900 17th Street, N.W.
Suite 1100
Washington, DC 20006
Phone: 202.783.0070
Fax: 202.783.0534
Web: www.ccianet.org

Computer & Communications Industry Association

ABSTRACT

INTERNATIONAL COPYRIGHT

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- *Just as unbalanced U.S. copyright law threatens competition within the United States, so too can asymmetric foreign copyright law threaten competition for U.S. businesses overseas.*

- *Copyright policy in trade agreements should not be captive to rights-holder lobbying; it must also reflect the needs of other stakeholders, including the technology industry.*

- *The U.S. Government must ensure that bilateral and multilateral treaties and agreements, including the Anti-Counterfeiting Trade Agreement (ACTA), mandate the balancing provisions that are an indispensable component of U.S. copyright law. This includes the doctrine of fair use, which is essential to technology industry stakeholders.*

***Background*:** The United States is a party to numerous international treaties addressing copyright, and U.S. officials continue to participate in international copyright negotiations. Increasingly, those international treaties fail to reflect the realities of new technology.

Since the 1998 enactment of the Digital Millennium Copyright Act (DMCA), copyright holders have prevailed upon our trade negotiators to incorporate detailed provisions from the DMCA into bilateral and multilateral trade agreements, such as the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA) and the South Korean, Colombian, and Peruvian free trade agreements. U.S. trade negotiators have included this elaborate language in numerous treaty instruments, yet at the same time have omitted provisions of copyright law that protect the information technology and Internet industries from liability, such as fair use.

Presently, the World Intellectual Property Organization's (WIPO) Standing Committee on Copyrights and Related Rights is exploring proposals on copyright "limitations and exceptions." Simultaneously, the U.S. government has engaged allies in the discussion of a new plurilateral enforcement agreement, the Anti-Counterfeiting Trade Agreement (ACTA). If U.S. negotiators do not utilize these venues to promote norms that ensure that U.S. technology interests are protected overseas, U.S. trade will be impaired.

In particular, ACTA threatens to greatly increase the risks faced by the U.S. technology industry when operating overseas by increasing intellectual property law penalties without ensuring the proper safeguards currently enshrined in U.S. law. Even today, U.S. businesses find themselves penalized by foreign courts for disruptive innovations that are permitted and encouraged by U.S. law, but forbidden abroad. Leaked versions of the secretive ACTA have long indicated that the agreement will worsen this troubling trend, and the recently released draft of the proposed agreement reaffirms that it will endanger U.S. business interests.

***CCIA's Position*:** The time has passed when the copyright aspect of trade policy was relevant only to a narrow set of rights-holder interests. Today, copyright policy must reflect the interests of all stakeholders, including the technology industry. Just as unbalanced U.S. copyright law threatens competition within the United States, asymmetric foreign copyright law threatens the ability of U.S. businesses to compete overseas.

Accordingly, the U.S. Government must ensure that future bilateral discussions, multilateral discussions at WIPO, and ACTA negotiations promote the doctrine of fair use, which is essential to stakeholders in the technology industry. As the Supreme Court noted in *Eldred v. Ashcroft*, the fair use doctrine and related limitations and exceptions function as a safety valve that preserves the constitutionality of copyright law. By failing to export fair use and other limitations, U.S. negotiators not only disadvantage important IT industries seeking to enter foreign markets, but also encourage our trading partners to enact laws that would likely be unconstitutional in the United States.

Current Status: Foreign courts are increasingly penalizing U.S. companies in a discriminatory fashion for innovative services. In two German cases, *Bernhard* and *Horn*, courts imposed copyright liability on Google for the operation of its search engine in a manner consistent with U.S. law. In the *Copiepresse* case, Belgian courts imposed liability on Google for news aggregation, yet months later dismissed nearly identical claims by the same plaintiff against the European Commission regarding the Commission's own government-operated news aggregator. In the face of this increasingly protectionist application of domestic law against U.S. companies overseas, U.S. trade negotiators must insist on fair use protections in trade negotiations.

Negotiations over free trade agreements such as ACTA and discussions in international fora such as WIPO will continue. CCIA engages in domestic and international venues working to improve future agreements and the domestic laws that implement them.