources to sue."[32]

In other words, the bill created such a risk of ruinous damages that no sane business would bring a new consumer electronics or information technology product to market without designing out its most consumer-friendly features if they were opposed by a single powerful content owner. To put the scope of the bill in perspective, the Electronic Frontier Foundation circulated a mock complaint showing how Apple's ubiquitous iPod could be outlawed by a natural application of the principles embodied in the bill.[33] Fortunately, the bill died a quiet death in the Senate.[34]

B. THE PERFORM ACT

In early 2006, legislation was introduced in the Senate and in the House that appeared to be aimed principally at new handheld devices being brought to market by XM Satellite Radio and Sirius Satellite Radio.[35] These devices allow consumers to record blocks of satellite radio programming and to browse the time-shifted programming by artist, song title, album, and genre.[36] The Platform Equality and Remedies for Rights Holders in Music Act of 2006[37] would have given the music industry powerful control over the way consumers can enjoy satellite radio—control the industry has never had over AM or FM radio.[38] Four decades after the introduction of the first cassette tape recorder, the bill would essentially have disabled a digital satellite radio service unless it "uses technology that is reasonably available, technologically feasible, and economically reasonable to prevent the making of copies or phonorecords

32. *Innovation Hearings*, *supra* note 16 (testimony of Gary J. Shapiro, President and CEO, Consumer Electronics Association), *available at* http://judiciary.senate.gov/testimony.cfm?id=1276&wit_id=3749.

33. *See* Electronic Frontier Foundation, Prelude to a Fake Complaint, http://www.eff.org/IP/Apple_Complaint.php (last visited Feb. 14, 2007).

34. The content industry apparently saw no further urgency in promoting the legislation once the Supreme Court handed down its *Grokster* decision in June 2005, holding that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919 (2005).

35. On January 11, 2007, Senator Feinstein reintroduced the Perform Act. *See* Perform Act of 2007, S. 256, 110th Cong. (2007).

36. *See, e.g.*, SIRIUS Satellite Radio, Stiletto 100 Live Personal Satellite Radio, http://www.sirius.com/gs/stiletto/mainpage.html (last visited Feb. 14, 2007).

37. Perform Act of 2006, H.R. 5361, 109th Cong. (2006); Perform Act of 2006, S. 2644, 109th Cong. (2006)

38. There are no laws on the books which limit the functionality of devices that allow consumers to record AM and FM radio programming.

embodying the transmission . . . except for reasonable recording . . . ."[39] The bill defined "reasonable recording" as recording where the user cannot *record or play back* selections "based on specific sound recordings, albums, or artists."[40] Thus, a consumer paying to receive programming from a satellite radio service could not select and then listen to individual songs he or she had recorded on a handheld time-shifting device.

The bill also sought to change the formula by which satellite radio companies pay performance royalties under Section 114 of the Copyright Act.[41] Given the timing of the introduction of the legislation, it appears to have been intended to put pressure on the companies to agree to pay more in performance royalties over the next five years, based on a periodic, statutorily mandated rate arbitration proceeding at the U.S. Copyright Office that was underway.[42]

Apparently impatient with the pace of the legislative and rate arbitration processes, the recording industry sued XM two weeks after introduction of the legislation.[43] In doing so, it seemed to confirm that the bill—which had been under discussion for many months and then was introduced on the eve of a hearing in the Senate Judiciary Committee[44]—had in fact been pushed as part of an effort by the recording industry to leverage the company into modifying the functionality of new devices it was bringing to market. When XM did not capitulate, it was sued.

C. "AUDIO FLAG" LEGISLATION

At the same time that the Senate was considering "video broadcast flag" legislation last year, both the House and the Senate were considering so-called "audio flag" legislation.[45] (The "video broadcast flag" legislation was intended

39. H.R. 5361, § 2(c)(1)(C); S. 2644, § 2(c)(1)(C).

40. H.R. 5361, § 2(d)(2); S. 2644, § 2(d)(2).

41. *See* H.R. 5361, § 2(b)(3)(B) (directing copyright royalty judges, when setting rates and terms of royalty payments, to consider the fair market value of the rights licensed and the degree to which "reasonable recording," as defined in the Act, affects the potential market for sound recordings, as well as the additional fees that services should pay for compensation); S. 2644, § 2(b)(3)(B) (same direction).

42. *See* Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services, 71 Fed. Reg. 1455-01 (Jan. 9, 2006).

43. Atlantic Recording Corp. v. XM Satellite Radio, Inc., 2007 WL 136186 (S.D.N.Y. Jan. 19, 2006).

44. *See Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).

45. In the Senate, video and audio broadcast flag legislation was part of an omnibus telecommunications reform measure. Communications, Consumer's Choice, and Broadband Deployment Act of 2006, S. 2686, 109th Cong. §§ 451-454 (2006). In the House, the audio flag measure was a freestanding bill. Audio Broadcast Flag Licensing Act of 2006, H.R. 4861, 109th Cong. (2d Sess. 2006).

to codify a Federal Communications Commission (FCC) rule[46] struck down by the U.S. Court of Appeals for the D.C. Circuit on jurisdictional grounds,[47] a rule that was aimed at limiting the mass indiscriminate redistribution of "high value digital content" on the Internet.[48]) Given the notoriety the legislation received, one would have thought an "audio flag," like the video flag, would be for the purpose of limiting the mass indiscriminate redistribution of radio content to the Internet. But such is the power of the clever use of words to mask reality.[49]

Although styled as a narrow bill ostensibly giving the FCC only "limited authority" to impose licensing conditions on new HD radios and satellite radios, the Audio Broadcast Flag Licensing Act of 2006 would have prohibited "unauthorized copying and redistribution of transmitted content through the use of a broadcast flag or similar technology."[50] Today, no such flag or similar technology exists. By empowering the FCC to impose license conditions on device manufacturers in the absence of a defined technology, the bill could have had no purpose other than to force the private sector to keep innovative new products from the market—or to privately negotiate technology limits before new products come to market. Witnesses at a hearing on the bill confirmed that such discussions were underway and had begun only after legislation was introduced.[51] The bill clearly seemed aimed at controlling copying inside the home. Otherwise, the reference to "unauthorized" copying would not be necessary because "redistribution" itself would be objectionable whether the copying was authorized or not. In short, as its supporters later confirmed, the bill appeared to have little or nothing to do with stopping the mass indiscriminate redistribution of music on the Internet.[52]

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46. *See* Digital Broadcast Content Protection, 18 F.C.C.R. 23,550 (2003) (codified at 47 C.F.R. pts. 73 & 76).

47. Am. Library Ass'n v. FCC, 406 F.3d 689 (D.C. Cir. 2005).

48. *See* 18 F.C.C.R. at 23,552.

49. *Compare* Jefferson Graham, *RIAA Chief Says Illegal Song-Sharing 'Contained*,' USA TODAY, June 12, 2006, *available at* http://www.usatoday.com/tech/products/services/2006-06-12-riaa_x.htm ("Nearly a year after the Supreme Court issued a landmark ruling against online music file-sharing services, the CEO of the Recording Industry Association of America says unauthorized song swapping has been 'contained.'") *with* Posting of John Biggs to Gizmodo.com, RIAA: Mission Accomplished, http://www.gizmodo.com/gadgets/portable-media/riaa-mission-accomplished-180275.php (June 13, 2006) ("[T]he RIAA may feel that on the surface, at least to the folks who matter, piracy looks dead. We all know, however, that this stuff will go on long after Mitch Bainwol is nodding into is [sic] porridge at the Beverly Hills Home for the Rich Aged.").

50. H.R. 4861, 109th Cong. § 2 (2006).

51. *See The Audio and Video Flags: Can Content Protection and Innovation Coexist: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. (2006).

52. *See* Letter From Congressman Mike Ferguson to Gary Shapiro, President and CEO, Consumer Electronics Association (July 14, 2006)

It is hard to imagine legislation more squarely intended to give content owners extraordinary leverage in the design of new consumer electronics products, especially in the absence of any devices on the market that expressly record HD radio content. In any event, this is one of those instances in which no legislation is necessary to achieve limits on Internet redistribution of broadcast content. Because satellite radio signals are encrypted, no statutory protections are needed to address the mass, indiscriminate redistribution of satellite radio programs to the Internet. And because a single company (iBiquity) is responsible for licensing the technology for HD radio,[53] it could control digital outputs through a product license—that is, if radio broadcasters and the recording industry agreed on the technology and appropriate limits on its use voluntarily, without the threat of crippling legislation.

D. *THE COPYRIGHT MODERNIZATION ACT*

In September 2006, the Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee introduced the Copyright Modernization Act.[54] Among other things, the measure would have made needed updates to the mechanical compulsory copyright license[55] to cover music downloads from the Internet, as well as interactive Internet streaming.[56] However, like the Audio Broadcast Flag Licensing Act, the Copyright Modernization Act included language aimed at keeping handheld devices off of the market.[57]

The Copyright Modernization Act would have given webcasters and terrestrial broadcasters an exemption from copyright liability for making server and incidental copies—copies with no independent economic value created by computers in the normal course of broadcasting a song.[58] When the Copyright Office commented on an earlier version of this legislation, it praised the bill for covering through a blanket license all intermediate copies—server, cache, and

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> (It is clear to me that the primary concern in the audio flag context is protecting creators from services that offer the automatic separation and storage of individual songs from a broadcast program without a marketplace license that compensates them. Redistribution over the Internet or similar networks is a concern, but not the most immediate concern in the audio flag context.)

(on file with author).

53. Digital Corporation, http://www.ibiquity.com (last visited Feb. 14, 2007) ("iBiquity Digital is the developer and licenser of HD Radio technology . . . .").

54. H.R. 6052, 109th Cong. (2006).

55. 17 U.S.C. § 115 (2006).

56. H.R. 6052, § 102.

57. *Id.* at §102; *see also*, Letter from David K. Rehr, Nat'l Ass'n of Broadcasters, to author (Sept. 26, 2006) (on file with author).

58. H.R. 6052, § 102.

buffer—needed to facilitate the digital delivery of music.[59] The exemption in the Copyright Modernization Act as introduced, however, would not have been available to companies that sell devices which allow users to time shift broadcasts for future listening.[60] Such an exclusion is not needed to effectuate the purpose of the legislation, which is to facilitate digital music downloads.

Excluding satellite radio providers, which sell such devices, from an exemption the Copyright Office deemed necessary to facilitate the digital delivery of music would appear to serve no purpose other than penalizing these companies for making available a device found threatening by the content industry. Without an exemption, music publishers could require satellite radio providers to obtain an additional reproduction license for server and incidental copies for every one of the more than two million songs in their broadcast libraries; and because the additional license would not be compulsory, a music publisher of any of these songs could either refuse to license them or demand an outrageous fee far exceeding a reasonable royalty. Thus, the Copyright Modernization Act was yet another example of a back door attempt to give content owners extraordinary leverage in the design of new consumer electronics products.

III. CODIFYING THE *BETAMAX* DECISION

The Digital Media Consumers' Rights Act of 2005 sought to combat potential legislative and judicial threats to the Supreme Court's *Betamax* decision.[61] In addition to codifying the *Betamax* holding, the bill would have authorized consumers to gain access to a copyrighted work protected with a technological protection measure in order to make non-infringing use of the underlying work.[62] The bill would also have ensured that scientists could help promote national security by engaging in technology research that would

59. *See Discussion Draft of the Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 59 (May 16, 2006) (prepared statement of the U.S. Copyright Office) (noting favorably that "the proposed blanket license covers all intermediate copies (*e.g.*, server, cache and buffer copies) necessary to facilitate the digital delivery of music . . . ."). The Copyright Office's 2001 Section 104 report supported an exemption for temporary buffer copies that are incidental to a licensed performance of a musical work, finding that such copies had no independent economic significance. U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 142-43 (2001). It also found a strong case that making temporary buffer copies is fair use. *Id.* at 133-41.

60. H.R. 6052, § 102 (creating an exception to the copyright exemption for "a digital music provider . . . that takes affirmative steps to intentionally induce, cause, or promote the making of reproductions of musical works . . . that are accessible by . . . end users for future listening").

61. H.R. 1201, 109th Cong. (2005) (introduced by the author). An earlier version, H.R. 107, was considered in the prior Congress. Digital Media Consumers' Rights Act, H.R. 107, 108th Cong. (2003).

62. H.R. 1201, § 5(b).

otherwise be potentially prohibited by the Digital Millennium Copyright Act.[63] Finally, the bill would have ensured that consumers get notice before they purchase the new nonstandard copy-protected CDs being introduced in the market.[64] While this measure was not enacted during the 109th Congress, I intend to introduce another measure to preserve fair use during the 110th Congress.[65]

Once such legislation is enacted, a device manufacturer would be able to bring new technology to market—without fear of crippling litigation—as long as the device is capable of substantial non-infringing uses. Looking back at the *Betamax* decision, it is clear that its real value was not so much that it permitted manufacturers to build a device that could record. The real value was in the broad principle it embraced. It said that any time technology has both infringing and non-infringing applications, the principal question is whether the device is capable of substantial non-infringing applications.[66]

Given the technological innovation that the decision unleashed, enacting the *Betamax* standard into law will offer a bulwark when content owners again ask the Congress, as they most assuredly will, to impose new limits on technology to protect existing business models.

CONCLUSION

By enacting the *Betamax* standard and thereby giving device manufacturers an objective basis for assessing their potential for litigation exposure (rather than subjecting them to the uncertainty of a subjective test, as in the proposed Induce Act),[67] H.R. 1201 is intended to ensure that consumers will have access to new hardware and software products that will enrich their lives. In addition, it is my intent through enactment of such legislation to discourage content owners from racing to Congress in search of legislative help

63. *Id.* § 5(a).

64. *Id.* § 3. In November 2005, Sony BMG was forced to recall millions of copy-protected CDs following consumer outrage upon discovering that Sony had failed to disclose that the CDs used virus-like techniques to prevent illegal copying. *See, e.g.*, *Sony Recalls Copy-Protected CDs*, BBC NEWS, Nov. 16, 2005, http://news.bbc.co.uk/2/hi/technology/4441928.stm. Sony also faces class action lawsuits related to the copy-protected CDs, see *Sony sued over copy-protected CDs* (BBC News broadcast Nov. 10, 2005) *available at* http://news.bbc.co.uk/2/hi/technology/4424254.stm, as well as a lawsuit filed by the Texas Attorney General. *See* Press Release, Attorney General of Texas Greg Abbott, Attorney General Abbott Brings First Enforcement Action in Nation Against Sony BMG for Spyware Violations (Nov. 21, 2005), *available at* http://www.oag.state.tx.us/oagnews/release.php?id=1266.

65. New bill introduced as the Freedom And Innovation Revitalizing U.S. Entrepreneurship Act of 2007, H.R. 1201, 110th Cong. (2007).

66. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

67. Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004). *See* discussion *supra* Part II.A.

every time a new consumer electronics device or information technology comes to market. Rather than relying on Congress to help them protect existing business models, content owners should be encouraged to embrace new technology. If they know device manufacturers have the freedom to design products that meet the well-established standard set down by the Supreme Court, they will have greater incentive to work cooperatively with the industries they increasingly implore Congress to help them oppose.