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ABSTRACT

INTERNATIONAL COPYRIGHT

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- *Just as unbalanced U.S. copyright law threatens competition within the United States, so too can unbalanced foreign copyright law threaten competition for U.S. businesses overseas.*
- *Copyright policy in trade agreements should not be captive to a narrow set of rights-holder interests; it must also reflect the needs of other stakeholders, including the technology industry.*
- *The U.S. Government must ensure that bilateral and multilateral treaties promote 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 negotiations on new instruments involving this subject. Increasingly, those international treaties fail to reflect the needs 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 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, including fair use.

The World Intellectual Property Organization's (WIPO) Standing Committee on Copyrights and Related Rights is exploring proposals on "limitations and exceptions" to copyrights and related rights. Simultaneously, the U.S. government has engaged allies in the discussion of a new plurilateral copyright agreement, the "Anti-Counterfeiting Trade Agreement" (ACTA).

***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, unbalanced 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 functions as a safety valve that preserves the constitutionality of copyright law. By failing to export fair use, 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 forums such as WIPO will continue. CCIA engages in domestic and international forums, working to improve future agreements and the domestic laws that implement them.