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ABSTRACT

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- *Copyright law 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 a "pro-rightsholder" approach to copyright legislation. Copyright law must be comprehensively reformed to 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 more recent *Grokster* opinion, 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.

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. This doctrine should maintain a balance between authors' incentives and the innovative use of information, ideas, and technology.*

Background: 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 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 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

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

copyright law.[2] 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 First Amendment scrutiny.

Fair use also promotes competition in technology markets. Courts have repeatedly held that fair use also permits reverse engineering of copyrighted software programs to ensure interoperability between software and hardware products. 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 the competitive market. Copyright policy should advance this crucial principle.

CCIA's Position: The erosion of fair use threatens crucial economic activity *and* treads 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. ***Statutory Damage Reform:*** *Copyright damages should have some proportional relationship to the injury suffered.*

Background: The intellectual property system today faces a crisis of credibility that is rooted in public disdain for an inflexible system replete with arbitrary distinctions, which has been modernized only with carve-outs and exemptions designed to protect narrow interests. Adding fuel to the fire of public discontent, copyright damages are "statutory," meaning that the copyright statute allows plaintiffs to seek up to $150,000 per work infringed without any requirement to prove any financial injury at all. Although the law also provides for actual damages – *i.e.*, damages which are based on the injury suffered – statutory damages awards today dwarf real damages, leading to hundred-million dollar claims, including a claim in one case for an award 1,000 times larger than actual damages.[3] Some courts have noted that this may raise constitutional due process claims.[4]

CCIA's Position: Previous enforcement-only legislation has failed to address structural asymmetries in the system, like the growing imbalance in statutory damages. Copyright reforms must be undertaken that restore balance to statutory damages, ensuring that there is some proportional relationship between the injury suffered and the damages imposed.

C. ***Digital Millennium Copyright Act (DMCA) Reform:*** *The DMCA has threatened computer security and suppressed competition. The DMCA must be reformed to protect copyrighted content 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 defeating technological measures that control copyrighted works in order to access the work. Currently, the technological measures most widely deployed in the marketplace are known as "digital rights management" (DRM); however, because the DMCA makes no accommodations for fair use rights-holders may restrict entirely lawful uses, such as efforts to

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[2] *See Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).
[3] *UMG Recordings v. Lindor*, No. 05-Civ-1095, slip. op. at 6 (E.D.N.Y. Nov. 9, 2006)
[4] *In re Napster Copyright Litig.*, 7 U.S.P.Q. 2d 1833 (N.D. Cal. 2005).

achieve interoperability. Thus, the spirit of the law is misaligned with the letter of the law. Today, the DMCA remains "ripe for anticompetitive abuse,"[5] particularly in cases that have *nothing to do with the infringement of copyrights.*

In addition to undermining competition, the DMCA undermines security. In 2006, for example, a Sony-BMG DRM 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 DRM was designed to protect copyrights, security software vendors seeking to counter this threat risked violating the DMCA, since the statute prohibits the removal of Sony's DRM. While the DMCA contains a narrow exception for security-related activities, it was so narrow that it did not fully protect security vendors acting in good faith to protect critical infrastructure from computer attacks. In short, the DMCA criminalized efforts to combat a global security threat.

In light of continuing concerns surrounding DRM, the Federal Trade Commission recently convened a series of panels to explore the legal landscape and assess how consumers might be better informed about restrictions on the digital products that they purchase.

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*,[6] *Chamberlain Group v. Skylink Technologies*,[7] and *Davidson & Associates v. Jung*.[8]

Not all DMCA litigation has been resolved favorably, such that anticompetitive companies may 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 the door to companies who view litigating as a viable alternative to competition.

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

[6] *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).

[7] *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).

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