



Property Rights Alliance
Scott A. LaGanga, Executive Director
1920 L Street, NW Suite 200
Washington DC 20036
202-390-6978

Property Rights Alliance Policy Brief

How “Fair Use” is Detrimental to Consumers, Industry, & Ultimately...Innovation

Scott A. LaGanga
Katherine Boyle
202-390-6978

Fair Use: Stifle Innovation, Harm Consumers

Under the semblance of fairness, it is difficult to oppose a measure that is presented to enhance consumer rights and provide individuals with greater access to media technology. However, “fair use,” the term often identified with the right to use certain copyrighted intellectual property without permission from or payment to the patent holder, is deceptive rhetoric that masks the real effects of this term. Fair use is inherently perverse to patent holders, intellectual property corporations, and most importantly, to the American consumer.

The House Subcommittee on Commerce, Trade, and Consumer Protection held a hearing on November 16, 2005 titled “Fair Use: It’s Effects on Consumers and Industry.” This examination is an unabashed attempt to rejuvenate support for fair use legislation, most likely H.R. 1201. The hearing, which poses as a committee hearing to discuss consumer interests is nothing more than a hearing for the supporters of the “Digital Media Consumers Rights Act.” Members of the Committee who desire to examine this issue and extend its domain are doing a great disservice to the 18 million

Americans employed in IP industries¹, as well as the consumers who will be negatively affected by fair use and this legislation.

H.R. 1201, the “Digital Media Consumers Rights Act”, attempts to statutorily mandate fair use under the guise of consumer rights. The bill legalizes trafficking of devices that circumvent technical protections. Although the intent of the act expressly reads, “To amend the Federal Trade Commission Act to provide that the advertising or sale of a mislabeled copy-protected music disc is an unfair method of competition,”² this statement is not the true purpose for the legislation. Fair use provisions stated in the measure allow for the manufacturing and dissemination of hacking devices that circumvent copyright protections and infringe on patents, so long as these products are “capable of substantial non-infringing

¹ “Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries”. Stephen Siwek, Economists Incorporated; November 2005.

² Library of Congress: Thomas. Digital Media Consumers' Rights Act of 2005. Washington, 2005.

uses.” Given that all of these devices have “non-infringement” purposes, this loophole eliminates necessary protections in any prior laws and court rulings that ban the production of devices that easily infringe upon patents and copyrights. Providing an exemption for any device that has non-infringement purposes effectively destroys all protections of copyrighted material.

This destruction of copyright protections will have major effects on consumers, the copyright industry, economic and technological growth, and international IP protections.

Effects on Consumers

- H.R. 1201 will not improve the rights of consumers, but rather increase prices on all content protection technologies, such as iTunes, Napster, and other legal downloading providers. These services currently operate at low costs to consumers and allow for easy legal downloading that does not infringe upon copyrights. Ultimately, this will make illegal downloading more prevalent, ultimately raising the price of legal downloading on honest consumers.

Economic Effects on the Copyright Industry

- H.R. 1201 will have harmful effects on the U.S. economy. The U.S. Copyright Industry currently provides jobs to over 11 million Americans, or 8% of workers in the U.S. IP industries employ over 18 million Americans.³ These jobs

³ “Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries”. Stephen Siwek, Economists Incorporated; November 2005.

are ensured and protected due to copyright and IP protections that allow for stability in the industry. If these protections are discarded, many of these workers are likely to lose their jobs as an effect of lost revenue in the industry.

- In addition to the effect on job employment, H.R. 1201 will affect the growth of the U.S. economy. Intellectual property industries are the most important growth drivers in the U.S. economy, contributing nearly 40% of the growth achieved by U.S. private industry and nearly 60% of the growth due to exportable products and services.⁴ The IP industries are essential to the future growth of the U.S. economy. **GDP 10-year growth is estimated to be approximately 30% lower than current predictions if IP industries were not included.** If protections are not maintained for these industries, IP industries will cease to continue research and development, ultimately causing dire consequences on domestic economic growth.

Effects on the Technological Growth

- H.R. 1201 will restrain technological growth and development by discouraging patent holders and innovators from creating new technologies. Research and development in technological fields is often very expensive and tedious. If technology hacks can easily replicate new technologies, innovations, and distribute

⁴ Ibid.

devices that make copyright infringement undetectable, there will be no incentive for technological development, resulting in a dearth of new products and technologies.

- New formats and types of technologies, rooted in the protections of the Digital Millennium Copyright Act of 1998 (DMCA) that protected creative works in the digital world, would not be protected under H.R. 1201. Since 1998, DMCA has fostered the growth of the patent industry and given way to numerous innovations in media and technology. H.R. 1201 will overturn the provisions of the act that protect patents and encourage technology innovators to invest in research and creating new products.

Effects on the International Community

- H.R. 1201 will send a wrong message to the international community that has followed the lead of the United States in intellectual property protections. The DMCA and the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement in the WTO have provided strong, minimum standards for IP protections around the globe and ensure that American patent owners are protected abroad. This bill sends a poor message to countries which are beginning to formulate IP protections and are following the U.S. model to protect their patent holders.

Conclusion

H.R. 1201 has dramatic repercussions in IP technological advancement, price levels, economic advancement, and international norms for IP rights. Fair use sets a dangerous precedent for IP regulation. The repercussions of the bill are dangerous to protecting IP rights at home and abroad. Fair use is unfair to patent holders, intellectual property corporations, and the individual consumers who expect to buy quality products.

As James DeLong, Director of the Center for the Study of Digital Property stated, "Property rights, technology, and markets, allowed to work their magic, will bring us a cornucopia of choices. Legislation will freeze us into pre-Internet patterns."⁵ Consumer choice is created by market forces and innovation, not legislative action.

⁵ DeLong, James. "Fair Use: Less Can Be More." Online. 28 February 2003. Available: www.pff.org