Fair Use and Abuse

Get set for an overdue national debate about consumer rights in the digital age By GARY STIX

The Big Red Shearling toy bone allows dog owners to record a short message for their pet. Tinkle Toonz Musical Potty introduces a child to the "magical, musical land of potty training." Both are items on Fritz's Hit List, Princeton University computer scientist Edward W. Felten's Web-based collection of electronic oddities that would be affected by legislation proposed by Democratic Senator Ernest "Fritz" Hollings of South Carolina. Under the bill, the most innocent chip-driven toy would be classified as a "digital media device," Felten contends, and thereby require government-sanctioned copy-protection technology.

The Hollings proposal—the Consumer Broadband and Digital Television Promotion Act—was intended to give entertainment companies assurance that movies, music and books would be safe for distribution over broadband Internet connections or via digital television. Fortunately, the outlook for the initiative got noticeably worse with the GOP victory this past November. The Republicans may favor a less interventionist stance than requiring copy protection in talking dog bones. But the forces supporting the Hollings measure—the movie and record industries, in particular—still place unauthorized copying high on their agenda.

The bill was only one of a number that were introduced last year to bolster existing safeguards for digital works against copyright infringement. The spate of proposed legislation builds on a foundation of anti-piracy measures, such as those incorporated into the Digital Millennium Copyright Act, passed in 1998, and the No Electronic Theft Act, enacted in 1997, both of which amend the U.S. Copyright Act.

The entertainment industry should not feel free just yet to harass users and makers of musical potties. Toward the end of the 2002 congressional year, Representative Rick Boucher of Virginia and Representative Zoe Lofgren of California, along with co-sponsors, introduced separate bills designed to delineate fair use for consumers of digital content. Both the Boucher and Lofgren bills look to amend existing law to allow circumvention of protection measures if a specific use does not infringe copyright. Moreover, the Lofgren bill would let consumers perform limited duplications of legally owned works and transfer them to other media.

The divisions that pit the entertainment industry against fair-use advocates should lay the groundwork for a roiling intellectual-property debate this year. Enough momentum exists for some of these opposing bills to be reintroduced in the new Congress. But, for once, consumers, with the support of information technology and consumer electronics companies, will be well represented. In addition to the efforts of Boucher and Lofgren, grassroots support has emerged. Digitalconsumer.org formed last year to combat new protectionist legislative proposals and to advocate alteration of the DMCA to promote digital fair use. The group has called for guarantees for activities such as copying a CD to a portable MP3 player and making backup copies, which are illegal under the DMCA, if copy protection is violated.

The DMCA has not only undercut fair use but also stifled scientific investigations. Felten and his colleagues faced the threat of litigation under the DMCA when they were about to present a paper on breaking a copy-protection scheme, just one of several instances in which the law has dampened computer-security research (see the Electronic Frontier Foundation's white paper, "Unintended Consequences": www.eff.org/IP/DMCA/20020503_dmca_consequences.html). The legal system should try to achieve a balance between the rights of owners and users of copyrighted works. An incisive debate is urgently needed to restore that balance. SA

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