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ABSTRACT

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- *Copyright protection requires balance. While under-protection discourages authors, over-protection discourages innovation, impairs competition, and injures the public. The fair use doctrine serves to protect this balance, and should not be undermined.*
- *The many challenges facing today's copyright system cannot be resolved with an "enforcement-only" bill. Copyright reform legislation must be comprehensive and must account for the needs of all stakeholders.*
- *Protecting content doesn't mean protecting business models; the law should penalize pirates, not pioneers.*

I. Copyright balance: Over-protection discourages innovation, threatens competition, and injures the public.

As the Supreme Court established in the *Sony* "Betamax" case and reaffirmed in its *Grokster* opinion, promoting copyright 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.

A. *The Fair Use Doctrine: Fair use protects vital economic activities, and allows copyright law to coexist with the First Amendment's hostility to restrictions on speech. Copyright policy should elevate this doctrine to maintain the balance between authors' incentives and the innovative use of information, ideas, and technology.*

Fair use encourages unauthorized, transformative copying of protected works in certain cases. This permits crucial economic activities like search-engine indexing, without which Internet users would be unable to navigate the World Wide Web, and reverse engineering of software, without which many computer programs would be unable to interoperate. As Judge Kozinski of the Ninth Circuit observed, "[o]verprotecting intellectual property is as harmful as underprotecting it.… Overprotection stifles the very creative forces it's supposed to nurture." In short, copyright law must balance the right to innovation against copyright owner incentives.

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's "built-in First Amendment accommodations" without which copyright law might not survive

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

First Amendment scrutiny. Proposed restrictions that erode fair use threaten crucial economic activity *and* tread on thin constitutional ice.

B. ***"Enforcement-Only" Copyright Legislation:*** *The current effort to reform copyright through the "PRO-IP Act" (H.R. 4279) focuses only on enforcement issues and neglects other crucial challenges to the IP system.*

Background: The intellectual property system today faces a crisis of credibility that is rooted in public disdain for an archaic and inflexible system riddled with absurd, arbitrary distinctions, which has been modernized only with carve-outs and exemptions designed to protect narrow interests.

Today, the PRO-IP Act (H.R. 4279) proposes to respond to this challenge largely by reorganizing federal agencies to create a new IP enforcement bureaucracy and ratcheting up penalties and enforcement without confronting the underlying threat to the system. While efforts to deter counterfeiting and piracy may be desirable, needed reform should not be preempted by an enforcement-only approach.

CCIA's Position: Copyright reform must be approached holistically. Enforcement-only legislation that fails to address structural challenges to the system will only worsen the IP crisis. A reform bill must address issues such as modernizing Internet licensing, ensuring proportionality in copyright statutory damages, and reconciling the constitutional challenges inherent in the DMCA's restriction of fair use.

Current Status: The PRO-IP Act remains under consideration by the House Judiciary Committee.

C. ***Digital Millennium Copyright Act (DMCA) Reform:*** *The DMCA has threatened computer security, suppressed competition, and restricted end-users in cases entirely unrelated to copyright piracy. The DMCA must be reformed to prevent piracy without undermining other important principles.*

Background: In 1998, urged on by copyright holders, Congress enacted sweeping changes to U.S. copyright law through the Digital Millennium Copyright Act. The DMCA created a new regime for intellectual property protection called "anticircumvention." Anticircumvention prohibits evading digital locks or "technological protection measures" on copyrighted works in order to access the work – even if that access is entirely lawful. Today, the DMCA remains "ripe for anticompetitive abuse,"[2] particularly in cases that have *nothing to do with copyright piracy.*

In 2006, for example, a Sony-BMG digital rights management technology was found to have been surreptitiously installed on the computers of up to 20 million consumers. Once the existence of this technology was revealed, hackers succeeded in exploiting the cloaking nature of this technology to launch unrelated malicious computer attacks. Yet because the software was designed to protect copyrights, security software vendors seeking to counter this threat risked violating the DMCA, since the DMCA prohibits the removal of such software. While the DMCA contains a narrow exception for security-related activities, it may not have covered all

[2] Dan Burk, *Anticircumvention Misuse*, 50 UCLA L. Rev. 1095, 1096 (2003).

activities necessary to immunize critical infrastructure from this threat. In short, the DMCA criminalized efforts to combat a global security threat.

CCIA's Position: The DMCA must be reformed to protect copyright without threatening security or impeding competition. On the computer security front, CCIA successfully petitioned the U.S. Copyright Office for a narrow, temporary exemption to the DMCA that would legalize circumvention when software like the Sony rootkit threatened computer security. On the competition front, CCIA has urged courts not to interpret the DMCA in an anticompetitive manner in cases such as *Lexmark International v. Static Control Components*,[3] *Chamberlain Group v. Skylink Technologies*,[4] and *Davidson & Associates v. Jung*.[5]

While *Lexmark* and *Chamberlain* were resolved favorably, they are only binding on the Circuits in which they were made. The *Davidson* case was resolved unfavorably, allowing anticompetitive companies to insulate themselves from competition through a combination of adhesion contracts and anti-circumvention. This demonstrates that the DMCA – a statute intended to prevent copyright piracy – instead opens door to companies who view litigating as a viable alternative to competition.

***Current Status*:** CCIA supports the legislative efforts of forward-thinking Members of Congress who aim to address these problems. Representatives Boucher and Doolittle introduced H.R. 1201, the FAIRUSE Act, in February 2007. In addition to establishing discrete, carefully targeted exceptions to DMCA's sweeping prohibitions, the bill also limits innovation-chilling statutory damages for secondary copyright liability, and codifies the "Betamax" rule that protects from copyright liability devices which enable substantial non-infringing uses.

D. ***Interoperability:*** *Copyright law must not be applied so broadly as to prevent interoperability or threaten competition, which hurts businesses and consumers.*

Interoperability is vital to the information technology industry. Interoperability occurs when devices and services "play well with others." Technologists analyze patented and copyrighted technologies in order to make their own products and services interoperate with the products and services of others. Whether it is software that runs on top of some other company's operating system or a toner cartridge that fits inside someone else's printer, this "interoperability" is central to the health of competitive marketplaces worldwide. Copyright policy should advance this crucial principle.

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[3] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 253 F. Supp. 2d 943 (E.D. Ky. 2003), *vacated and remanded*, 387 F.3d 522 (6th Cir. 2004).

[4] *The Chamberlain Group Inc. v. Skylink Techs., Inc.*, 292 F. Supp. 2d 1040 (N.D. Ill. 2003), *aff'd*, 381 F.3d 1178 (Fed. Cir. 2004), *cert. denied*, 125 S. Ct. 1669 (2005).

[5] 422 F.3d 630 (8th Cir. 2005).