



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

Before the
United States House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Regarding

The Scope of Fair Use

January 28, 2014

Statement of the
Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies that collectively generate more than \$250 billion in annual revenues.¹ CCIA requests that this statement be included in the record of this hearing.

It is no accident that the fair use doctrine is the first limitation to follow the enumerated exclusive rights in the Copyright Act. In addition to being fundamental for purposes such as 17 U.S.C. § 107’s statutorily delineated “criticism, comment, news reporting, teaching, scholarship, or research,” the broad contours of fair use are what help reconcile the Copyright Act’s inherent limitations on free speech with the First Amendment’s prohibition of the same – a fact motivating the Supreme Court’s decisions in *Eldred v. Ashcroft*,² and more recently in *Golan v. Holder*.³

Although these scholarly and expressive foundations of the principle have led some to the mistaken conclusion that fair use does not apply in the commercial context, courts routinely apply it there as well to encourage unauthorized but socially desirable, transformative uses. For example, the Supreme Court’s latest decision addressing fair use unanimously concluded that a commercial rap parody was fair use, in *Campbell v. Acuff-Rose Music, Inc.*⁴ This provision has

¹ A complete list of CCIA members is available at <http://www.cciagnet.org/members>.

² 537 U.S. 186, 219-20 (2003).

³ 132 S.Ct. 873, 890 (2012).

⁴ 510 U.S. 569 (1994).

also been extended to uses as diverse as using technology to “time-shift” television programming,⁵ creating thumbnails of images for indexing on a search engine,⁶ and introducing students’ papers into a database in order to detect plagiarism.⁷

Nowhere is the fair use doctrine’s importance to innovation more evident than in the tech industry. Since the *Betamax* decision,⁸ thirty years old last week, fair use has enabled innovators to bring to market numerous new technologies. Consumers have this decision and its interpretation of the fair use doctrine to thank for a generation of technology products, from mp3 players to DVRs to smartphones, and a vast segment of online services, including search and cloud storage. Although initially feared by copyright holders, new technologies from the piano roll player to the VCR to mp3 players have in fact created more opportunities for commercial exploitation by content producers, effectively “growing the pie” for all stakeholders.

More recently, direct-broadcast satellite and Internet companies have relied on fair use last year to develop new technologies and services to benefit consumers and the public good. Dish Network’s “PrimeTime Anytime” feature in its “Hopper” DVR enables consumers to record primetime content on the four major broadcast networks, and the “AutoHop” feature lets them skip over commercials. Fox sued for infringement, but the Ninth Circuit held that the treatment of fair use in the venerable *Betamax* case governed, and to the extent it did not, “commercial-skipping does not implicate any copyright interest.”⁹ The same issue is being litigated by ABC in New York, where Dish has so far prevailed over broadcasters.¹⁰ More recently, a federal court held that Google’s academic book-scanning project was also fair use, because of the “significant public benefits” of enabling digital search of analog texts, which provides an “invaluable research tool.”¹¹ Although plaintiffs in the case have already indicated plans to appeal, the trial court’s decision nevertheless represents a significant milestone in fair use jurisprudence favoring innovative technologies.

These are not isolated examples. Research commissioned by CCIA in 2011 and recently

⁵ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁶ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

⁷ *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

⁸ *See supra* n.5.

⁹ *Fox Broad. Co., Inc. v. Dish Network LLC*, 723 F. 3d 1067, 1076 (9th Cir. 2013).

¹⁰ A district court held that Dish “is likely to succeed in establishing that copying by its customers constitutes fair use of ABC’s copyrighted programming.” *In re AutoHop Litig.*, 2013 WL 5477495, at *7 (S.D.N.Y. Oct. 1, 2013).

¹¹ *Authors Guild v. Google*, 2013 WL 6017130, at *10 (S.D.N.Y. Nov. 14, 2013).

cited by the National Research Council of the National Academies¹² concluded that industries depending upon fair use and related limitations to copyright generated revenue averaging \$4.6 trillion, contributed \$2.4 trillion in value-add to the U.S. economy (roughly one-sixth of total U.S. current dollar GDP) and employ approximately 1 in 8 U.S. workers. Exports of goods and services related to fair use industries increased by 64 percent between 2002 and 2009, from \$179 billion to \$266 billion. Exports of trade-related services, including Internet or online services, were the fastest growing segment, increasing nearly ten-fold from \$578 million in 2002 to more than \$5 billion annually in 2008-2009.¹³

The conclusions reached by the 2011 study are borne out by the wide array of industries relying on fair use to create and innovate, often for commercial purposes. The value of fair use extends well beyond industries that bring us new technological innovation. Just in 2013 alone, the fair use doctrine came to the defense of various creative and innovative entertainment and technology defendants, representing film and theatre, the NFL, art, satellite, music, and digital books. A Broadway show's use of a 7-second clip of television was found to be fair use,¹⁴ with the court characterizing the dispute as "a good example of why the 'fair use' doctrine exists," and accusing the litigation of "having a chilling effect on creativity."¹⁵ A well-known "appropriation" artist's collages of copyright-protected photographs were found to be transformative fair use.¹⁶ A movie studio prevailed with a fair use defense over piracy allegations arising from a film that paraphrasing nine words from William Faulkner.¹⁷ An unlicensed multimedia image used in a band's live performance was found to have no effect on "the value of the piece or of [the artist's] artwork in general", and was therefore non-infringing.¹⁸ The NFL and the Baltimore Ravens recently won a long-running copyright dispute, with the court holding that "[a]ny other result would visit adverse consequences not only upon

¹² Stephen A. Merrill & William J. Raduchel, *Copyright in the Digital Era: Building Evidence for Policy*, National Research Council (2013), available at http://www.nap.edu/catalog.php?record_id=14686.

¹³ Thomas Rogers & Andrew Szamosszegi, *Fair Use in the U.S. Economy* at 26-27 (2011), available at <http://www.cciinet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>.

¹⁴ *SOFA Entertainment v. Dodger Productions*, 709 F.3d 1273 (9th Cir. 2013).

¹⁵ *Id.* at 1280. The Supreme Court has explained that fair use is an "'equitable rule of reason' which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

¹⁶ *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

¹⁷ *Faulkner Literary Rights v. Sony Pictures Classics*, 2013 WL 3762270 (N.D. Miss. July 18, 2013).

¹⁸ *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013).

filmmaking but upon visual depictions of all sorts.”¹⁹ The court pointed to a brief by the MPAA and film-makers when explaining that “creation itself is a cumulative process; those who come after will inevitably make some modest use of the good labors of those who came before,” noting that fair use “is crucial to the exchange of opinions and ideas.”²⁰ Underscoring the value of fair use across the economy, the court stated that “[s]ociety’s interest in ensuring the creation of transformative works incidentally utilizing copyrighted material is legitimate no matter who the defendant may be.”²¹

The committee’s consideration of the subject of fair use should recognize the importance of fair use and related limitations in ensuring a balanced intellectual property system. In particular, the absence of technology innovators among today’s witnesses should not obscure the significance of fair use to the technology industry and the broader economy. Not only does fair use serve extensive societal interests, it has enabled extraordinary contributions to the U.S. economy, which our copyright policy should seek to encourage.

¹⁹ *Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 935 (4th Cir. 2013).

²⁰ *Id.* at 944.

²¹ *Id.* at 945.