

## Congress Needs a Great Tech Debate

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BY JERRY BERMAN

In the first week of its new term, the Supreme Court became the latest flash point in one of the most important and heated debates of the Information Age: the protection of copyright in a digital world. At the heart of arguments before the Court in *Eldred v. Ashcroft*, a challenge to the 1998 Sonny Bono Copyright Term Extension Act, was how long we should extend the term of past copyrighted works. Although the law in question extends copyrights for future works as well, the heart of the case looked backward, to the copyright protection for works that have already been created.

But the next set of debates about digital copyright will look more to the future than to the past. This is partly because copyright holders can increasingly couple legal protections with new digital locks that may protect creative works even longer than the Copyright Act does—maybe even forever. At the same time, other new technologies—particularly computers and the Internet—increasingly threaten the value of copyrighted works, regardless of legal protection.

### CONGRESS, NOT COURTS

The venue for the next round of this policy debate will not be the courts—it will be Congress. Even as *Eldred* was argued

in the court of last resort, a host of copyright initiatives focused on new technologies are moving through the legislature of first resort. The debate now under way in the halls of Congress will define how Americans watch TV, listen to music, and use their computers for decades to come. At stake is nothing less than billions of dollars, the future of intellectual property, perhaps even the future of information itself.

How can we best protect artists and authors while preserving the Internet's potential for free expression and innovation? It is Congress, and not the courts, that is in the best position—as fact-finder and legislator—to answer that question. But the current debate is polarized and complex, and demands thoughtful dialogue before a rush to legislation.

The root cause of this struggle is simple: piracy of copyrighted works. As every teenager now knows, digital technologies and the Internet make it easier than ever to copy music, movies, software, and other content, without the permission of the owners and without compensating those who produce it. Peer-to-peer networks like Napster and its successors make it possible for individuals to provide thousands of songs to millions of people worldwide free of charge. Digital copies of songs or movies are being distributed online and burned onto physical discs without a penny paid to artists or authors.

Something is wrong with this picture. The public has an interest in access to information, but it also has an interest in



fairly compensating authors and artists. Reasonable consumers understand that massive unwarranted sharing should be stopped. At the same time, the solutions—from law enforcement to digital rights management technologies—must be consistent with reasonable consumer expectations to use information. People who buy a CD, watch a TV program, or buy a book expect to have certain rights to use it, including the ability to take snippets, watch or listen to the program when they want, and use their existing playback devices.

These are issues for Congress to decide. With billions at stake, at least a half-dozen bills—plus a major Federal Communications Commission rule making—are proceeding quickly toward sweeping legal changes in digital copyright protection.

There are many well-intentioned proposals to protect copyright before Congress. But something essential has not happened. There has been little serious dialogue between consumers and the affected content, information technology, and consumer electronics industries—particularly regarding what these technologies and solutions will really do.

### MOVING BILLS

Consider some of the initiatives now before Congress:

- *Copyright security mandates.* Last year's bill from Sen. Ernest Hollings (D-S.C.) would require that most digital devices include a government-approved copyright security system, unless industry is able to design one of its own. Legitimate questions about the bill's implications and scope have been raised. What standard would be chosen, and would it protect reasonable consumer expectations about uses of content? Would a government technology mandate harm innovation in new technologies, particularly online?

- *Digital TV broadcast flag.* In what is probably the fastest-moving copyright initiative, a draft bill from Rep. Billy Tauzin (R-La.) and a rule making under way at the FCC this fall would require the next generation of digital television products to build in FCC-approved copy protections. But will reasonable consumer expectations about copying broadcasts and watching them later or in a different place be supported? Will existing products such as VCRs work with the new televisions?

- *Protecting "fair use."* A set of bills from Reps. Rick Boucher (D-Va.), Zoe Lofgren (D-Calif.), and Christopher Cox (R-Calif.) would seek to allow some kinds of circumvention or legal copying, or affirmatively protect fair use. But content owners have raised legitimate questions about the scope and effect of these measures, and concerns about whether they would eviscerate their copyright protection technologies must be addressed.

- *Peer-to-peer file sharing.* The bill from Rep. Howard Berman (D-Calif.) is designed to permit copyright holders to take steps against those who share their material. But if a copyright holder attacks a home computer in an effort to stop suspected file sharing, will the home user even know what is happening and have a right to respond if there is some mistake?

- *Anti-counterfeiting measures.* A relatively noncontroversial bill to penalize trafficking in illicit authentication devices, like the hologram seals on software or CDs, has been expanded to include nonphysical protections like digital watermarks. But credible critiques suggest the bill could make federal felons out

of millions who might share a watermarked digital file, or of the Internet service providers and other providers whose networks are used for such sharing.

In each case, Congress has not fully explored and may not understand the sometimes unintended consequences of these bills for consumers, for the technology industry, and for content providers. Congress needs to educate itself and the public before it takes action.

### TOWARD A CEASE-FIRE

There are many reasons to believe there is a third, better way to approach this debate—one based on a mix of solutions that balances the interests of copyright owners and consumers. It will likely include a variety of technologies—not a one-size-fits-all technology mandate—to provide secure platforms to support the delivery and fair use of content; a range of different business models to give consumers new choices; and better enforcement of existing and powerful laws. New laws and regulations may in fact be needed—but only once their impact is understood.

The reasonable answer that will protect the four Cs—content, commerce, connectivity, and consumers—will not emerge in the trenches of legislative warfare over a particular bill. Instead, Congress needs to lead a broad national dialogue that includes the consumers who remain largely unaware of the threats.

Such a dialogue should not just be an adversarial hearing before Congress, where two positions pass each other in the night. And it should not just be having consumers attend a meeting or read a position paper. A sustained and substantive public debate—a face-to-face dialogue—is needed where the real implications of all the various proposals on the table are explored.

Congress and the public need to know what proposed technical or legal solutions will and won't do. We need to understand what consumer expectations will be protected and how—in order to provide notice and promote accountability. And we need a common fact basis for weighing policy alternatives. Only then are we likely to achieve a balance sustainable in the courts and in the court of public opinion.

Congress has several critical and constructive roles to play. It should be a fact-finder, to investigate and help explain the implications of proposed solutions in this debate. It could also hold educational hearings or even convene an investigatory commission. Congress should be a convener, to bring warring parties together in a meaningful dialogue. For instance, the Digital TV Roundtables convened by the House Commerce Committee may be an instructive model. Congress should be a voice for consumers, to ensure that consumer perspectives are included in the dialogue already taking place among industries. Congress should help cooler heads prevail, instead of moving expeditiously toward well-intentioned but poorly understood solutions.

In the copyright wars, it is time for a breather. As Lyndon Johnson would have said, "Come, let us reason together." Let us put dialogue before regulation, to seek solutions that define and balance the interests of consumers. ■

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