



COPYRIGHT

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Copyright law requires balance. While under-protection may discourage creative activity by authors, over-protection discourages innovation, impairs competition, and injures the public. Exceptions to copyright help achieve this balance.

Policy responses to online intellectual property rights infringement must be rational and measured. The carefully structured safe harbors of the Digital Millennium Copyright Act (DMCA) establish a clear mechanism for responding to infringement online, and the certainty it provides has enabled the evolution of the modern Internet economy.

Just as unbalanced U.S. copyright law threatens economic interests and competition within the United States, so too can unbalanced foreign copyright law threaten the ability of U.S. businesses to compete overseas. The U.S. Government must therefore promote established fair use, online safe harbors, and related copyright limitations in international trade negotiations.

A. Promoting Balanced Copyright

Background: As the Supreme Court has repeatedly ruled, protecting copyright interests must be balanced against promoting innovation. Copyright policy must recognize and reflect this balance, thereby accounting for the interests of all industries, all innovators, and all end-users. Unbalanced copyright law can impede technological advancement and threaten the open Internet.

The Copyright Act balances the rights-holder's ability to exclude others from using copyrighted material with legally established exceptions for the use or copying of protected works in certain cases. These exceptions permit crucial economic activities like search-engine indexing, without which Internet users would be unable to navigate the World Wide Web, reverse engineering of software, without which many computer programs would be unable to interoperate, and the first sale doctrine, which allows copyrighted works to move through the economy after their 'first sale' without being encumbered by undue restrictions on distribution. As Chief Judge Kozinski of the Ninth Circuit once observed, "[o]verprotecting intellectual property is as harmful as underprotecting it.... Overprotection stifles the very creative forces it's supposed to nurture."¹ In

¹ *White v. Samsung Electronics*, 989 F.2d 1512 (9th Cir.) (Kozinski, J., dissenting), cert. denied, 113 S. Ct. 2443 (1993).

short, copyright law must balance innovation with incentive. This balanced framework of modern copyright law depends greatly on fair use and related limitations and exceptions.

Fair use is more than a statutory right, however. According to the Supreme Court in *Eldred*, fair use is one of the “traditional First Amendment safeguards” that ensure the constitutionality of copyright law.¹ In *Eldred*, the Supreme Court observed that fair use was one of copyright law’s “built-in First Amendment accommodations,” without which it may not survive constitutional scrutiny.

CCIA’s Position: The Copyright Act’s exceptions protect vital economic activities and allow copyright law to coexist with the First Amendment’s hostility to restrictions on speech. Exceptions for activities such as fair use, temporary reproduction and the first sale doctrine help maintain a balance between authors’ incentives and the innovative use of information, ideas and technology. Attacks on balanced copyright threaten crucial economic activity and tread on thin constitutional ice. Copyright law must not be applied so broadly as to prevent interoperability or undermine competition, which hurts businesses and consumers.

B. The Importance of the Digital Millennium Copyright Act (DMCA) Safe Harbors

Background: The DMCA safe harbors provide online intermediaries business certainty in the face of extraordinary liability risks. By limiting the liability of service providers who respond expeditiously to copyright infringement complaints, the safe harbors enable the Internet industry to provide significant benefits to the economy without the risk of being exposed to penalties based on misconduct by third parties using online services.

CCIA’s Position: To disturb the DMCA through legislative action, international agreement, or domestic regulation could significantly hamstring the day-to-day operations of U.S. businesses and discourage investment in new technologies and services. Even today, the protections of the DMCA have been insufficient to protect lawful services from being litigated into bankruptcy; the statute must not be weakened.

C. Promoting the Internet Economy Abroad

Background: Just as unbalanced U.S. copyright law threatens competition within the United States, so too can unbalanced foreign copyright law impede U.S. businesses overseas. The limitations and exceptions that are essential to technology industry innovators in the United States are equally important abroad. However, because all international intellectual property treaties and most major trade agreements pre-date the Internet economy of today, they fail to reflect the realities of new technology. As a result, they must be modernized to ensure that

¹ See *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).

innovative U.S. businesses are not subjected to liability in other countries, particularly those aiming to insulate domestic constituencies from Internet-related economic change.

CCIA's Position: Trade policy should promote balanced copyright norms, including fair use and safe harbors for Internet services and online platforms in bilateral and multilateral trade negotiations.

The time when trade policy was relevant only to a narrow set of rights-holder interests has long passed. Today, trade policy must reflect the interests of numerous stakeholders, including the technology industry. Accordingly, the U.S. position when negotiating free trade agreements should promote U.S. intellectual property law, including Copyright Act provisions on fair use and related limitations and exceptions that are essential to the Internet economy.