FAIR USE: ITS EFFECTS ON CONSUMERS AND INDUSTRY

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

NOVEMBER 16, 2005

Serial No. 109–78

Printed for the use of the Committee on Energy and Commerce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

27–003PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON ENERGY AND COMMERCE

JOE BARTON, Texas, *Chairman*

RALPH M. HALL, Texas
MICHAEL BILIRAKIS, Florida
Vice Chairman
FRED UPTON, Michigan
CLIFF STEARNS, Florida
PAUL E. GILLMOR, Ohio
NATHAN DEAL, Georgia
ED WHITFIELD, Kentucky
CHARLIE NORWOOD, Georgia
BARBARA CUBIN, Wyoming
JOHN SHIMKUS, Illinois
HEATHER WILSON, New Mexico
JOHN B. SHADEGG, Arizona
CHARLES W. "CHIP" PICKERING, Mississippi, *Vice Chairman*
VITO FOSSELLA, New York
ROY BLUNT, Missouri
STEVE BUYER, Indiana
GEORGE RADANOVICH, California
CHARLES F. BASS, New Hampshire
JOSEPH R. PITTS, Pennsylvania
MARY BONO, California
GREG WALDEN, Oregon
LEE TERRY, Nebraska
MIKE FERGUSON, New Jersey
MIKE ROGERS, Michigan
C.L. "BUTCH" OTTER, Idaho
SUE MYRICK, North Carolina
JOHN SULLIVAN, Oklahoma
TIM MURPHY, Pennsylvania
MICHAEL C. BURGESS, Texas
MARSHA BLACKBURN, Tennessee

JOHN D. DINGELL, Michigan
Ranking Member
HENRY A. WAXMAN, California
EDWARD J. MARKEY, Massachusetts
RICK BOUCHER, Virginia
EDOLPHUS TOWNS, New York
FRANK PALLONE, Jr., New Jersey
SHERROD BROWN, Ohio
BART GORDON, Tennessee
BOBBY L. RUSH, Illinois
ANNA G. ESHOO, California
BART STUPAK, Michigan
ELIOT L. ENGEL, New York
ALBERT R. WYNN, Maryland
GENE GREEN, Texas
TED STRICKLAND, Ohio
DIANA DEGETTE, Colorado
LOIS CAPPS, California
MIKE DOYLE, Pennsylvania
TOM ALLEN, Maine
JIM DAVIS, Florida
JAN SCHAKOWSKY, Illinois
HILDA L. SOLIS, California
CHARLES A. GONZALEZ, Texas
JAY INSLEE, Washington
TAMMY BALDWIN, Wisconsin
MIKE ROSS, Arkansas

BUD ALBRIGHT, *Staff Director*
DAVID CAVICKE, *Deputy Staff Director and General Counsel*
REID P.F. STUNTZ, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

CLIFF STEARNS, Florida, *Chairman*

FRED UPTON, Michigan
NATHAN DEAL, Georgia
BARBARA CUBIN, Wyoming
GEORGE RADANOVICH, California
CHARLES F. BASS, New Hampshire
JOSEPH R. PITTS, Pennsylvania
MARY BONO, California
LEE TERRY, Nebraska
MIKE FERGUSON, New Jersey
MIKE ROGERS, Michigan
C.L. "BUTCH" OTTER, Idaho
SUE MYRICK, North Carolina
TIM MURPHY, Pennsylvania
MARSHA BLACKBURN, Tennessee
JOE BARTON, Texas, (Ex Officio)

JAN SCHAKOWSKY, Illinois
Ranking Member
MIKE ROSS, Arkansas
EDWARD J. MARKEY, Massachusetts
EDOLPHUS TOWNS, New York
SHERROD BROWN, Ohio
BOBBY L. RUSH, Illinois
GENE GREEN, Texas
TED STRICKLAND, Ohio
DIANA DEGETTE, Colorado
JIM DAVIS, Florida
CHARLES A. GONZALEZ, Texas
TAMMY BALDWIN, Wisconsin
JOHN D. DINGELL, Michigan, (Ex Officio)

CONTENTS

Page

Testimony of:
- Adler, Prudence S., Associate Executive Director, Federal Relations and Information Policy, Association of Research Libraries 29
- Aiken, Paul, Executive Director, Authors Guild, Incorporated 62
- Band, Jonathan, Netcoalition 32
- DeLong, James, Senior Fellow and Director, Ipcentral Information, Progress and Freedom Foundation 43
- Hirsch, Frederick, Senior Vice President, Intellectual Property Enforcement, Entertainment Software Association 56
- Jaszi, Peter, Washington College of Law, American University 16
- Shapiro, Gary J., President and Chief Executive Officer, Consumer Electronics Association 22
- Sohn, Gigi B., President and Founder, Public Knowledge 36

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD:

Black, Edward J., President and CEO, Computer & Communications Industry Association and the Open Source & Industry Alliance, prepared statement of 88

Jaszi, Peter, Washington College of Law, American University, letter dated November 22, 2005, to Hon. Cliff Stearns 97

Sun Microsystems, Inc., prepared statement of 98

FAIR USE: ITS EFFECTS ON CONSUMERS AND INDUSTRY

WEDNESDAY, NOVEMBER 16, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2123 of the Rayburn House Office Building, Hon. Cliff Stearns (chairman) presiding.

Members present: Representatives Stearns, Bono, Ferguson, Murphy, Blackburn, Barton (ex officio), Schakowsky, Ross, Towns, Green, DeGette, and Gonzalez.

Also present: Representative Boucher.

Staff present: Bud Albright, staff director; David Cavicke, general counsel; Andy Black, deputy staff director, policy; Chris Leahy, policy coordinator; Will Carty, professional staff; Julie Fields, special assistant to the deputy staff directory, policy; Terry Lane, press secretary; Larry Neal, deputy staff director, communications; Billy Harvard, clerk; Jonathan Cordone, minority counsel; and Jonathan Brater, minority staff assistant.

Mr. STEARNS. Good morning. I am pleased to welcome all of you to the Commerce, Trade, and Consumer Protection Subcommittee hearing on "fair use." The principle of fair use is an important if not well defined component of copyright law. Simply stated, the fair use doctrine allows free use of copyrighted material for purposes such as comment and criticism, news, reporting, teaching, scholarship, and research. To determine whether a particular use is fair, four factors must be applied to the facts of the case. As with most simplifications, the devil is in the details and fair use is not short on details. The fair use doctrine is a list of factors applied after the fact and subject to broad interpretations by the courts, all copying is subject to challenge by the copyright holder. Fair use is a defense. The only way for someone to know whether a use is in fact a fair use is to finally resolve it through litigation. This can be costly and time consuming.

Further, my colleagues, complicating the inherent tension surrounding fair use is a rapid advancement of digital media and the internet to allow flawless reproduction of creative material and light speed dissemination of that material across the globe almost instantaneously. Technologies such as browsing, linking, and streaming were not even imagined during the formative years of the fair use doctrine but now are at the heart of a debate involving

fair use and the implications of rapidly involving technologies. I doubt we are going to solve all of these issues this morning. What I would hope is that we can have a reasoned and thoughtful examination of the law of copyright and fair use, how technology is making traditional fair use analysis and distinctions more nuanced, and how consumers are fairing in the middle of all of this.

With today's hearing, I also would like to lay the groundwork for further examination of H.R. 1201, my colleague, Mr. Boucher's bill. H.R. 1201 would allow the circumvention of anti-piracy, encryption technology in cases when a user intends to make a fair use of the underlying work. The Digital Millennium Copyright Act passed in 1998 (DMCA) created civil and criminal penalties for circumventing encryption in other technology designed to prevent tampering or hacking into copyright material. But it also can prevent fair use. I believe the effects of the DMCA to lock out consumers from the proper and fair use of material is a perverse result of the law.

Also known as digital rights management or DRM, the DMCA also extends its prohibitions to those who sell or trade in technology design to break encryption technology or circumvent it. My colleagues, Mr. Boucher's bill would allow for the development of technologies that assist consumers in fair use of copyrighted material. This is a noble pursuit but when we consider the real and growing threat of piracy and hacking, it becomes very obvious that such a policy could be easily exploited by criminals and hackers looking to make a fast buck on someone else's creative genius.

While I would like to explore the issues of H.R. 1201 that seeks to remedy, I think the cleaner solution to this lies in technology and not necessarily legislation. On that note, I have a number of issues that I would like to discuss here today. The first question I have is whether we have gotten any closer to that technology that would allow a limited number of protective copies to be made of copyrighted protected works. According to Mr. Valenti, who represents the Motion Picture Association before the subcommittee last year, he said, "Keep in mind that, once copy protection is circumvented, there is no known technology that can limit the number of copies that can be produced from the original." So I would like to know about the state of the technology in this area today. I cannot think that this is not a solvable problem even though it is a challenge. Why don't we make it the copyright equivalent to the race to the moon so to speak? We went to the moon 40 years ago. It seems to me technology should afford a means of limiting the number of copies we can make of a protected work. Absent promising news on the technology front, I assume we will have to allow the legislative process to work and see if that will yield a solution, although perhaps not the best one.

In closing, as I said last year, I support fair and balanced intellectual property laws but I also understand that the rest of the world sometimes does not play by the rules. We have seen that in our hearings here many times. I believe there is a balance to be achieved here but I think technology is the best way to manage that balance and protect the rights of both the creators of works and the consumers who purchase, use, and improve upon them for the benefit of all.

And so I welcome the witnesses today and I welcome the ranking member, Ms. Schakowsky.

Ms. SCHAKOWSKY. Thank you, Mr. Stearns, for holding today's hearing on the fair use of copyrighted material in the digital age.

Technological innovations have once again opened the door of our subcommittee to legislative arenas that would not have been imagined just a few years ago. The internet digitization of information and E-commerce have necessitated the updating of laws that have been rendered ineffective or perhaps become too stifling because of technological advances. Today's hearing focuses our attention on how the availability of copyrighted materials in digital format effects artists, consumers, researchers, librarians, and hosts of industries.

Because of the unpredictability of where technology developments will take us tomorrow, we have to be careful on proposing to update laws. As we have seen in the past and as we will hear today about what has happened with the Digital Millennium Copyright Act or DMCA, closing loopholes could end up shutting doors to a range of innocent bystanders. With the passage of the DMCA in 1998 which was before I came to Congress, my colleagues made a significant attempt to contend with the new challenges that digital capabilities introduced to copyright law. The DMCA was meant to stop copyright infringement on new digital mediums. Unfortunately, by trying to predict where the ever-evasive nature of technology would take us, the DMCA was drafted with such broad strokes that it swept away the fair use provisions of the copyright law and has been abused by those who want to squelch competition in areas totally unrelated to copyrights. For example, manufacturers of garage door openers and toner cartridges have used the DMCA to try to prevent their competitors from developing alternative and cheaper models. Remember, they are not infringing on copyrights or violating any patents.

Make no mistake about it, copyrights need to be protected and artists need to be compensated for the work. However, when a law pits artists against consumers, when millions of fans are called criminals, when companies can use the DMCA to prevent new products from coming to the market, when libraries may have to limit or charge for services they traditionally have provided for free, then in my view, the law needs to be fixed.

I believe that Mr. Boucher's and Chairman Barton's bill, H.R. 1201, the Digital Media Consumer Rights Act has opened the door to meaningful discussions about the overreaching applications of the DMCA even with the new questions and concerns it raises. I have met with artist groups, consumer groups, technology developers and believe that we can work together to craft a remedy to the DMCA that would protect artist copyrights, consumer rights, competition, and technological innovation. This is an exciting time. We are at a technological crossroads that is changing how we think about commerce, art distribution, and traditional consumer protection. It is our responsibility as lawmakers to make sure all voices are heard in this debate.

I am glad that we are here today with so many people who are affected by the DMCA and its effect on fair use. I look forward to your testimony.

Thank you.

Mr. STEARNS. Ms. Blackburn?

Ms. BLACKBURN. Thank you, Mr. Chairman.

I had read through some of the testimony and just want to make just a couple of comments even though I basically have no voice today. It does not seem to shut me up much.

I want to welcome our guests and thank you all for being with us and we are looking forward to hearing from you. I want to thank the chairman for the hearing today. I think it is a very important hearing. I think this is a critical, critical issue for our country.

As I read your testimony, I find it is like when you say you cannot be a little bit pregnant so how do you go snip just a little bit of what somebody has created and where do you draw that line? It is like when my children were little, I would say, they would say something and it would be just a little white lie but little white lies lead to great big lies. And I think we have to begin to look at this issue not as just piracy, not as just snippets but we have to look at it as theft.

And there is an underlying reason I think we have to do that. It is because you may call it fair use. One of my country music constituents in Tennessee looks at what you want to do and says this is fair use for technology to steal my work. And many in our creative community do that, look at it that way. I think that is dangerous. I think we have to be very careful in codifying something that would allow theft and it concerns me tremendously. It concerns me for the economic renaissance that I would love to see happen in this great Nation. And I see some of you laughing and shaking your head and that concerns me that you would make light of what is of great concern. The greatest asset this Nation has had is our constitution. The greatest asset this economy has ever had, ever had is the fact that private property ownership has been revered and has literally been held sacred.

So I thank the chairman for holding the hearing. I thank each of you for being here. I look forward to talking with you, to questioning you, and to visiting you about this issue.

Brother, I yield back.

Mr. STEARNS. I thank the gentlelady.

Mr. Gonzalez?

Mr. GONZALEZ. Waive opening.

Mr. STEARNS. The gentleman waives opening.

Mr. Ferguson?

Mr. FERGUSON. Thank you, Mr. Chairman. Thank you for holding this hearing. It is one that I hope will clarify what constitutes fair use in the consumer marketplace.

This issue of fair use is commonly misunderstood, it is often misinterpreted, and most disturbingly from my point of view, it is easily distorted. As someone who represents a district of industries that are leaders in research and development whether that is in healthcare or telecommunications or communications or high tech, I am acutely aware of the importance of an intellectual property protection and the responsibility that we have to protect intellectual property rights ensuring productivity and innovation and the

deployment of the most advanced technologies and medical solutions for people all around this country and around the world.

My wife and I have four young children and we frequently find ourselves as the role of the judge among them in deciding what is fair and what is not fair. Needless to say, our interpretation ends up being a bit different from our four young kids' interpretation of what is fair. That being said, the notion of what is indeed fair can take on a life of its own, particularly in a court of public opinion. And as one of our witnesses today, Mr. DeLong wrote a few years back "A party who successfully grabs the label of fairness is on the way to victory."

Unfortunately when debating the issue of fair use, the fairness label has been used inaccurately to the advantage of those who perpetuate piracy and to the detriment of the copyright owners and ultimately the American consumer. As Members of Congress, we have to discard the labels and the easy to digest talking points and focus on what is actually permissible under the law. First and foremost, what is the fair use principle mean and what is it intended to cover? Some have contended that each and every person who buys a copy of a copyrighted work, a DVD or a CD for instance has full license under the fair use doctrine to make as many copies as they want without regard to the nature of the copying or the ultimate exploitation of the work. This is simply untrue.

The determination of fair use is always, always based on an examination of facts "any particular case" including consideration of the four factors in Section 107 of the Copyright Act. Even a fair use determination in the Sony Betamax case which many here claim is the touchstone of fair use was based on a careful balancing of the four factors and limited in its outcome to one specific act, time shifting.

Another argument we will hear is that under the principle of fair use, the public should have the ability to circumvent copy protection measures on DVD's and CD's so long as it is for a "non-copyright infringing use." This subjective narrow view, frankly an optimistic view not only makes a substantial leap of faith that those who are using hacking tools are doing do for personal use without intention to steal, but worse, it undercuts the goal of the DMCA which was to promote experimentation and development of technologies, a goal more important now than ever in the digital age which is in full bloom. Intellectual property is our country's greatest economic contributor. We should not devalue it by statutorily instituting a buy one get as many as you like free rule.

At the end of the day, this hearing represents the beginning of what I hope will be a robust and healthy debate on the principle of fair use and intellectual property rights grounded in facts and not grounded in distortions.

Thank you, Mr. Chairman, I yield back.

Mr. STEARNS. I thank the gentleman.

Mr. Ross?

Mr. ROSS. Thank you, Mr. Chairman and Ranking Member Schakowsky for having this hearing here today.

As a relatively new member of this committee, this is my first hearing on fair use and I am looking forward to the testimony of the witnesses and the dialog that follows.

The copyright clause of the constitution authorized Congress to "promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their writings and discoveries." The copyright law is ultimately commercial law. It protects the creator's right to financially exercise his or her intellectual property. The fair use doctrine was codified in the Copyright Act of 1976 where four criteria were established to determine whether unauthorized use of a work is fair use or whether it is an infringing use. The history of copyright law is a history of law adjusting to new technology. Often these laws cannot keep up with the state of technological advances. As we know, the internet and digital technology have created new possibilities for methods of distribution, of popular entertainment such as music and film in addition to enhancing academic studies.

Determining how fair use is applied in this digital environment in the concept of appropriate fair use is something we as policymakers must carefully consider as we contemplate new laws to protect the interest of creators while maintaining access for consumers. In the past, traditional methods of copyright enforcement often involve the holder against a middleman. Illegal replication and distribution were more centralized in the activities of a bootlegger or an innocent infringer. Today, digital technology has cut out the middleman which makes copyright enforcement more challenging. In addition, as the public's consumption of digital products grows, the law and technology increasingly focus on digital means to protect copyright interest because of the great risk of piracy inherent in digital media exchanged over the internet. Thomas Freedman in his book, The World is Flat, talks in great depth about this very issue and the pros and cons involved in what the technology today is allowing us to do.

Today, the House is scheduled to consider H. Con. Resolution 230, the resolution expressing the sense of Congress that Russia provide adequate and effective protection of intellectual property rights. The U.S. Trade Representative estimates that U.S. businesses lost $1.7 billion in copyright and other intellectual property theft in the Russian Federation in 2004, $1.7 billion lost in Russia alone in 2004, that's money that cannot be spent to further develop and enhance products and new innovation.

The bill expresses concern about the failure of Russia to uphold international standards in the protection of intellectual property rights, a core American asset. This asset is not limited to the compensation received by those who create or publish material but also impacts the numerous jobs created throughout this country and the economic revenue communities depend on for further growth.

Copyright itself is an engine of free expression because it supplies the economic incentive to create and disseminate ideas. I believe it is imperative that as more information and products become available in this digital environment, we do not weaken our laws which could result in making piracy easier and more prevalent.

Again, thank you for having this hearing today and I look forward to hearing from those who have joined us.

And with that, Mr. Chairman, I yield back my remaining 45 seconds.

[The prepared statement of Hon. Mike Ross follows:]

PREPARED STATEMENT OF HON. MIKE ROSS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Thank you Chairman Stearns and Ranking Member Schakowsky for having this hearing today.

As a relatively new member of this Committee, this is my first hearing on Fair Use and I am looking forward to the testimony of the witnesses and the dialogue that follows.

The Copyright Clause of the Constitution authorized Congress "To promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries."

Copyright law is ultimately commercial law; it protects the creator's right to financially exercise his or her intellectual property.

The fair use doctrine was codified in the Copyright Act of 1976 where four criteria were established to determine whether unauthorized use of a work is "fair" use, or whether it is an infringing use.

The history of copyright law is the history of law adjusting to new technology. Often, these laws cannot keep up with the speed of technological advances.

As we know, the Internet and digital technology have created new possibilities for methods of distribution of popular entertainment such as music and film in addition to enhancing academic studies.

Determining how fair use is applied in this digital environment and the concept of appropriate fair use is something we, as policy makers, must carefully consider as we contemplate new laws to protect the interest of creators while maintaining access for consumers.

In the past, traditional methods of copyright enforcement often involved the holder against a "middleman." Illegal replication and distribution were more centralized in the activities of a "bootlegger" or an innocent infringer.

Today, digital technology has cut out the middleman, which makes copyright enforcement more challenging.

In addition, as the public's consumption of digital products grows, the law and technology increasingly focus on digital means to protect copyright interests because of the great risk of piracy inherent in digital media exchanged over the Internet.

Today, the House is scheduled to consider H. Con. Res. 230, a resolution expressing the Sense of Congress that Russia provides adequate and effective protection of intellectual property rights.

The U.S. Trade Representative estimates that U.S. businesses lost $1.7 billion in copyright and other intellectual property theft in the Russian Federation in 2004.

The bill expresses concern about the failure of Russia to uphold international standards in the protection of intellectual property rights, a core American asset.

This "asset" is not limited to the compensation received by those who create or publish material, but also impacts the numerous jobs created throughout this country and the economic revenue communities depend upon for growth.

Copyright itself is "an engine of free expression" because it supplies the economic incentive to create and disseminate ideas.

It is imperative that as more information and products become available in this digital environment, we do not weaken our laws which could result in making piracy easier and more prevalent.

Again, thank you for having this hearing today, and I look forward to hearing from those who have joined us.

Mr. STEARNS. I thank the gentleman.

The chairman of the full committee, the distinguished gentleman from Texas, Mr. Barton.

Chairman BARTON. Thank you, Chairman Stearns for holding the hearing today.

The doctrine of fair use has a long history in our country. I am glad that we have such a distinguished panel today to talk about it. It is extremely important to protect people's intellectual property and our copyright protections stem directly from our Nation's founding document, the Constitution. If you think back at the time the formers and framers of the Constitution were meeting, piracy involved sailors with cutlasses and cannons and a taste for gold.

Their only worry with the law was that if it caught them they would hang them. With some notable exceptions, today's pirates are more likely to come armed with computers and pocket protectors. They still do not have much concern for legalities, however, and they still retain a taste for unarmed wealth. The framers did not anticipate the digital age but they did anticipate theft. It seems to me that they would have no problem identifying the modern pirates who steal other people's creative ideas and sell it.

As this subcommittee has explored with hearings in the past, international and domestic intellectual property infringement is a real problem and we must vigorously prosecute those who break the laws that deal with those types of situations. I think, however, that the people who wrote the Constitution would recognize the difference between a pirate and a consumer. Copyright owners for example do not have eternal and complete control over their works. Over the years and with the Constitution as their guides, the courts have determined and Congress had codified certain restrictions including the fair use doctrine. Simply put, consumers are allowed to use copyrighted works without permission of the owner under certain limited circumstances. These limited circumstances have been a strength of our system, not a weakness. They allow consumers who pay for works appropriate access to and use of and I want to accentuate appropriate copyrighted works. At the same time, ownership rights have been secured in order to encourage creativity and innovation. America is a Nation that values ideas and the freedom of Americans to innovate and to invent is another of our great strengths and fair use is a fundamental part of that.

I am concerned that some attempts to protect content may overstep reasonable boundaries and limit the consumer's legal options particularly in light of the emerging technologies that we are beginning to see in the marketplace. It boils down to this. I believe that when I buy a music album or a movie DVD, it should be mine once I leave the store. Who does not believe that? Does that mean that I have unlimited rights to use that DVD or that album? No, of course not, but the law should not restrict my fair use right to use my own property. Current law provides that I am liable for anything I do that amounts to infringement but current law also prevents me from making legal use of the content that is technologically locked even if I have the key. That just does not make sense to me. In defending this conflict, some say that fair use leads to piracy. Some even say that fair use is piracy. I do not believe that. I do not think it is. By definition, fair use is the use that does not infringe upon the owner's rights.

I am very interested in the state of content technology, content protection technology. Is it effective? Has it limited consumer's fair use rights? How might these developments hurt consumers in the future? How is the consumer electronics industry been affected? How would it affect the research and scientific community? I look forward to finding some of the answers to these questions from our distinguished panelists today. I also look forward to a comprehensive discussion about the doctrine of fair use, its historic origins, its future, and the real world effects in the marketplace of today.

Finally, I want to thank Mr. Boucher for his work on this issue and for helping to prepare us today in providing or at least rec-

ommend some of the witnesses that we're going to hear from. He is not on the subcommittee but has done important work in trying to protect consumers fair use rights.

Thank you, Mr. Chairman for holding this hearing. I look forward to participating in it.

[The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Good morning. Thank you, Chairman Stearns, for holding this important hearing. The doctrine of "fair use" has a long history in our country, and I'm glad that we have such a distinguished panel to talk about the issue.

It is extremely important to protect people's intellectual property, and our copyright protections stem directly from our nation's founding document. At the time that the Framers were meeting, piracy involved rogue sailors with cutlasses and cannon and a taste for gold. Their only worry with the law was that if it caught them, it would hang them. With some notable exceptions, today's pirates are more likely to come armed with computers and pocket protectors. They still don't have much concern for legalities, however, and they retain a taste for unearned wealth. The Framers didn't anticipate the digital age, but they did anticipate theft. It seems to me that they would have no problem identifying the modern pirates who steal other people's creative work and sell it. As this subcommittee has explored with hearings in the past, international and domestic intellectual property infringement is a real problem, and we must vigorously prosecute those who break the law.

I think that the people who wrote the Constitution also would recognize the difference between a pirate and a consumer. Copyright owners, for example, do not have eternal and complete control over their works. Over the years and with the Constitution as their guide, the courts have determined—and Congress has codified—certain restrictions, including the "fair-use" doctrine. Simply put, consumers are allowed to use copyrighted works without permission of the owner under certain limited circumstances. These limited circumstances have been a strength of our system, not a weakness. They allow paying consumers appropriate access to, and use of, copyrighted works. At the same time, ownership rights have been secured in order to encourage creativity and innovation. America is a nation that values ideas, and the freedom of Americans to innovate and invent is another of our great strengths. Fair use is a fundamental part of that.

I am concerned that some attempts to protect content may overstep reasonable boundaries and limit consumers' legal options, particularly in the light of the emerging technologies that we are beginning to see in the marketplace.

It boils down to this: I believe that when I buy a music album or movie, it should be mine once I leave the store. Who doesn't believe that? Does it mean I have unlimited rights? Of course not. But the law should not restrict my fair-use right to use my own property.

Current law provides that I am liable for anything I do that amounts to infringement, but current law also prevents me from making legal use of content that is technologically "locked," even if I have the key. This doesn't seem to make sense. In defending this conflict, some say that fair use leads to piracy, or that it is piracy. No, it isn't. By definition, "fair-use" is a use that DOES NOT infringe on owners' rights.

I am very interested in the state of content-protection technology. Is it effective? Has it limited consumers' fair use rights? How might these developments hurt consumers in the future? How has the consumer electronics industry been affected? How will it affect the research and scientific communities?

I look forward to finding some answers to these difficult questions and to a comprehensive discussion about the doctrine of "fair use," its historic origins, its future, and the real world effects in the marketplace.

Finally, I want to thank Mr. Boucher for attending this hearing today to hear from our witnesses and discuss the topic. He is not on the subcommittee, but has done important work trying to protect consumers' fair use rights. I want to welcome him, and commend him for his leadership on the issue.

Thank you, Mr. Chairman, and I yield back the balance of my time.

Mr. STEARNS. I thank the gentleman.

Ms. DeGette?

Ms. DEGETTE. Thank you, Mr. Chairman.

I will not make a long opening statement. I would like to associate myself with a lot of the comments people have made. I was reading recently about Google is going to scan full text of books and put it on the internet. That really raises an issue about how far we go with the fair use doctrine and that is why I am so delighted that you have decided to schedule a serious of hearings on this issue. And I look forward not just to this hearing but also future hearings to see where we put the balance between fair use and copyright protection because really copyright protection is the bow work of the intellectual, artistic, and commercial flourishing in the last few centuries in this country.

And I yield back.

Mr. STEARNS. The gentlelady yields back.

Mr. Murphy?

Mr. MURPHY. I thank you, Mr. Chairman. I also thank you for holding this hearing.

As an author myself and when I have the concerns about what is happening with text of books it—I know how much time it takes to put into a manuscript, sometimes hundreds of hours including research goes into preparing a book. And certainly in any case whether it is text books or whatever that book may be, to use them for the standard issues of reviews, critiques, and scholarship all within the bailiwick of what copyrights should allows. But as we look at the ease by which other people may copy material as the gentlelady was just saying whether it is making it available on line or whatever the case may be, it is a concern that those people who are out there trying to make a living by writing in essence we are taking away their ability to make a living when it is distributed whether they are singers or songwriters, recording artists, authors. I wonder what would happen if similar things were done to just tell other professions that we could simply take their services and access it for free and provide that free on line and no on could charge for it anymore. What good is it to have a specialty? What good is it to even work if we open that up to the marketplace?

So I am pleased we are having this hearing. I look forward to getting some answer to this and how in this new world of technology we can indeed protect the efforts and the work of so many who put in so much time and research into their creative endeavors and we need to make sure that we protect their part of the economy as well.

And I yield back the balance of my time.

Mr. STEARNS. The gentleman yields back.

Mr. Green?

Mr. GREEN. Mr. Chairman, I will waive opening statements and submit a statement to the record.

Mr. STEARNS. The gentleman waives.

Ms. Bono?

Ms. BONO. Thank you, Mr. Chairman. I would like to begin by thanking you so much for holding this hearing and the chairman of the full committee also for being so willing to hear me out all the time with my thoughts on this. I would like to thank our panelists for what is going to be a lively and spirited debate about something that is extremely important to us all.

I just want to start by saying if we are going to talk about H.R. 1201, I am a staunch opponent and I hope we can certainly slow down this movement of this bill if not stop it all together. I speaking for myself as a consumer, I am also a copyright holder. I have personally three iPods. I have gone through 5 or 6 for whatever reason. My children each have gone through two iPods. Now when I put my iPod when I connect it to my computer, the same list of songs is downloaded from iPod to iPod to iPod. Now is that technology mutual? I do not think so. I think technology is benefiting. I am paying the songwriter. I'm paying the royalty once 99 cents to iTunes.

So I think it is important to realize fair use is alive and well with these issues. What scares me the most is that the revolution that we are witnessing that my colleague talked about is a very, very exciting one for technology and for content providers. I have always said the inner key is the creator's greatest tool. I can, you know, we can talk about some song, we can hear it on the radio, we go home, we look it up on iTunes or either Yahoo, whatever we want, we find it and we hit enter and we have that song. But if we go forward with something like 1201 which basically guts DRM, Digital Rights Management, no longer allows this to work for us, it is going to stifle both technologies and the sale of intellectual property.

So I have great concerns. And I often think about this fact. We have not talked about this with books. We do not say, okay, I just bought a new book, the great book on Lincoln's political leadership and if I ruin it, if I drop it in a puddle of water going to Dulles Airport, do I call the publisher and say I bought that book once, I want another one for free, that is fair use? This is something we should talk about. Why can't we? I have already paid for the intellectual property. I paid that writer for her work, why am I not entitled to a whole new book for free? But we do not think like that. I have already paid you once for property but the publisher and I do not want to send shutter through the publishing community right now. I know, you know, I am really speaking metaphorically here. But we are not talking about that. We pay the provider, we pay the content creator once, and we share that amongst multiple platforms.

I think it is important when I talk to my colleagues about MP4 files, movie files, we as consumers have gone, all of us in this room have probably, every Super Bowl we go out and buy the latest, greatest biggest screen we can find and we brag about it to our friends, I have got a 60" HDTV, you know, LCD screen whatever it is and this is what I have. But we're also now going to iPod style 1" screens that we are all going to buying for Christmas for ourselves so we are going to be staring at these little teeny tiny screens. Thanks to digital rights management, we can download different movies, we can download different television programs. But if we make it legal to circumvent encryption technologies that allow us to have that on our personal player, we are going to stifle this whole globe.

So I have great concerns. I think that there have been mistakes made, there are no questions. I think people have made mistakes in being way too proprietary with their technology and protecting

their content. But I think we need to partner with industry, Mr. Chairman and work with them and shape with them policies that say you own this, you have got this once, you can move it to multiple platforms. But I think to say remove encryption technology, let people ahead and make—and if it happens to be pirated, if it happens to end up on the internet, oh, well it was not my fault. I think that is reckless and I think it is dangerous to this country.

As my colleague said too, I believe our country is the greatest Nation on this earth because of intellectual property whether it is writing song, whether it is writing a book, whether it is creating a patent, whatever it is, I think we need to hold those things near and dear. And I think this is a very important issue and I am hoping again we look at 1201 and we do not undo something that is very important to our country. So I look forward to hearing all of you in the question and answer.

And again, thank you, Mr. Chairman, I yield back my time.

[The prepared statement of Hon. Mary Bono follows:]

PREPARED STATEMENT OF HON. MARY BONO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, thank you for holding this hearing today.

We are all very fortunate to live in a world where music, movies and other forms of entertainment are just a mouse click away. I've always maintained that the "enter" key is the entertainment industry's best friend if they manage to tap into this digital revolution.

And yes, the onus is on this industry to adapt to the changing environment. But, they cannot make this successful transition if the federal government decides their intellectual property is free for the taking under the "fair use" doctrine.

Mr. Chairman, there are some who suggest that technology will be stifled if Congress insists on protecting IP rights. I would assert just the opposite. Why would a company put financial resources behind a product that can be taken for free?

Furthermore, under current law, technology and innovation are blossoming at the same time copyrights are protected. It seems as if there is a smaller, sleeker MP3 player or gaming device coming out every week! Even founders of the illegal Grokster see a successful business model predicated on copyright protection.

Our country has a long tradition of protecting property rights and copyright. We have frowned upon "takings" without permission or due compensation. However, if Congress amends the DMCA, "fair use" will resemble "unfair takings."

During recent debate, Congress rejected "unfair takings." In a vote of 376-38, the House passed a bill to address the Supreme Court's flawed decision in the Kelo case. Both Republicans and Democrats from across the political spectrum agreed that the federal government could not use "eminent domain" for economic development purposes.

It is my hope that in relation to the new digital era, Congress does not allow "fair use" to embody the haunting specter of Kelo's "eminent domain." If we are to allow "fair use" to run this course, we will not only undermine one of this nation's most important industries, but will also weaken our position in protecting intellectual property rights internationally.

I am glad we have an opportunity to explore this issue today. Believe me, I want the Internet to serve as the portal to entertainment. There are many exciting advances on the horizon. But, I hope Members keep one thing in mind: Property is property, whether we are talking about private property or intellectual property or whether we are seeking to protect ranchers or rockers. That is the history of our great nation and we must continue in this tradition.

Thank you and I yield back.

Mr. STEARNS. I thank the gentlelady.

Mr. Towns?

Mr. TOWNS. Thank you very much, Mr. Chairman and also thank you Member Schakowsky for arranging the hearing today.

We will be addressing a very delicate topic this morning and I look forward to hearing from all of the witnesses. I am pleased to

see the videogame industry represented here today. Any discussion of the impact of the fair use doctrine on consumers should include this important segment of the entertainment industry.

The videogame industry has experienced significant growth in recent years and one reason for such growth is due to its meeting and often exceeding consumer expectations with regard to accessing and playing content. In 2004, the sale of computer and videogames in the United States topped $7 billion. And the global entertainment software market reached $25 billion. I look forward to this exciting vibrant industry to continue to flourish and to continue to meet the demands of its consumers. It must continue to be able to reasonably protect intellectual property. Further, it must have the confidence that Congress is not going to upset the balance that has resulted in a win-win situation for the videogame industry and its consumers.

Today's hearing is also about how to best balance consumer demand for content with the copyright holders ability to protect that content. These are both important goals. But as I see it, the marketplace is working fairly well. Content companies are using technology to develop innovative ways to protect their intellectual property while allowing consumers to make their personal uses that they want to make. Sometimes the technologies are not perfect as we saw recently with some content protection technology. But we—but as we saw in that case and as we see it all the time, when new software is developed and released, the marketplace responds very quickly to consumer concern. So I firmly believe this is how the industry should be allowed to grow and we must allow it to be involved innovation.

On that note, Mr. Chairman, I yield back the balance of my time and I am anxious and eager to be hearing from all of the witnesses. Thank you very much.

Mr. STEARNS. I thank the gentleman.

Anyone else seek opening speech?

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you, Mr. Chairman, for holding this timely hearing on the fair use of copyrighted works. Copyright litigation has focused increasingly on digital media exchange and its inherent piracy risks. How these disputes are settled stands to impact in a very profound way the level and nature of consumer access to digital entertainment.

Historically, copyright law has adapted in the face of new technologies, as have consumer expectations as to what constitutes fair use. When Congress passed the Digital Millennium Copyright Act (DMCA) in 1998, we could not possibly have foreseen the rapid advances in technology that would ensue in just a few short years.

The public audience for digital entertainment has grown, along with technological restraints on the use of that entertainment. In particular, the "anti-circumvention" clause of the DMCA has allowed the content community to successfully limit the circumvention of digital copyright protections.

Members of the content industry insist on the value of the DMCA for their continued ability to market and distribute their products. Consumer advocates, however, believe this protection regime jeopardizes their right to fair, noninfringing use of copyrighted works. This is one of many fair use issues likely to be brought up by today's panelists, who represent both the content community and consumer rights advocates.

I hope today's hearing will help our committee better understand the growing tension between consumers, who desire to exercise the fair use of legitimately pur-

chased products, and the rights of the content industry to restrain the reproduction and distribution of their copyright protected material.

Thank you Mr. Chairman. I yield back the balance of my time.

PREPARED STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I'd like to thank the Chairman and Ranking Member for holding this hearing today. This is an important and complicated issue. I'm glad we'll be adding to the knowledge we gained from the hearings we held last year through the members on the panel we'll hear from today.

This bill does strike to the heart of one of the most significant debates for the future of the digital economy—the regulation of intellectual property.

With all of its promise, the digital age has also brought a tremendous amount of intellectual property piracy—the software industry reports losing $11 billion a year to software piracy, the motion picture industry another $3-4 billion, and the recording industry $4.2 billion.

What is scary to people who make software, movies, and music is that those are the figures only the ones they can calculate. Even more losses from online piracy exist, but are very difficult to calculate.

Numerous studies support the theory that many producers have been severely hurt by online piracy. And this is one of the few industries that has a positive balance of trade, reducing our trade deficit.

The question before us today is: how can rampant piracy crimes be stopped or contained while society's beneficial fair use rights are preserved?

All the witnesses on the panel we're going to hear from today were watching the Supreme Court closely when they ruled in MGM V. Grokster. In this particular ruling, the Court emphasized that the intent with which Grokster created and marketed Peer to Peer file sharing software was what made them liable for copyright infringement. Not the technology itself.

This committee does not have the luxury of such specific examples of the creation, use and intent of using such technology in front of us. Should we pass legislation on this issue, it will have a broad impact on these industries regardless of what the circumstances may be.

I supported the Digital Millennium Copyright Act when Congress approved it, so I do get concerned when I hear reports of the DMCA being used to eliminate aftermarkets for a variety of replacement parts.

What is the point of having digital rights management at all, if someone can create software to hack it, post his hacking software on the Internet, and software pirates in China download it and start cranking out bootleg copies of the latest feature films all in one day?

Consumers may be right to complain that they cannot fast forward through previews on their DVDs. But if the software that allows them to fast forward could also allow piracy, I do not think that is the proper balance.

As a final note, I would like to mention one section of HR 1201 which falls directly under our jurisdiction—FTC labels for copy-protected compact discs.

I think the recording industry knows that sufficiently informing the public of any changes to the CD format is the right thing to do in the first place.

The recording industry certainly has a right to copy-protect their products, but Americans have been buying CDs for well over a decade now and have come to expect their CDs will work in all CD drives and players.

If new copy-protected compact discs do not work in consumers' CD players, the consumer reaction is likely to be very negative.

I hope the parties involved can work together to avoid such situations.

Mr. Chairman, thank you for holding this important hearing on the future of digital intellectual property protection.

PREPARED STATEMENT OF HON. C.L. "BUTCH" OTTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Thank you for holding this hearing today, Mr. Chairman. In one respect, the issues of fair use and copyright protection are always changing, adapting to an ever-rapidly transforming technology market. Yet they always remain at the heart of the laws of this land.

Less than a month ago, we met here to express our concern, frustration, and fear following the Supreme Court's decision in Kelo vs. City of New London. Our outrage was universal and our alarm widespread at the implications of the Court's ruling. And just two weeks ago we spoke loudly in favor of protecting private property, will-

ing to fight tooth and nail if necessary, on the floor of the House when we passed the Private Property Rights Protection Act.

To me this debate is no different, Mr. Chairman. And yet here we sit, no longer united in defense of the Fifth Amendment but in many ways trying to find a convenient exception to our laws which are laid so firmly on a foundation of private property rights. "Fair use" is often craftily disguised as a right and an entitlement, and we discuss it as though we are obligated to protect it. But deep down "fair use" is just another argument for taking someone else's property to use for our own convenience. This argument and the one we found so repulsive in Kelo are one and the same.

Some are tempted to separate "intellectual property" from our general idea of private property, but intellectual property is no different than the dirt on my ranch in Idaho. Our entire concept of democracy is based on our right to own, to innovate, and to benefit from our work. Without protecting those rights and making it worthwhile to turn an idea into something more tangible, we would not be the nation we are today.

As a believer in the free market system, this debate about "fair use" concerns me on another level. About twenty years ago, we had a similar debate when a new technology called the VCR hit the market. The implications of this new technology seemed devastating for the industry. But a marvelous thing happened: rather than allow government regulation to harm both industry and consumer, the industry responded to consumers' desire to see films at home and became innovative, building an economic empire in the video rental and retail industry as a result. Everybody won.

While there are certainly differences in today's debate over fair use, I believe one principle is the same: Consumer demand, not government regulation should lead industry response.

It seems to me that the entertainment industries again have an opportunity to work with the software and device manufacturers to develop and sell products that meet consumer demand. Protecting intellectual property investments is the key element in achieving cooperation. Without these protections, all of these industries will ultimately suffer.

I believe consumers have a voice and should be heard. That does not, however, obligate the government to mandate the industry response, especially since we are discussing a luxury product—not a right or a basic necessity to life, but a luxury.

In closing, I do not believe Congress should promote policies that stifle investment, nor do I believe that this debate on "fair use" should be allowed to carve out an industry in which the rights of property holders do not apply. We are obligated to protect private property, discourage theft, and encourage investment into intellectual properties, not the other way around.

I look forward to the witnesses' testimony and thank the Chairman again for the opportunity to discuss this issue.

PREPARED STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

I thank Mr. Chairman for holding this hearing today on Fair Use and its effects on consumers and the industry.

Rapid advances in technology have increased tensions between the content community and consumers.

At the heart of the issue is the tension between attempts by content owners to protect and control the use of their works by means of technology and the consumer's use of technology to make use of content under fair use.

Private property and intellectual property rights have been an important part of this country's existence since the inception of the Constitution.

Protecting the intellectual property of our artists, writers and inventors from illegal reproduction and distribution should important to all of us, because without protection of these works, we may not be blessed books, music, movies, and art that is made available to us year after year.

I am interested to hear from our witnesses today on their views of fair use and whether they believe there is a technological solution instead of a legislative one?

Thank you again Mr. Chairman for holding this hearing. In closing I would like to say that I'm sorry that the Recording Industry, Motion Picture Association and the National Association of Broadcasters could not be here to discuss their views on this matter with us.

Mr. STEARNS. If not, we will move to our witness and I want to welcome all of them this morning. We have Mr. Professor Peter

Jaszi from the University, excuse me, Washington College of Law, the American University; Mr. Gary Shapiro, President and Chief Executive Officer Consumer Electronics Association; Ms. Prudence S. Adler, Associate Executive Director of the Federal Relations Information Policy Association of Research Libraries; Mr. Jonathan Band who is here on behalf of NetCoalition; Ms. Gigi B. Sohn, President and Founder of Public Knowledge; Mr. James DeLong, Senior Fellow and Director, IPCentral Information of Progress and Freedom Foundation; Mr. Frederick Hirsch, Senior Vice President, Intellectual Property Enforcement, Entertainment Software Association; and Mr. Paul Aiken, Executive Director of Authors Guild, Incorporated.

So I wish to welcome all of you and we'll start out with you, Professor, your opening statement. Just turn the mike on and move the mike a little closer to you if you would be so kind.

STATEMENTS OF PETER JASZI, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY; GARY J. SHAPIRO, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CONSUMER ELECTRONICS ASSOCIATION; PRUDENCE S. ADLER, ASSOCIATE EXECUTIVE DIRECTOR, FEDERAL RELATIONS AND INFORMATION POLICY, ASSOCIATION OF RESEARCH LIBRARIES; JONATHAN BAND, NETCOALITION; GIGI B. SOHN, PRESIDENT AND FOUNDER, PUBLIC KNOWLEDGE; JAMES DELONG, SENIOR FELLOW AND DIRECTOR, IPCENTRAL INFORMATION, PROGRESS AND FREEDOM FOUNDATION; FREDERICK HIRSCH, SENIOR VICE PRESIDENT, INTELLECTUAL PROPERTY ENFORCEMENT, ENTERTAINMENT SOFTWARE ASSOCIATION; AND PAUL AIKEN, EXECUTIVE DIRECTOR, AUTHORS GUILD, INCORPORATED

Mr. JASZI. Thank you. Mr. Chairman, Ranking Member Schakowsky, and members of the subcommittee, my name is Peter Jaszi and for the last 25 years, I have been teaching copyright here in Washington.

So I am going to start by invoking academic privilege in trying to give a description of the fair use doctrine even more succinct than the chairman's elegant summary of a few moments ago. In essence, the doctrine provides that when the cultural or economic benefits that will flow to the public from an unauthorized use of copyrighted material outweigh the costs it will impose on the copyright owner, that use should be permitted. Fair use is not piracy. Fair uses are non-infringing uses, not merely tolerated infringements. The law does not just accept fair use but actively encourages it. Although fair use is sometimes described technically in terms of legal procedure as a mere affirmative defense, it functions in the real world analogue and digital as an important entitlement for students, artists, teachers, librarians, writers, entrepreneurs, musicians, programmers, and ordinary consumers.

As Mr. Ross noted, fair use was first codified as part of the general revision of the Copyright Act in 1976 but it has been a part of U.S. copyright laws since the decision of Folsom against March in 1841. Thus for more than 150 years, the success, the unparalleled success of our copyright system has stemmed from the fact that strong protection for owners consistently has been balanced by

use rights that to paraphrase the Supreme Court, encourage others to build freely upon preexisting works and make their own contributions to cultural progress. Moreover, as the court recently reaffirmed in Eldred against Ashcroft, the fair use doctrine is a mechanism, a crucial mechanism by which copyright law recognizes and implements the free speech values of the First Amendment.

Major industries such as motion pictures, poplar music, and computer software have prospered in part because innovators have been free to copy important elements of their predecessor's work. Moreover it is because of fair use that we all can make many personal uses of the information products we purchase. Students can copy text or image from published sources to enhance a term paper or homework assignment. Music fans can combine selections from their record collections to make mixes for a family member's birthday. And it is the freedom to read, view, and listen to information products assured by fair use that enables many consumers to move from absorbing the words, images, and notes of others to making their own creations.

The reach of copyright law is constantly expanding to provide longer terms of stronger protection against more kinds of unauthorized uses than at any point in history. More than ever than fair use matters now. In the courts, the doctrine is being creatively and robustly applied to guarantee fundamental fairness and balance and providing useful guiding precedence. In other quarters, however, fair use is threatened. Some academics complain that fair use is too vague or uncertain to be of real value to users. It would, however, be a serious mistake for Congress to codify the doctrine in greater detail, precisely because the enduring strength of fair use lies in its dynamism and adaptability to change circumstances. Instead, I believe the best answer to this objection is for various user communities to articulate clearly their own shared vision of best practices in fair use, a process that I am happy to say is beginning to get under way.

Self help cannot address other threats to fair use such as those posed by anti-circumvention laws. Thus for example, a teacher who copies short film segments to show in class. This is a classic core example of fair use can still be liable under Section 1201 of the Digital Millennium Copyright Act if he or she bypassed the so called CSS Code with which commercial DVD's are sold. Such anomalies cry out for legislative regress. I would note that H.R. 1201, the Digital Media Consumer Rights Act of 2005 introduced by Representatives Boucher, Doolittle, and Barton illustrates the kind of legislation that would be well calculated to provide that regress.

Thank you for your attention. I look forward to trying to answer whatever questions you may have about this vital aspect of American copyright.

[The prepared statement of Peter Jaszi follows:]

PREPARED STATEMENT OF PETER JASZI, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

My name is Peter Jaszi. For the last 25 years, I have taught copyright at the Washington College of Law of American University, here in the District of Columbia. In recent years, I also have represented the Digital Future Coalition on various

copyright policy issues.[1] Today, however, I am testifying in my personal capacity about the critical importance of the "fair use" doctrine in American copyright law.

Summary

In the two centuries following the enactment of the first Copyright Act in 1790, the United States enjoyed an unequaled and unbroken record of progress that gave us, on the one hand, educational institutions and research facilities that are preeminent in the modern world, and on the other, entertainment and information industries that dominate the global marketplace. Schools, libraries and archives benefited from the operation of our copyright system, and the public reaped the reward; likewise, expanding American publishing, motion picture, music and software businesses generated not only wealth but also less tangible forms of public good. And this was as it should be. From its inception, the copyright system has operated both as a strong force for cultural development and as a powerful engine of economic growth.

The success of traditional U.S. copyright law was not due only to the unprecedentedly high levels of protection it has afforded to works falling within its coverage. That success also stemmed from the fact that strong protection consistently has been balanced against use privileges operating in favor of teachers, students, consumers, creators and innovators who need access to copyrighted material in order to make—or prepare to make—their own contributions to cultural and economic progress. To put the point more simply, the various limitations and exceptions on rights that traditionally have been a part of the fabric of copyright are not results of legislative or judicial inattention; rather, these apparent "gaps" in protection actually are essential features of the overall design. As the Supreme Court observed more than a decade ago, in its Feist decision, the limiting doctrines of copyright law are not "unforeseen byproduct[s] of a statutory scheme . . .;" in fulfilling its constitutional objective, copyright "assures authors the right to their original expression but encourages others to build freely upon" preexisting works. And, as the Court recently has reaffirmed in *Eldred v. Ashcroft,* these limiting doctrines are the mechanism by which copyright law recognizes and implements the values of free expression codified in the First Amendment.

Today, more than ever, fair use matters. In the courts, the doctrine is being creatively applied to guarantee fundamental fairness and balance. In other quarters, however, fair use is under threat. But the doctrine (like the vision of balanced copyright law that it represents) deserves to be defended and supported. Some of that support can come from the Congress of the United States, but much of it must derive from the various user communities that depend on the doctrine for the opportunity to make their cultural and economic contributions to our society.

Some issues of terminology

The term "fair use" can be used in two different ways—one loose and one more precise. Often, it is employed as shorthand to reference all the vital limitations and exceptions on the rights of copyright owners that are built into our system and have done so much to help fulfill the Constitutional objective of intellectual property: promoting the "progress" in "Science and useful Arts." Over the years, U.S. copyright law has built up a catalogue of limitations and exceptions to copyright protection, including:

- The "idea/expression" distinction, which assures (among other things) that copyright protection does not attach to the factual contents of protected works;
- The "first sale" principle, codified in 17 U.S.C. Sec. 109(a), which assures that (as a general matter) purchasers of information products from books to musical recordings can sell or lend their copies to others;
- A variety of specific exemptions for educational, charitable and other positive public uses; and, most importantly,
- The doctrine codified in Sec. 107 of the Copyright Act, which provides—in essence—that some other unauthorized uses of copyrighted works, not specifically covered by any of the other limitations just summarized, should be permitted rather than punished because their general cultural and economic benefits outweigh the costs they might impose on copyright owners.

[1] The DFC is a coalition of more than 30 trade associations, non-governmental organizations and learned societies representing a broad cross-section of the educational, high-tech, consumer and creative communities in the United States; it was organized during the run-up to the Digital Millennium Copyright Act of 1998, and has continued to be active on current copyright policy questions.

"Fair Use" under Sec. 107

It is to this last doctrine to which the term "fair use" refers in its more precise sense, and it is to this doctrine and its importance that my remarks today will primarily be addressed. That is because fair use (in this sense) has a special place in the array of limitations and exceptions to copyright. Of all the doctrines noted above, it has the greatest potential to grow and change with new technological, economic and cultural circumstances. Whereas many of the statutory exceptions to copyright are static, fair use under Sec. 107 is, by its very nature, adaptable and dynamic. For this reason, it operates as a kind of keystone in the edifice of our copyright system. It absorbs pressure from different sides (i.e., from copyright owners and copyright consumers), and in so doing it allows the structure to stand. Our fair use doctrine is unique—no other country has anything quite like it. Indeed, it functions as a kind of secret weapon in support of U.S. competitiveness in the international competitive marketplace. Fair use helps account for the innovative dynamism that has made our information industries the envy of the world.

This particular concept of fair use has been a central and unquestioned feature of U.S. copyright law since 1841, when Joseph Story announced the doctrine in the case of *Folsom v. Marsh*. It was refined the courts in the century and a quarter that followed, and codified in 1976, as part of the general revision of the Copyright Act.[2] That codification, however, had some unusual features. Rather than attempting to specify the contents of the doctrine, or to shape and regulate its future growth, the Congress merely provided a non-exhaustive list of four factors that (along with other unremunerated considerations) should be taken into account when a federal court is called upon to determine whether a particular challenged use of copyrighted material should be considered fair. When Sec. 107 was amended in 1992, to clarify that fair use applies to both unpublished and published works, its provisions retained this remarkable open texture. Thus, the dynamism of the doctrine has been preserved in the course of its codification. Today, in weighing the balance at the heart of fair use analysis, courts return again and again to two key questions:

- Did the unlicensed use "transform" the material taken from the copyrighted work by using it for a different purpose than the original, or did it just repeat the work for the same intent and value as the original?
- Was the amount and nature of material taken appropriate in light of the nature of the copyrighted work and of the use?

Among other things, both questions address whether the use will cause excessive economic harm to the copyright owner.

In this connection, there also are some misconceptions about the reach of the fair use doctrine that should be noted and corrected:

- *Fair use need not be exclusively high-minded or "educational" in nature.* Although nonprofit or academic uses often have good claims to be considered "fair," they are not the only ones. A new work can be "commercial"—even highly commercial—in intent and effect and still invoke fair use for its use of preexisting material. Most of the cases in which courts have found unlicensed uses of copyrighted works to be fair have involved projects designed to make money, including some that actually have.
- *Fair use doesn't have to be boring.* A use is no less likely to qualify as a fair one because the new work in connection with which it occurs is effective in attracting and holding an audience. If a use otherwise satisfies the criteria of the law, the fact that it is entertaining or emotionally engaging should be irrelevant to the analysis.
- *A failed effort to clear rights doesn't inhibit a users' ability to claim fair use.* Everyone likes to avoid conflict and reduce uncertainty. Often, there will be good reasons to seek permissions in situations where they may not literally be re-

---

[2] § 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

quired. When a would-be user's good faith effort to do so fails, he or she loses nothing in terms of fair use rights.

It also is important to note that fair use is not, as sometimes has been suggested, a mere negative byproduct of the economics of rights clearance in the analog information marketplace, which can be expected to whither away with the transition to digital. Rather, it is a provision of copyright law that serves an affirmative cultural and economic mission. It is likely to be more important than ever in the new information era. Nor does it detract from the importance of fair use to assert, as its detractors sometimes do, that it is not a "right" but merely an "affirmative defense." This, I would suggest, is a legal quibble rather than a serious argument. The availability of an affirmative defense in a proceeding of certain factual circumstances is tantamount to a right to engage in the privileged conduct when those circumstances actually are present. In criminal law, "self defense" is classified as a defense for purposes of courtroom procedure. However, its recognition also functions as an affirmative authorization for some kinds of self-protective conduct the real world. The same analysis applies to fair use in copyright.

Fair use today

Although fair use has been a prominent feature of U.S. copyright since the inception of the doctrine, it truly has come into its own in the last several decades. In this period that, copyright law has become dramatically more restrictive in other respects. The last twenty years have seen extensions of copyright term, an expansion in copyright scope, a dramatic development in secondary liability for copyright infringement, and dramatic increases in civil and criminal penalties. All these developments have contributed to the importance of maintaining a legal space in which socially and economically productive uses of protected material can occur without risk of liability. The courts have responded both by reaffirming the applicability of fair use in a number of traditional contexts (such as critical quotation and educational practice), and by adapting the flexible doctrine for a range of new purposes (including copying that promotes healthy market competition).

The benefits of a balance mediated by fair use

It may be useful to provide some general illustrations of how the balance that is assured in our copyright law by the operation of fair use has served the twin goals of cultural and economic progress. It is common to note the self-evident proposition that the non-profit educational and library sector depends on limiting doctrines for many essential functions. Although schools and libraries are among the largest purchasers of copyrighted materials in the United States, their most typical and beneficial activities—from classroom teaching to scholarly research—would not be possible without the built-in fairness safeguard that fair use provides.

It is less frequently noted that such major information industries as motion pictures and computer software came into being not despite the fact that filmmakers and programmers were free to copy important elements of their predecessors' work, but because of it. They have continued to prosper under these conditions; likewise, fair use also is critical to a wide range of practices within the book publishing and music industries. It would not be going too far to say that the creativity and innovation that copyright exists to promote are fueled as much by this strategic "gap" in the law as they are by its strong protections. Individual creative artists understand this point well from direct personal experience, even though large copyright-owning media companies sometimes lose sight of it. Although the entertainment industries are legitimately concerned about "piracy" of copyright works, it is important not to confuse the activities they rightly condemn with the ordinary, lawful exercise of the various use privileges, including fair use, that are conferred by the Copyright Act itself.

Equally important, fair use operates to the direct and immediate benefit of ultimate information consumers. It is because of fair use (and other limiting doctrines) that we all can make a broad range of personal uses of the content of information products we purchase, without fear of legal liability. Because of fair use, students can copy texts or images from published sources to enhance a term paper or homework assignment and music fans can combine selections from their personal record collections to make "mixes" for a family member's birthday or anniversary celebration, all without any concern that by doing so they will violate traditional copyright principles. Nor is this all. Ultimately, it is the freedom to read, listen and view information products assured by fair use that enables many consumers of copyrighted content to become producers—to move from absorbing and repeating the words, images and notes of others to making their own creative contributions to the general store of cultural resources.

Some examples: fair use in filmmaking and film teaching

For the last 18 months, my colleague Professor Pat Aufderheide (of the American University School of Communication) and I have been directing a project designed to investigate the ways in which documentary filmmakers interact with copyright law in the United States. Early on, we discovered how extensively and pervasively producer-directors in this increasingly popular medium must rely on the fair use doctrine if they are to fulfill their mission. Documentarians need fair use in order to quote limited amounts from copyrighted works (TV programs, literary texts, musical recordings, and other films). In turn, they need the right to quote to make critical comments about contemporary media, in order to illustrate the social and cultural phenomena they address in their films, to depict truthfully the often media-saturated environments in which their human subjects are found, and (sometimes) to illustrate important historical events through archival footage.[3] When filmmakers' ability to employ fair use is frustrated (as is too often the case), their work suffers and their audiences are the ultimate losers.

Another example of the importance of fair use comes from the educational context—specifically, the domain of media education. In our time, teaching media literacy is more important than ever, and various kinds of film and television studies courses are increasingly popular in institutions of higher and even secondary education. Effective teaching in this field, however, involves the use of visual illustrations to demonstrate an instructor's points about the content and style of audio-visual works under consideration. The most effective teaching often occurs in the classroom where a lesson juxtaposes numerous short clips from various media sources for purposes of visual comparison and contrast. In short, one can no more teach media studies course effectively without media clips than a literature course without selections from literary texts. Effective media studies teachers take advantage of fair use in order to assemble "clip reels" of examples to accompany their lectures and classroom discussions. When they are unable to do so, their students pay a price in terms of forgone learning opportunities.

The internal critique of fair use

One potential threat to the survival of fair use as a useful tool for consumers and creators comes from an unexpected source—progressive commentators on copyright who argue that the doctrine simply does not go far enough, or fails to provide a level of clarity that would permit users to proceed with reasonable certainty. This argument overlooks, of course, the advantages (already noted) associated with a dynamic, flexible fair use doctrine. Unfortunately, however, this potentially self-fulfilling message has achieved considerable currency. Among the filmmakers with whom I have been working in recent months, for example, some individuals are reluctant to invoke fair use because either they themselves, or the "gatekeepers" (distributors, broadcasters, etc.) on whom they rely for access to audiences, cannot understand or will not place trust the doctrine. This is so, incidentally, despite the fact that in almost every court case where a documentary filmmaker has relied on fair use, the court has accepted this defense to a claim of infringement, thus shielding the defendant from liability.

Even though it sometimes may be overstated, this friendly critique of fair use has a real foundation. Because of its situational nature, the applications of fair use to particular sets of circumstances are sometimes difficult to predict. The solution to this dilemma lies not with the Congress or the courts, but with disciplinary communities (filmmakers, historians, musicians, teachers, etc.) who rely on fair use. Each such community has the opportunity to articulate their shared understanding of what constitutes a reasonable level of unlicensed quotation from copyrighted works in particular contexts. Were they to do so in a balanced manner, after a full process of consultation, their conclusions would have great persuasive force. In this connection, I am pleased to say that this coming Friday, November 18, a group of national organizations representing independent documentary filmmakers will announce a "Statement of Best Practices on Fair Use of Copyrighted Materials." [4]

The external threat to fair use

In the last decade, one of copyright owners' most significant responses to the uncertainty of the new communications environment has been to develop digital rights management ("DRM") tools (sometimes referred to as "technological protection

[3] The "Untold Stories" project is described at www.centerforsocialmedia.org/rock/index.htm

[4] The organizations are the Association of Independent Video and Filmmakers, Independent Feature Project, International Documentary Association, National Alliance for Media Arts and Culture, and Women in Film and Video (Washington, D.C., chapter). I will supply the Subcommittee with copies of the Statement upon its release.

measures" or "TPMs") to control access and use of texts, images and sounds in electronic formats, with the aim of preventing "piracy" and enabling new, and newly secure, forms of electronic information commerce on a "pay-per-use" model. Inevitably, however, the risk that such DRM's may be hacked has loomed large in the concerns of copyright owners. From this concern has grown domestic and international political pressure for the creation of a new species of intellectual property protection: the so-called anti-circumvention provisions that are the centerpiece of the 1998 "Digital Millennium Copyright Act" (DMCA) in the United State, and of similar legislation elsewhere in the world. This new family of legal norms is not a development of copyright law, although it is superimposed on copyright; rather, it is a kind of "paracopyright" that provides for new rights, new remedies and—crucially—a new and exclusive set of exceptions. Thus, copyright's traditional limiting doctrines, including fair use, do not apply as such in this new and evolving legal space.

The U.S. legislation makes relatively few concessions to the access interests of follow-on creators and innovators. This problem already is acute in fields (such as encryption research) where essential information is incorporated into copyright works that are made available only in digital formats. It will become increasingly significant in other fields (including scholarship, criticism and education) as literary texts and (especially) audiovisual works migrate to exclusive digital formats.[5] Thus, for example, the ability of media teachers to assemble clip reels of short excerpts from commercially available copy-protected DVD's—a clear instance of fair use under copyright law—is threatened by the paracopyright regime of 17 U.S.C. Sec. 1201. The narrow specific exceptions provided in the DMCA do not apply to this instance,[6] nor is it clear that the special rulemaking procedure for devising a limited range of additional exceptions, specified in Sec. 1201(a)(1), could be successfully invoked by media teachers.

Unlike the problem of uncertainty in fair use referred to in the preceding section of my testimony, the threat to fair use posed by anti-circumvention laws will require Congressional intervention if it is to be dispelled. H.R. 1201, the "Digital Media Consumers Rights Act of 2005," as introduced by Representatives Boucher, Doolittle and Barton last March, is an example of legislation that would be well calculated to fulfill that important goal.

Thank you for your attention to my views on this important doctrine, its place in U.S. copyright law, and the challenges that it currently faces.

Mr. STEARNS. I thank you, Professor.

Mr. Shapiro, welcome.

STATEMENT OF GARY J. SHAPIRO

Mr. SHAPIRO. Thank you for holding this incredibly important hearing and thank you all for listening, those of you who already expressed strong views actually on both sides.

To us fair use remains a very thin line protecting consumers and innovators. Of course commercial piracy is harmful. And as Chairman Barton indicated, intellectual property protection is incredibly important. But in our rush to crack down on pirates, we risk gutting a critical consumer right, fair right, fair use. Fair use is the right freely, freely to use copyrighted material without the permission of the copyright owner. Fair use ensures innovation because it allows us to invent new products for the benefit of the public even though they do disrupt existing business models. Fair use protected the Betamax VCR when MPA members tried to ban its sale to consumers. Without fair use, we would have no VCR's no tape recorders, no DVR's, no iPods, no TiVo's, and no Slingboxes. You would not be able to find information on Google or forward an email. Each of these products and applications allows you to enjoy

[5] The problem is exacerbated by the fact that, by design, anti-circumvention laws are insensitive to the distinction between the protected and unprotected elements of copyright works.

[6] In particular, the "savings" language of Sec. 1201 (c), as it is generally interpreted, does not give a film teacher the authorization to engage in circumvention for purposes of fair use. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

copyrighted works in ways that no one had anticipated and in ways which copyright holders at least initially did not like and they certainly did not authorize.

American technological leadership in the age of the internet relies on the protection that fair use gives to innovators and to venture capitalists. But this protection is eroding. Until the Supreme Court's Grokster decision this year, technology innovators were playing under the Betamax decisions bright line rule. A product is legal if it is capable of substantial non-infringing uses including fair uses. The Grokster opinion added a new layer, a new inducement test which leads innovators unsure of the legal status of their products.

The content industry's entire history is to challenge new technologies even after the Betamax decision MPA members successfully sued a competitor to TiVo into bankruptcy. Their complaint, that product allowed Americans to record, index and playback video content in their private homes. Similarly, the record companies sued and won against an internet site who helped consumers manage the music on the CD's that they already legitimately bought and owned. And today, record labels have threatened suit against new portable XM and Sirius radios already for sale, despite the fact that the music industry is paid with each one of these sales. The RIA also wants to lock down new digital radios and control consumer's ability to record free over the air radio programs in the privacy of their homes. Just 2 weeks ago in a hearing room down the hall, the head of the RIA said that Americans who record a song off a digital radio are guilty are piracy and should be subject to prosecution.

The dark shadow of litigation hanging over the introduction of virtually any new product that manipulates content especially harms smaller entrepreneurs. Many are forced to change products or simply not offer them at all because they cannot afford the immense costs of copyright litigation even though they believe they could be vindicated in court.

Now copyright law has repeatedly been strengthened by Congress and has never been so protective of the copyright monopoly. Our copyright term is not more than five times the length of the patent term and the penalties for infringement have been repeatedly and radically increased. Also what is considered infringing has also been expanded, so fair use is now all that protects inventors, investors, and consumers from an overregulated world, a world in which every use of every product must be authorized in advance by any copyright holder. And as the copyright monopoly expands, fair use needs to be strengthened not weakened. But instead, laws like the DMCA have reduced fair use as a defense for consumers and as a safe harbor for manufacturers.

In response, Chairman Barton and Representatives Boucher and Doolittle have introduced H.R. 1201 to clarify the impact of the DMCA on fair use, ensure that consumer's cannot be liable for otherwise legal conduct, and codify the Betamax case as preserved by the Supreme Court in Grokster. Another provision of H.R. 1201, which is especially important after last week's news about copy protected CD's hiding a window for viruses, requires simply that record labels post warnings on copy protected CD's. This bill is

more necessary than ever. We endorse H.R. 1201 as a sensible way to preserve consumer's autonomy and protect innovators in the 21st Century.

By preserving fair use, we will ensure that piracy is not confused with the right of families to enjoy lawfully acquired content when and where they choose. You also ensure American's their fair use right to use the capabilities of new digital technologies to inform, communicate, and entertain. You will also ensure that any one copyright holder cannot dictate and control future innovations and you will increase the odds that the next iPod or TiVo will be invented in America.

Americans should be able to use their property as they choose as long as they do not harm others. We tinker with our cars, we make music mix CD's from our collections, we look for new ways to experience the content we buy, the products we use and the new versions we create. Freedom to use our property is something we take for granted. With digital products like music, movies, and software, only fair use can give us that freedom autonomy because every use of a digital product creates a copy. Limiting fair use allows copyright owners to enter our private space and dictate how we can use our property within our own homes and vehicles. Fair use is at risk and remains the only line protecting consumers and allowing innovation. At the upcoming international CES in Las Vegas, the world will see 2,500 companies——

Mr. STEARNS. I just need you to sum up.

Mr. SHAPIRO. [continuing] unveil their most innovative products. These products shift content and time and space and allow you to manage it and they do disrupt existing business models.

Thank you for holding this hearing on fair use. It is absolutely critical. And on behalf of the CEA and Home Recording Rights Coalition, I would be happy to work with you further.

[The prepared statement of Gary J. Shapiro follows:]

PREPARED STATEMENT OF GARY J. SHAPIRO ON BEHALF OF THE CONSUMER ELECTRONICS ASSOCIATION AND THE HOME RECORDING RIGHTS COALITION

In Robert Bolt's extraordinary 1960 play, *A Man for All Seasons,* Sir Thomas More, Chancellor of England, is challenged by his son-in-law, Roper, for adhering to the law, rather than exercising his own authority:

ROPER: So, now you give the Devil the benefit of law!

MORE: Yes! What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat?

For consumers and for technologists, Mr. Chairman, fair use is one of the last laws standing today. Most of the rest have been flattened by congressional enactments, mandatory licenses, and court decisions that threaten to concentrate all copyright authority in the hands of a few large companies, in a few large industries. On behalf of the Consumer Electronics Association[1] and its more than 2,000 mem-

[1] CEA is the principal trade association of the consumer electronics and information technology industries and the sponsor of the International Consumer Electronics Show. CEA represents more than 2,000 corporate members involved in the design, development, manufacturing, distribution and integration of audio, video, mobile electronics, wireless and landline communications, information technology, home networking, multimedia and accessory products, as well as related services that are sold through consumer channels. Combined, CEA's members account for more than $121 billion in annual sales. CEA's resources are available online at www.CE.org,

bers, and the Home Recording Rights Coalition,[2] of which I am the chairman, I thank you, Chairman Stearns, Ranking Member Schakowsky, and the Subcommittee for holding this hearing on the importance of fair use to consumers and industry.

Consumer fair use was the key to allowing consumer video recorders onto the U.S. market in the 1970s and 1980s—when members of the Motion Picture Association of America sought a *court injunction* against their sale to consumers. By a single vote, the Supreme Court held in 1984 that "time-shifting" of complete works, by consumers for private noncommercial purposes, was fair use, even though it occurred without the authorization, or even over the objection, of the copyright owner. The Supreme Court's decision in this *year's* Grokster case makes this holding all the more important, because the Court has now said that inventors and distributors of new technology can be found liable for copyright infringement based on "intent" to induce infringing uses. Sony, the Court says now, escaped liability for marketing the first VCR only because it was not clear at the time that it was unlawful for a consumer to make and keep a home recording, as Sony's advertising encouraged them to do. In other words: without fair use, we would have no VCRs and no audio tape recorders, and today, we would have no TiVos, no DVD recorders, no iPods, and no Slingboxes.

But the importance of fair use does not end with new products. Without it, I could not have shared with you the quotation with which I began my testimony—despite the fact that Mr. Bolt's play is now 45 years old and that he himself died in England 10 years ago. Without fair use I could not have quickly found this information in the on-line *Wikipedia,* or retrieved it via *Google.* Without fair use I could not have quoted the lines of the play to CEA and HRRC members. Indeed, without fair use there would be very few web sites I could usefully visit, very few informative emails that I could send, and far fewer hardware and software products with which to learn and communicate.

The Nature of Fair Use

Unlike the judge-created legal theories of secondary copyright liability, under which inventors and manufacturers can be held liable for the actions of others, fair use protection is statutory. It resides in Section 107 of the Copyright Act, and represents the consolidation of hundreds of years of common law precedent in which courts protected against the abuse of copyright owners' monopoly power. It has origins in our First Amendment, because free expression includes the right to build on the ideas and accomplishments of others. More generally, it represents the balance between protection and innovation that can be traced back to the granting clauses of our Constitution itself, in which the rights to patent and copyright protection are created for a limited time, to promote the progress of science and the useful arts.

Fair use is a vital part of the bargain that our founders envisioned between artists and the public: artists get certain rights in the work they create; the public gets to use those works in fair and reasonable ways. Three years ago in *Eldred v. Ashcroft,* the Supreme Court said that fair use is not a triviality—it is one of the key provisions that keeps copyright law in harmony with the First Amendment. Fair use, the Court said, was a major reason why Congress had the discretion to extend the term of copyrights—because users' rights and autonomy were preserved by fair use.[3]

The concept of fair use is almost uniquely American. In most other societies, unauthorized uses must be the subject of enumerated exceptions to the copyright laws. In a rapidly changing technological and consumer environment, this is far from ideal. The truly innovative, popular new products, things like digital video recorders and iPods, allow consumers to enjoy copyrighted works in ways that no one had anticipated. No legislature could hope to lay out specific copyright exemptions for products like those before they are invented, and without an exemption, even investing in the development of a new product becomes far too risky. I think it is fair to say that American technological leadership—particularly in the age of the Internet—has relied largely on the assurance that our fair use doctrine has given to innovators and venture capitalists. But this may be changing.

---

[2] The Home Recording Rights Coalition was founded in 1981 in response to legal and legislative threats to consumer enjoyment of new technologies. *See* www.HRRC.org.

[3] CEA and HRRC believe nevertheless that this discretion was exercised unwisely in this instance.

The Importance of Fair Use

Until the Supreme Court's *Grokster* decision this year, most innovators and venture capitalists had a concise view of the law as a "bright line" test, based on language in the 1984 *Betamax* decision: If a new product has or is capable of substantial non-infringing uses, it is lawful to put it on the market. In this construct, a product designer or manufacturer understood that any product that had or was likely to have substantial fair uses was lawful. The *Grokster* opinion, however, seems to have turned this formulation on its head: Whether an intention to "induce" a copyright violation is found may now depend on whether any uses of the product, if they are urged and enabled by the manufacturer, investor, or distributor, are deemed *unlawful* as a matter of copyright law.

The idea that product innovators, investors, and consumers should have to live in a world of *only* those uses authorized, in advance, by copyright proprietors, was exactly what the Supreme Court in the *Betamax* case said it wished to avoid. Such a regime would subjugate the intellectual property rights of *patent owners,* granted in recognition of their promotion of new technology, to the more easily obtained rights of *copyright proprietors.* The *Betamax* Court said that such a result would "choke the wheels of commerce." In *Grokster,* the Court did not say that any such result would be preferable or justified. The Court pointed out that even though Sony's advertising for the Betamax VCR promoted uses such as the "librarying" of programs, such consumer conduct was not "necessarily unlawful."

This is the essence of fair use—giving consumers, innovators, and manufacturers the benefit of the doubt that the private, reasonable activity of consumers, and the productive activity of those inspired by copyrighted works is not "necessarily unlawful." Now that the Supreme Court, in order to get at some "purposeful, culpable" practices of free file sharing services, has cut down the other legal protections that technologists thought they enjoyed, fair use is *all* that stands between inventors, investors, and consumers and a world in which all new products must be fully authorized, in advance, by any owner or distributor of any copyrighted material that a new device is able to store, reproduce, communicate or perform.

The Threat To Fair Use

Even before the *Grokster* case, some major motion picture studios were unwilling to accept the notion that the modern successors to the VCR could be marketed on an unauthorized basis. A competitor to TiVo was sued into bankruptcy in a case in which a complaint by three major studios attacked the basic recording, indexing, and playback features of a consumer home recorder. An entire chapter of the complaint brought by MGM, Orion Pictures, Fox Film Corporation, Universal City Studios Productions, and Fox Broadcasting specifically attacks standard features, found on any PVR product, as "inducements" to copyright violation:

> "Defendants cause, accomplish, facilitate and induce the unauthorized reproduction of Plaintiffs" copyrighted works in violation of law. *** The ReplayTV 4000 device provides expanded storage, up to (currently) a massive *320 hour* hard drive, which allows the unlawful copying and storage of a vast library of material. *** ReplayTV 4000's expanded storage and sorting features organize disparate recordings into coherent collections, and cause, facilitate, induce and encourage the storage or "librarying" of digital copies of the copyrighted material, which harms the sale of DVDs, videocassettes and other copies, usurps Plaintiffs' right to determine the degree of "air time" a particular program receives in various cycles of the program's distribution...."[4]

This year, elements of the recording industry have threatened suit against innovative new, portable products that have been announced for the Sirius and XM satellite radio services—*despite* the fact that these products fall squarely under the protection of the Audio Home Recording Act, under which royalties are paid to the music industry and there is an express immunity from copyright suit. The Recording Industry Association also is seeking legislation to empower the Federal Communications Commission to "lock down" the functions of consumer radio receivers for the new Digital Audio Broadcasting service. Forty-three years since the first audio cassette recorder came to the U.S. market, the recording industry still wants to deny consumers the ability to record radio programs in the privacy of their homes. In fact, just two weeks ago during an appearance down the hall from this hearing room, the head of the RIAA complained that "the one-way method of communication

[4] *Metro-Goldwyn-Mayer Studios, Inc. et al v. ReplayTV, Inc.,* U.S. District Court, Central District of California, Case No. 01-09801, Complaint of MGM, Orion Pictures, Twentieth Century Fox, Universal City Studios, and Fox Broadcasting, ¶¶ 24-25, November 14, 2001 (emphasis in original). Pleadings in this case can be found at http://www.eff.org/IP/Video/Paramount_v_ReplayTV/.

[enabled by HD radio] allows individuals to boldly engage in piracy with little fear of prosecution." In other words, the RIAA believes that when you, your staff, and your constituents tape a song off the radio, you have engaged in piracy and ought to be criminally prosecuted.

The campaign for copyright absolutism has not stopped with attacks on consumer devices and long-standing consumer practices. Just this year, major publishing groups filed suit against Google, which has been working with major university libraries, and others, to digitize libraries as a tool in aid of research and education. Google will not make entire works available without authorization, and will withdraw from the program any work as to which the copyright owner objects, these publishers, apparently, pursue this case only in the name of absolute control over use—a direct affront to the fair use doctrine.

The Encroachment Of Other Laws

In 1998 the Congress passed the Digital Millennium Copyright Act (the "DMCA"), which prohibits "circumvention" of technical measures used in aid of copyright protection. While this legislation made a bow toward the fair use doctrine, it did not clearly or explicitly provide that legality of the intended use under copyright law was a defense to violation of the DMCA.

So, for example, a use that courts and commentators universally agree is fair—such as time-shifting a TV program to watch later—can be effectively made illegal by adding a technical lock to prevent that use. Time-shifting is legal, but if a consumer would have to violate the DMCA in order to exercise his or her right to do it, then the right becomes meaningless. As presently written, the DMCA therefore allows a single company to violate the balance of fair and unfair uses that the courts have developed over the past century. This consequence, perhaps unintended, has caused concern and uncertainty among consumers, small businesses, educators, librarians, and others. As you know, Chairman Barton and Representatives—Boucher and Doolittle have introduced—H.R. 1201 to clarify the impact of the DMCA on the fair use doctrine, and to codify the elements of the *Betamax* case that were preserved by the Supreme Court in *Grokster* and—most presciently—to require that consumers be warned against Compact Discs to which copy protection technology has been applied. CEA and the HRRC have endorsed H.R. 1201 as a sensible way to preserve consumers' autonomy and protect innovators in the 21st century.

Fair Use and Personal Autonomy

Americans believe they should be able to use the things they buy in whatever way they choose, as long as their use doesn't injure others. We tinker with our cars. We put radios in the shower. We look for new ways to experience the content that we buy, the Internet that we use, and the new versions that we can create. The autonomy and the freedom to use what we buy is something we take for granted.

For digital products like music, movies, and software, fair use is what gives us that freedom and autonomy, because every use of a digital product creates an incidental copy. Limiting fair use opens the door to copyright owners to enter our sphere of personal autonomy, and dictate how we can use the products that we buy within our own homes and vehicles.

Americans who believe in speed limits still won't buy a car that's electronically blocked from going over 70 miles per hour. We trust people to use their cars responsibly; legal enforcement kicks in only when they don't. For music, movies, the Internet, and the digital products we use every day, fair use is what gives us that trust and autonomy, within our personal sphere, and saves legal enforcement for those who, as the Supreme Court said in *Grokster,* engage in clearly culpable conduct.

Fair Use And Creativity

The last few years have seen the rebirth of the feature-length documentary as a popular and socially valuable art form. Yet, denying that fair use applies, copyright owners have demanded stiff royalties from documentary producers for every billboard, every whistled tune, and every cellphone ring that appears in their portrayals of real everyday life. Jonathan Caouette's acclaimed documentary *Tarnation,* which showed at the Cannes and Sundance film festivals this year, cost $218 to produce but required tens of thousands in licensing fees for incidental appearances of copyrighted material. Fair use, as it exists today, can and should help filmmakers like Jonathan Caouette get a fair deal. All that's missing is that these filmmakers know their rights and are not bullied into giving them up.

Even if one will never become a film producer or a songwriter, the First Amendment protects our rights to *receive* expression, as well as to *send* it. A fully informed citizenry is at the core of our democracy. We cannot afford to have our information and, indeed, our own history, managed by corporations on a 100 percent authorized

basis any more than we can afford to have our technology and innovation managed that way.

Fair Use Is A Check On Monopoly Power

Given the relatively small number of mass media companies, and their size, it is daunting enough for a single corporation to control, in seeming perpetuity, a large portion of our cultural and historical heritage. It is even more daunting when these corporations band together as industry groups, and insist on the right to prescribe how their content will be enjoyed, *and* the technologies that can and cannot be used whenever any of their collective content is involved. We do not believe that either the Congress or the Supreme Court has envisioned them enjoying such power, but already they do.

Already, content providers and distributors have been moving to announce *in advance* that they will "license" only technologies and techniques that are satisfactory to them, and will not license, or will challenge, others. Already, the ability of competitive manufacturers to benefit from a 1996 Telecommunications Act provision that Rep. Markey and former Chairman Bliley introduced, to assure that competitive products can work directly on digital cable and satellite systems, has been slowed by the centralized control over product licensing by a technology consortium owned by the cable industry, "CableLabs."[5]

In September, the motion picture industry announced that is forming a similar central laboratory, reporting directly to the CEOs of the major motion picture companies: *"MovieLabs."* The purpose of MovieLabs, according to statements attributed to a senior studio executive, is to fill "gaps in research on content protection left by consumer electronics companies and Silicon Valley."[6] In reality, though, the market for such new "DRM" technologies has been highly competitive and more than robust. Something more seems to be going on.

Thus far, DRM technologies have been licensed by the technology companies that develop them. Often, these companies are *also* developers of consumer products, and are reluctant to impose limitations on the usefulness of these products to consumers. Therefore they have negotiated with content providers about the nature and level of "protections" to be applied. In resisting the power of movie and cable monopolists who have complete control over product distribution, their only argument has been based on *fair use*—not necessarily as a consumer right to engage in specific practices, but as a *public policy expectation,* deeply engrained in our law and jurisprudence, that consumers and technologists must be afforded space and freedom consonant with their roles in our society.

These negotiations have escalated to congressional and regulatory proceedings. The only technology mandate in the DMCA, Section 1201(k), requires that certain analog VCRs to respond to Macrovision copy protection technology. It is, however, limited by "encoding rules" that strictly govern when this technology can and cannot be triggered. Similarly, the FCC's "Plug & Play" regulations for "Digital Cable Ready" devices acknowledge that an industry-wide license for products to attach to digital cable systems requires the mandatory application of certain copy protection technologies, *but also* strictly limits the circumstances in which these technologies can be triggered.

These "encoding rules" do not state or approximate judicial outcomes; they are, rather, a set of expectations based on public policy. They are enormously difficult to negotiate and maintain in the face of the demands of copyright proprietors to control and specifically authorize every conceivable use of their products. In the case of the FCC regulations, the outcomes are open to review by the Commission whenever there is a new service, or a petition for a rule change. And the music industry—which negotiated the very first set of encoding rules with us and the Congress as part of the Audio Home Recording Act of 1992—is now trying to ignore the very AHRA rules it agreed to. It is asking the Congress for different and harsher impositions in new legislation, governing satellite and terrestrial broadcasts, that the industry has proposed to the House Judiciary Committee.

It is only through the vitality of the fair use doctrine as a *political* expression of public policy that the concerted might and licensing pressure of the industries that sell and distribute content can be brought into some balance. This involves, of course, maintaining the vitality of Section 107 in the courts. It also requires, however, that the Congress maintain a legislative and policy balance with fair use in mind—

---

[5] The legal rationale for such control is grounded in the copyright concerns of content providers.

[6] *See,* http://www.nytimes.com/2005/09/19/business/19film.html?ex=1127793600&en=fb357f94a7634723&ei=5070&emc=eta1

- That the Congress not conflate instances of mass, indiscriminate and anonymous redistribution of works over the Internet with the right of individuals and family groups to enjoy content in a modern and flexible home or family network that may embrace households in different regions.
- That the Congress should not allow the technical tools to create and maintain such home networks to fall under the exclusive control of those who sell or distribute content, solely by virtue of their effective or concerted *copyright* monopolies.

This Committee has played a key role in preventing or limiting such abuses. By holding today's hearing on the fair use doctrine, your Committee and this Subcommittee continue their leadership in protecting the American public, American innovation, and American culture. On behalf of CEA and the Home Recording Rights Coalition, I again thank you for holding this hearing, and pledge our continued cooperation with you and your staffs.

Mr. STEARNS. Ms. Adler?

STATEMENT OF PRUDENCE S. ADLER

Ms. ADLER. Mr. Chairman, Ranking Member Schakowsky, and members of the subcommittee, I am Prudence Adler and I am speaking today on behalf of the Library Copyright Alliance or LCA. The LCA consists of five major library associations that represent over 139,000 libraries employing 350,000 librarians and other personnel throughout the United States. Our Nation's libraries spend over $2 billion each year on all forms of information, thus we seek to ensure that our patrons have effective and long term access to these information resources.

Thank you for including libraries in this hearing today on fair use. Fair use is central to our ability to achieve many facets of our library missions. Each day teachers, students learn, researchers advance knowledge, and consumers access copyrighted information due to exceptions in the Copyright Act such as fair use. For libraries and for consumers the fair use doctrine is the most important limitation on the rights of the copyright owners. It is the safety valve if you will of the U.S. Copyright Law for consumers.

Fair use balances the rights of authors, publishers, and copyright owners with society's need for the free exchange of ideas. Fair use provides the basis for our most important day to day activities in scholarship and education and safeguards our collective interest in the flow of information. Fair use has served us well because there is no fair use checklist. Importantly there is no bright line for fair use. Fair use is accessible, fair use is dynamic, it is inherently ambiguous and not easily defined but critically important in ensuring legitimate access to copyrighted work.

In addition to fair use by library patrons on a daily basis, libraries also reply upon fair use to support a number of our activities such as print and electronic reserve and increasingly and more recently the digitization of copyrighted work.

Publishers more recently have relied upon the licensing of copyrighted work in lieu of the acquisition of those works. Licensing provides publishers with greater control in the use of their work. How they are used, by whom, and at what cost. Under license agreements, a library is bound by the terms of that agreement and these agreements do not always reflect the exception and privileges of the copyright act such as fair use.

As a result, we are witnessing an erosion of fair use and related library exceptions as licensing and technological controls built into

licensed data bases can restrict the fair use rights of library users and of libraries. For example, technological controls can limit the numbers of copies of an article or the amount of text reproduced. It is important to note that once technological controls are built into a data base with copyrighted materials, it is very difficult if not impossible for libraries to negotiate exceptions in our license agreement.

Moreover, if a license does not permit the preservation of copyrighted work and a library cannot exercise fair use through the license terms copyrighted works will be lost to future generations. Publishers had not undertaken preservation of copyrighted work. Instead it is libraries that preserve these works for future users. That is why the library community is a strong supporter of legislation to address these concerns, H.R. 1201.

In closing, fair use reflects copyrights laws first amendment based principles of free speech and provides the basis for our most important day-to-day activities. Fair use safeguards our collected interest, our Nation's interest in the flow of information which is in turn a source of cultural, historical, and economically valuable matters.

Thank you.

[The prepared statement of Prudence S. Adler follows:]

PREPARED STATEMENT OF PRUDENCE S. ADLER, ASSOCIATION OF RESEARCH LIBRARIES ON BEHALF OF THE LIBRARY COPYRIGHT ALLIANCE

My name is Prudence Adler and I am speaking today on behalf of the Library Copyright Alliance or LCA. The LCA consists of five major library associations—the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. These five associations collectively represent over 139,000 libraries employing over 350,000 librarians and other personnel throughout the United States. These five associations cooperate in the LCA to address copyright issues that affect libraries and their patrons. Our Nation's libraries spend over two billion dollars each year on all forms of information; thus we seek to ensure that our patrons have effective and long-term access to these information resources.

Thank you for including libraries in this hearing today on fair use. Fair use is central to our ability to achieve many facets of our missions. Libraries are essential to the communities that they serve and to our Nation. Libraries preserve and provide access to our cultural, historical and scientific heritage; support and encourage research, education and lifelong learning; and provide a venue for community engagement on a host of issues.

Libraries, like many other sectors, are undergoing significant transformation in this rapidly evolving digital environment. Today, researchers, students and members of the public can engage in sophisticated searching and manipulation of information including ready access to data, sound and image files, and more. Increasingly, the data and information available is both current and historical as many libraries, and others such as Google, Yahoo, Microsoft, and the Internet Archive, digitize special collections that richly reflect the cultural and political history of our Nation.

In this time of transformation, intellectual property policies have been and will continue to be central to the library community. Historically, the library community has relied on copyright law as the policy framework for balancing the competing interests of creators, publishers, and users of copyrighted works. Copyright law balances the rights of authors, publishers and copyright owners with society's need for the free exchange of ideas. Provisions in the Copyright Act including fair use and related exemptions for libraries and educational institutions allow libraries to achieve our mission of providing effective public access to and the preservation of information in all formats.

Each day teachers teach, students learn, researchers advance knowledge, and consumers access copyrighted information due to exemptions in the Copyright Act such as fair use. Fair use permits the use of copyrighted material without permission from the copyright holder under certain circumstances. For libraries and indeed for

consumers, the Fair Use Doctrine is the most important limitation on the rights of the copyright owner—the "safety valve" of U.S. copyright law for consumers.

Fair use or Section 107 of the Copyright Act allows reproduction and other uses of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship and research. The statute sets forth four factors to be considered in determining whether a use is fair; including the character of the use, the nature of the work, the amount used in proportion to the whole, and the impact on the market for the work. Fair use has served us well because there is no fair use checklist. The four factors provide libraries and users alike with needed flexibility. And there is no need to import from other sections of the law the detailed list of conditions, prohibitions, and exclusions such as those found in the TEACH Act concerning distance education. Importantly, there is no bright line for fair use. Thus, fair use is dynamic, inherently ambiguous and not easily defined but critically important in ensuring legitimate access to copyrighted works.

Library patrons routinely rely on fair use. A teacher, for example, might photocopy a few pages of a history text found in a library to hand out to her class. A student may include in a term paper a quotation from a novel checked out of a library while a researcher might give a copy of a journal article describing a laboratory technique to a technician who works for her. A small business owner may print out accounting tips from a website he accesses from a library computer. These are fair uses of copyrighted works.

In addition to fair uses by library patrons, libraries rely upon fair use in support of a number of library activities. While U.S. copyright law does contain explicit exceptions for libraries and archives in Section 108, these exceptions do not cover every circumstance under which a library might need to use a work. Section 108 specifically provides that "[n]othing in this section . . . in any way affects the right of fair use as provided by section 107 . . ." For example, library practices for both print and electronic reserves are based on fair use.

For decades, libraries have provided access to materials selected by faculty as required or recommended course readings in a designated area of the library, with materials available to students for a short loan period and perhaps with additional restrictions to ensure that all students have access to the material. These materials are important to the course but do not warrant the purchase of an entire text by the student. Libraries have based these reserve reading room operations on the fair use provisions of the Copyright Act.

More recently, as with other services, many libraries have introduced electronic reserves (e-reserves) systems that permit material to be stored in electronic form and accessed in the library or remotely by the student enrolled in the course. E-reserves systems are a more effective means to provide student access to needed copyrighted materials. E-reserves are an excellent example of the flexibility of fair use and demonstrate that it is technologically neutral in its application.

Within the past decade, there has been a notable shift by publishers to license their works to libraries in lieu of the purchase of these works by libraries. Licensing provides publishers with greater control in the use of their works—how they are used, by whom and at what cost. Licensing access to copyrighted works versus the acquisition of the copyrighted work by libraries presents new challenges to both libraries and their patrons. Under license agreements, a library is bound by the terms of the agreement. These agreements do not necessarily reflect the privileges and exceptions of the Copyright Act such as fair use, preservation and interlibrary loan. For example, if libraries are unable through negotiation to include in the license terms the ability to perform preservation on copyrighted works, libraries can no longer exercise the rights that are otherwise available through the Copyright Act.

Licensing and technological controls built into a licensed database can restrict the fair use rights of library users in a number of ways. Technological controls can limit the number of copies of an article copied or the amount of text reproduced. These amounts are controlled by the printing and downloading commands of the licensed database. Once technological controls are built into a database with copyrighted materials, it becomes difficult if not impossible for libraries to negotiate exceptions.

Although libraries may preserve copyrighted works under Section 108 of the Copyright Act, there may be times that libraries choose to preserve copyrighted works under Section 107, Fair Use. If a license does not permit the preservation of copyrighted works and a library cannot exercise fair use due to the license terms and/or technological controls, copyrighted works will be lost to future generations. Publishers have not undertaken preservation of copyrighted works. Instead, it is libraries that preserve these works for future users.

In closing, fair use serves a critically important role in the library and educational arena and in all sectors, both public and private. Fair use, in addition to reflecting in copyright law First Amendment-based principles of free speech, provides the

basis for our most important day-to-day activities in scholarship and education. Fair use safeguards our collective interest in the flow of information—which is, in turn, a source of culturally and economically valuable knowledge.

Mr. STEARNS. Mr. Band?

STATEMENT OF JONATHAN BAND

Mr. BAND. Chairman Stearns, Ranking Member Schakowsky, and members of the subcommittee, NetCoalition appreciates this opportunity to testify on the importance of fair use through the internet.

NetCoalition members believe in strong intellectual property protection. They own copyrights, patents, and trademarks and enforce them vigorously. Indeed, their most valuable assets are intellectual property. At the same time, NetCoalition members believe that overprotection of intellectual property is as harmful as under protection. Congress and the courts have carefully structured the copyright law to maintain the balance between the interest of authors and the control of their writings and supplied its competing interests in the free flow of ideas, information, and commerce.

Fair use is an important means by which the copyright law maintains this balance. Fair use is particularly important in the digital environment where even the most basic functions require computers to make copies. Almost every activity on the internet involves copying, viewing a website, printing out a new article, responding to an email including an image from a website in a book report. I will provide three instances where fair use plays a critical role for internet companies, search engines, software development, and on line creativity. I then will discuss on threat to fair use.

Search engines depend on fair use in their daily operations. A search engine firm sends out a software spider that crawls to websites and copies vast quantities of data into the search engine's data base. As a practical matter, each major search engine copies a large percentage of the entire worldwide web every few weeks to keep the data base current. Significantly, the search engines conduct all this copying without the permission of the website operators. The search engines believe that fair use permits this copying. In other words, the billions of dollars of market capital represented by the search engine companies are based primarily on fair use.

The fair use status of search engines has been considered in one case, Kelly v. Arriba Soft. There the Ninth Circuit concluded that fair use allowed the copying performed by a search engine. We will be hearing from the Authors Guild about the Google print library project. At this point, I would like to just say that Google will only be displaying short snippets of copyright books to users. Also any copyright owner can opt out of the project simply by asking Google not to scan his book into its data base. Because of the snippets and the opt out Google print will not harm any authors and should be considered a fair use by the court.

Fair use is also critical to the inner workings of the internet. The interoperability between the many components that make up the internet can often be achieved only if developers through reverse engine the different software components. Software reverse engineering typically requires the making of temporary copies. Several courts have found that fair use permits this copying. Fair use facili-

tates political and artistic discourse on the internet. Bloggers for example frequently quote from articles or other bloggers. The internet is also full of parody. NetCoalition members encourage and benefit from this robust creative activity.

Entertainment companies understandably seek to prevent infringement of their works through the use of Digital Right Management Systems. But such DRM's typically preclude both fair and unfair uses. As DRM's become more pervasive, Congress may need to consider mechanisms for preserving fair use. Additionally, Congress should exercise great care before mandating DRM's. Such technological mandates will not only limit fair use, they will also impede innovation.

In sum, as Congress fashions policies to protect the entertainment industry from large scale infringement over digital networks it must take care not to prevent lawful uses that enrich our lives.

Thank you for your attention.

[The prepared statement of Jonathan Band follows:]

PREPARED STATEMENT OF JONATHAN BAND ON BEHALF OF NETCOALITION

NetCoalition appreciates this opportunity to testify before the subcommittee on the importance of fair use to the Internet. NetCoalition represents some of the Internet's most innovative companies, including Bloomberg, CNET Networks, Google, Interactive Corp., and Yahoo!. NetCoalition members believe in strong intellectual property protection. They own copyrights, patents, and trademarks, and enforce them vigorously. Indeed, their most valuable assets are intellectual property.

At the same time, NetCoalition members agree with Judge Alex Kozinski that overprotection of intellectual property is as harmful as underprotection. *See White v. Samsung Electronics,* 989 F.2d 1512 (9th Cir.)(Kozinski, J., dissenting), *cert. denied,* 113 S.Ct. 2443 (1993). The Supreme Court explains that the intellectual property system requires a "balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other." *Sony Corp. v. Universal City Studio, Inc.,* 464 U.S. 417, 429 (1984).

Congress and the courts have carefully structured the copyright law to maintain this balance. Thus, while "copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression," copyright does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . ." 17 U.S.C. 102. Similarly, the Supreme Court in *Feist v. Rural Telephone,* 499 U.S. 340 (1991), stated that "the most fundamental axiom of copyright law" is "that no one may copyright facts . . ." *Id.* at 353. Accordingly, "raw facts may be copied at will." *Id.* at 349.

The fair use doctrine is another means by which the copyright law balances "the competing concerns of providing incentive to authors to create and of fostering competition in such creativity." *Kern River Gas Transmission Co. v. Coastal Corp.,* 899 F,2d 1458, 1463 (5th Cir.), *cert. denied,* 498 U.S. 952 (1990). The Supreme Court has described fair use as 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 that law is designed to foster." *Stewart v. Abend,* 495 U.S. 207, 237 (1990). Just two years ago, Justice Ginsburg termed fair use as one of copyright law's "built-in First Amendment accommodations . . ." *Eldred v. Ashcroft,* 123 S.Ct. 769, 788 (2003).

Fair use is particularly important in the digital environment, where even the most basic functions require computers to make copies. For example, for a user to view a website, the user's computer must make a temporary copy of the website in its random access memory. Almost every other activity on the Internet also involves the making of a copy: printing out an interesting article; responding to an email; including an image downloaded from a website in an elementary school book report.

The balance of my testimony will address three instances where fair use plays a critical role for Internet companies: search engines, software development, and online creativity. My testimony then will discuss some of the threats to fair use.

FAIR USE AND SEARCH ENGINES

Internet companies rely on fair use in their daily operations. This reliance is most apparent with search engines, the basic tool that allows users to find information on the Internet. A search engine firm sends out software "spiders" that crawl publicly accessible websites and copy vast quantities of data into the search engine's database. As a practical matter, each of the major search engine companies copies a large (and increasing) percentage of the entire World Wide Web every few weeks to keep the database current and comprehensive. When a user issues a query, the search engine searches the websites stored in its database for relevant information. The response provided to the user typically contains links both to the original site as well as to the "cache" copy of the website stored in the search engine's database.

Significantly, the search engines conduct this vast amount of copying without the authority of the website operators. Although the search engines will respect an exclusion header, a software "Do Not Enter Sign" posted by a website operator, the search engines does not ask for permission before they enter websites and copy their contents. Rather, the search engine firms believe that the fair use doctrine permits their activities. In other words, the billions of dollars of market capital represented by the search engine companies are based primarily on the fair use doctrine.

KELLY V. ARRIBA SOFT

The application of fair use to search engines has been considered in one case—*Kelly v. Arriba Soft,* 336 F.3d 811 (9th Cir. 2003). There, the Ninth Circuit concluded that the fair use doctrine permitted the copying performed by search engines.

Arriba Soft operated a search engine for Internet images. Arriba compiled a database of images by copying pictures from websites, without the express authorization of the website operators. Arriba reduced the full size images into thumbnails, which it stored in its database. In response to a user query, the Arriba search engine displayed responsive thumbnails. If a user clicked on one of the thumbnails, she was linked to the full size image on the original website from which the image had been copied. Kelly, a photographer, discovered that some of the photographs from his website were in the Arriba search database, and he sued for copyright infringement. The lower court found that Arriba's reproduction of the photographs was a fair use, and the Ninth Circuit affirmed.

With respect to the first of the four fair use factors, "the purpose and character of the use, including whether such use is of a commercial nature," 17 U.S.C. § 107(1), the Ninth Circuit acknowledged that Arriba operated its site for commercial purposes. However, Arriba's use of Kelly's images

> was more incidental and less exploitative in nature than more traditional types of commercial use. Arriba was neither using Kelly's images to directly promote its web site nor trying to profit by selling Kelly's images. Instead, Kelly's images were among thousands of images in Arriba's search engine database. Because the use of Kelly's images was not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use.

Kelly at 818.

The court then considered the transformative nature of the use—whether Arriba's use merely superseded the object of the originals or instead added a further purpose or different character. The court concluded that "the thumbnails were much smaller, lower resolution images that served an entirely different function than Kelly's original images." *Id.* While Kelly's "images are artistic works intended to inform and engage the viewer in an aesthetic experience," Arriba's search engine "functions as a tool to help index and improve access to images on the internet . . ." *Id.* Further, users were unlikely to enlarge the thumbnails to use them for aesthetic purposes because they were of lower resolution and thus could not be enlarged without significant loss of clarity. In distinguishing other judicial decisions, the Ninth Circuit stressed that "[t]his case involves more than merely a transmission of Kelly's images in a different medium. Arriba's use of the images serves a different function than Kelly's use—improving access to information on the internet versus artistic expression." *Id.* at 819. The court closed its discussion of the first fair use factor by concluding that Arriba's "use of Kelly's images promotes the goals of the Copyright Act and the fair use exception" because the thumbnails "do not supplant the need for the originals" and they "benefit the public by enhancing information gathering techniques on the internet." *Id.* at 820.

With respect to the second fair use factor, the nature of the copyrighted work, the Ninth Circuit observed that "[w]orks that are creative in nature are closer to the core of intended copyright protection than are more fact-based works." *Kelly* at 820. Moreover, "[p]ublished works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred." *Id.* Kelly's works were

creative, but published. Accordingly, the Ninth Circuit concluded that the second factor weighed only slightly in favor of Kelly.

The third fair use factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). The Ninth Circuit recognized that "copying an entire work militates against a finding of fair use." *K*elly at 820. Nonetheless, the court states that "the extent of permissible copying varies with the purpose and character of the use." *Id.* Thus, "if the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her." *Id.* at 820-21. In *Kelly,* this factor weighed in favor of neither party:

> although Arriba did copy each of Kelly's images as a whole, it was reasonable to do so in light of Arriba's use of the images. It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site. If Arriba copied only part of the image, it would be more difficult to identify it, thereby reducing the usefulness and effectiveness of the visual search engine.

Kelly at 821.

The Ninth Circuit decided that the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4), weighed in favor of Arriba. The court found that the Arriba "search engine would guide users to Kelly's web site rather than away from it." *Kelly* at 821. Additionally, the thumbnail images would not harm Kelly's ability to sell or license full size images because the low resolution of the thumbnails effectively prevented their enlargement.

Are other circuits likely to reach the same conclusion as the Ninth Circuit when reviewing the copying performed by search engines? They are, because the Ninth Circuit's fair use analysis relied heavily on the Supreme Court's most recent fair use decision, *Campbell v. Acuff-Rose, Music, Inc.,* 510 U.S. 569 (1994). Thus, *Kelly* correctly noted that *Campbell* held that "[t]he more transformative the new work, the less important the other factors, including commercialism, become." *Kelly* at 818, *citing Campbell* at 579. Likewise, *Kelly* cited *Campbell* for the proposition that "the extent of permissible copying varies with the purpose and character of the use." *Kelly* at 820, *citing Campbell* at 586-87. And *Kelly* followed *Campbell's* conclusion that "[a] transformative work is less likely to have an adverse impact on the market for the original than a work that merely supersedes the copyrighted work." *Kelly* at 821, *citing Campbell* at 591. Perhaps most importantly, *Kelly* repeated the Supreme Court's articulation in *Campbell* and *Stewart v. Abend,* 495 U.S. 207, 236 (1990), of the objective of the fair use doctrine: "This exception 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" *Kelly* at 817.

FAIR USE AND SOFTWARE DEVELOPMENT

Fair use is also critical to the inner workings of the Internet. A user's computer can access information stored on a distant server only because the software on the user's computer, on the server, and on all the computers in between, can communicate with one another. This interoperability often can be achieved only if the software developer can reverse engineer the products with which it seek to communicate. And because of the nature of software, this reverse engineering, this studying of the operation of an existing product, can require the making of temporary copies or translations of the existing program. Several courts have concluded that fair use permits the copying that occurs during the course of software reverse engineering. *See Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992); *Atari v. Nintendo,* 975 F.2d 832 (Fed. Cir. 1992); *Sony v. Connectix,* 203 F.3d 596 (9th Cir. 2000).

FAIR USE AND CREATIVITY ON THE INTERNET

The Supreme Court has observed that the Internet is "a unique and wholly new medium of worldwide communication." *Reno v. ACLU,* 521 U.S. 844 (1997). It "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers and buyers." *Id.* at 853. The Court marveled at the "vast democratic fora of the Internet," *id.* at 868, including thousands of newsgroups, "each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls." *Id.* at 851. Much of the commentary on newgroups and blogs involves quotations from articles or other commentators. Or it may consist of parodies of speeches or songs. Fair use makes this vital form of political and artistic speech lawful. And hyperlinking technology allows the commentator to link back to the original work. In this manner, the transformative fair

use provides wider distribution to the original work. NetCoalition members encourage—and benefit from—this robust creative activity.

THREATS TO FAIR USE

Entertainment companies understandably seek to prevent infringement of their works through the use of digital rights management systems. But such DRMs typically preclude fair uses as well as unlawful ones. As DRMs become more pervasive, Congress may need to consider mechanisms for preserving fair use. Additionally, Congress should exercise great care before mandating DRMs. Such technological mandates will not only limit fair use; they will also impede innovation. These activities permitted by the fair use doctrine must be distinguished from the unauthorized widespread distribution of entertainment content such as sound recordings and motion pictures.

In sum, as Congress fashions policies to protect the entertainment industry from large-scale infringement over digital networks, it must take care not to prevent lawful uses that enrich our lives. The Supreme Court in a related context cautioned that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." Id.

Mr. STEARNS. Ms. Sohn?

STATEMENT OF GIGI B. SOHN

Ms SOHN. Chairman Stearns, Ranking Member Schakowsky, and members of the subcommittee, thank you for inviting me to participate in this very important hearing.

For those of you who are unfamiliar with Public Knowledge, we are a non-profit organization that is dedicated among other things to ensuring that copyright laws are balanced. And balanced is the hallmark of our copyright system and fair use is a key component of that balance. The ability to access and use copyrighted works for certain limited uses has been a driver of creativity, technological innovation, and the broad dissemination of knowledge. For consumers, fair use has resulted in a greater choice of movies, music, videogames, and computer software, a wider variety of useful and inexpensive gadgets on which to play that content, and the ability to quickly and cheaply create their own contents which is happening more and more these days.

But fair use is in great peril. For the past decade, the fair use rights of consumers, your constituents have been chipped away little by little. While technology has advanced and consumers have come to expect that they can enjoy the content they buy when and where they want where at the same time seeing a dedicated and forceful campaign to restrict what consumers can lawfully do with that content.

The content industries have employed a variety of strategies in the campaign against fair use. First, their successfully championed Digital Millennium Copyright Act which prohibits the circumvention of technological protection measures even for lawful uses. Second, many content owners employ restrictive and user license agreements which limit fair use. Third, the industries are seeking Government mandated technological protection measures like the broadcast flag and digital radio content protection which would restrict a variety of fair uses of digital, TV, and radio and would make once interoperable devices incompatible. Finally the content industries have promoted permissions culture in which even the most incidental use of a copyrighted work requires a high licensing fee or leads to a lawsuit.

What has the shrinking of fair use meant for consumers? Here are just some of the lawful personal uses that prohibited under the current regime, ripping songs from a copy protected CD, their personal computers, or an mp3 player; making a digital copy of a DVD for playback on a video iPod, cell phone, or other portable device; making a backup copy of a copy protected CD or DVD; playing legally download music on a competing mp3 player or computer; and removing from a computer malicious digital rights management tools like the now infamous Sony-BMG rootkit DRM. And let me just say a word about the DRM because I think there is a lesson here. My organization does not oppose digital rights management as long as it is marketplace driven as opposed to Government driven.

The lesson to be learned there is that consumers did not like the restrictions and the spyware in that DRM and they were outraged and it caused Sony to pull that DRM from the shelf. This is in contrast to the iTunes fair play DRM which people have accepted for limits in that DRM. If you have a Government mandated digital rights management scheme like the broadcast flag for radio content protection, consumers cannot protect themselves in the marketplace or express themselves in the marketplace.

So I urge you to reject all efforts in Government mandated technological protection measures. This committee has a great responsibility to make sure that innovation will not be stifled and that consumers will have the broadest legal use of their digital media and technology as is possible. I urge you to reject the premise that your constituents are pirates and thieves and that they will not buy digital content if it were provided to them at a reasonable price and with the flexibility they have come to expect. Indeed, they already do purchase such content. For example, DVD sales and rentals last year totaled $25 billion and in just a matter of weeks of its launch, iTunes sold $1 million TV programs for use on the video iPod. An RIA chief, Mitch Bainwol recently predicted that legitimate online song purchases could surpass CD retail markets by 2007.

In my written testimony, I have supplied four suggestions for actions you can take to reinvigorate fair use in the digital age. The most important of these is to reform the DMCA so that it permits circumvention solely for lawful purposes. Congress can address this in two ways. It can pass legislation like H.R. 1201 which specifically permits such legal activity and it can clarify and strengthen the DMCA's triennial review process. Congress intended, expressly intended that this process be the fail safe mechanism that protected lawful uses from the unintended consequences of the DMCA, some of which we have heard about today. Instead, it has become a futile exercise for merely everyone seeking an exemption no matter how worthy.

I urge the subcommittee to hold hearings on the triennial review process and a copyright office's standard for granting exemption.

Thank you again for the opportunity to testify today. I look forward to your questions.

[The prepared statement of Gigi B. Sohn follows:]

PREPARED STATEMENT OF GIGI B. SOHN, PRESIDENT, PUBLIC KNOWLEDGE

Chairman Stearns, Ranking Member Schakowsky and other members of the Subcommittee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a nonprofit public interest organization that addresses the public's stake in the convergence of communications policy and intellectual property law. I want to thank the Subcommittee for inviting me to testify on the vitally important issue of fair use and its impact on consumers and industry.

SUMMARY

The hallmark of our copyright system is balance—creators and publishers receive a limited monopoly in their works in exchange for providing the public rights of access to those works. Fair use is a key component of that balance—permitting individuals to make limited, but important uses of copyrighted works without having to ask permission of the copyright holder.

For over two hundred years, this balance, aided by fair use, has served creators, educators, libraries, consumers and the content and technology industries very well. It has resulted in greater creativity, greater innovation and greater consumer choice, and has invigorated the U.S. economy both for creative goods and technology.

Over the past decade, however, a number of legal, technological and marketplace efforts by the content industry have put fair use in great peril. These efforts include laws like the Digital Millennium Copyright Act, which prohibits circumvention of technological protection measures even for lawful uses; end user license agreements (EULAs), that restrict fair use; government-imposed technology mandates like the broadcast flag, which put agencies like the Federal Communications Commission in charge of determining what technologies consumers can use to receive digital television and which also restrict fair uses of digital TV; and the rise of business practices that shrink fair use by requiring expensive licensing fees or denying permission for even the most incidental uses of copyrighted works.

Congress can, and must, revitalize fair use for the digital age. While my list is not comprehensive, I suggest four places where Congress can start: 1) ensure that the DMCA protects fair use, whether it be through legislation such as H.R. 1201 or by instructing the Copyright Office to follow the express intent of Congress that the triennial review be a "fail-safe" mechanism the purpose of which is to protect non-infringing uses; 2) reject any and all efforts to impose government-mandated copy protection; 3) pass legislation that protects individuals who make a good faith effort to locate copyright holders who cannot be found and 4) monitor the Google Print litigation and other related matters to ensure that search engines can continue to do what they do best—provide consumers with a comprehensive "card catalogue" of all the world's information—whether the information is online or offline.

CONSUMERS, CREATORS AND INDUSTRY ALL BENEFIT FROM A STRONG AND VITAL FAIR USE DOCTRINE.

Ever since the framers of the Constitution gave Congress the ability "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . ." the hallmark of our copyright system has been balance. That balance ensures both strong protection for copyrighted works and unauthorized access to those works for certain limited uses. As the Supreme Court has stated "[t]his protection has never accorded the copyright owner complete control over all possible uses of his work." [1] The idea behind this balance was simple—the framers understood that giving individuals the ability to access protected works would lead to even greater creativity and innovation.

One of the key guardians of this balance is fair use. Fair use is a doctrine developed in common law and codified at 17 USC § 107 that permits individuals to make certain limited uses of copyrighted works without seeking permission from the copyright holder. The idea behind fair use is that creativity, knowledge-building, public criticism and innovation would be severely hampered, if not completely stifled, if artists, librarians, scholars, inventors and consumers had to seek permission from rights holders even for the most mundane use of a work.

For most of the last two hundred years, this balance worked well for consumers, creators and both the content and technology industries. Because of fair use and the other limitations on copyright, the United States has been the unquestioned leader in the creation of artistic works from artists big and small, and our educational and research institutions are the envy of the world. Moreover, and particularly since the

[1] *Sony v. Universal City Studios,* 464 US 417, 463 (1984).

Supreme Court's ruling in *Sony v. Universal City Studios,* which ensured the growth of legal technologies, the U.S. has been the world leader in technological innovation, particularly as new digital technologies have taken the world by storm.

The benefit of this balance to consumers has also been enormous. Consumers have greater choice of movies to watch, music to listen to, video games to play and computer software to use. They have a wide variety of useful and inexpensive gadgets on which to play those movies, music, games and software where and when they want. Importantly, those gadgets permit consumers to create their own movies, music and games. Who could imagine, even three years ago, that people would be viewing movies and television programs on their cell phones? Or that AOL would be selling old sitcoms online? Or, that as a recent Pew Internet and American Life poll showed, 57 percent of online teens would create their own content for the Internet? [2]

Fair use has benefited everyone largely because of its flexible nature. Whereas 21 years ago the Sony Court talked about "time shifting" as a fair use, it is now commonly understood that the ability to play media on different machines in different places (space shifting) is a fair use as well. We must ensure that fair use remains flexible and vibrant in the digital age, so that new innovations will develop that enable new fair uses that we cannot foresee.

Unfortunately, as I will discuss in the next section, the past decade has seen a shrinking of fair use in a way that has tipped the copyright balance not in favor of creators or consumers, but in favor of large content companies. New laws, technological tools and marketplace mechanisms are being used to limit legal uses of content beyond what the copyright law traditionally allows and beyond what the framers of the Constitution intended. If course corrections are not made soon, we will reverse the vibrant market for content and technology that has grown out of the traditional balance between control and access.

FAIR USE IN THE DIGITAL AGE IS IN PERIL

The Supreme Court's decision in *Sony* confirmed what had been a common consumer expectation since the invention of audiotape—that it is fair use for consumers to use the content and technology they buy for personal uses. Despite the content industry's efforts to paint consumers as copyright thieves, enormous DVD sales and the growth of online music indicate that when good content is made available both offline and online at a reasonable price and with flexibility of use, consumers will buy it. Moreover, sales of personal video recorders (PVR) (like TiVo), MP3 players (like the iPod), wireless routers, portable DVD and video game players, and digital radios with playback (like XM to-go) indicate that what consumers expect and want to do with the content they buy is the ability to play it wherever and whenever they want. They also expect that the devices they own will work with one another—that a simple cable or port can, for example, connect a television set to a VCR or PVR or a computer to an MP3 player.

Unfortunately, this expectation of flexibility, portability and interoperability for personal use is increasingly at risk. Even though our copyright law does not give copyright holders control over when, where and how a consumer uses the content she lawfully purchases, the content industry, in its zeal to control every use of its content, has employed a variety of legal, technological and marketplace mechanisms that limit consumers fair use of technology and content. They include:

Paracopyright: Laws that Enforce Technological Protection Measures

The speed, ubiquity and relatively low cost of digital networks present greater opportunities for copyright holders to make their works available to a wider audience. However, they also present copyright holders with a tremendous challenge—how to protect those works from massive indiscriminate redistribution over those digital networks while at the same time giving the consumer flexibility to make lawful uses of the technology and content they purchase.

The content industry has attempted to meet this challenge through use of technological protection measures, otherwise referred to as Digital Rights Management (DRM) tools. While Public Knowledge does not necessarily oppose these efforts, so long as they are not government mandated, to the extent that these tools eliminate certain fair uses, the law should not prohibit their circumvention for that purpose. For example, certain DRM-protected CDs prevent the ripping or copying function of personal computer in the hopes of preventing unauthorized file trading. In some instances, those CDs will fail to play entirely. Similarly, many DVDs will not play on Linux-operated computers. The DMCA prohibits a consumer from circumventing

[2] http://www.pewinternet.org/pdfs/PIP__Teens__Content__Creation.pdf

that DRM even to make an otherwise lawful personal use of the content they purchased. The DMCA's chilling effect on fair use and on free speech have been well documented.[3]

Thus, as digital technologies and accompanying protection measures become more pervasive, laws like the DMCA virtually eliminate consumer fair use for certain content. The existence of the so-called "analog hole," which permits redigitizing of captured analog content, is cold comfort to the ordinary consumer, who doesn't know the analog hole from a hole in the wall. Although the content industry likes to tout the analog hole as the solution for limits on fair use imposed by the DMCA, it is now seeking a legislative vehicle to close the analog hole. Moreover, traditional copyright law does not judge fair use based on the technical methods by which it was made (using digital software or analog outputs); rather it looks to whether the use was otherwise lawful.

Licenses that seek to replace copyright law with contract law

Another way that large corporate copyright holders seek to protect their works is through the use of so-called "end user license agreements" or EULAs. These are the windows of legal jargon that you see when trying to install or download software or other digital content (click-through licenses), or the terms you agree to when breaking the shrink-wrap on your newest piece of software (shrink-wrap licenses). Without any negotiation, you are asked to waive fair use and other rights reserved to you under the Copyright Act and agree to a list of restrictions, some of which can include a limitation on criticizing the work without the licensee's permission.

The EULA that accompanied the Sony-BMG CDs with the now-infamous rootkit DRM (which left consumers vulnerable to viruses) provides a chilling example of the kind of restrictions consumers are subject to after, and without disclosure before, purchasing digital media. Some of the restrictions include:

- all rights terminate if a consumer fails to accept any update of the protection software;
- all rights terminate as soon as a consumer files for bankruptcy;
- Sony-BMG reserves the right to exercise technological self-help mechanisms against consumers, at any time, without notice;
- consumers have no right to transfer any digital copies or software;
- consumers are prohibited from reverse engineering, and changing, altering, or creating derivative works; and
- consumers are prohibited from circumventing any restrictions that may be imposed by the software, regardless of whether or not they are "access" controls under the DMCA.

Government Mandates Limiting Access to Content via "Authorized Devices"

A recent strategy of the copyright industries is attempting to ensure that every technology that can receive and retransmit its content is "authorized" to do so by the government. The idea works like this: if a television, radio, computer, or other digital device is not pre-approved to receive or record content, then the technology is either illegal or will be otherwise rendered incapable of doing so. These types of technological mandates impose serious limitations on the ability of consumers to make fair uses of content.

The so-called digital television broadcast flag scheme, adopted in November 2003 by the FCC and vacated by the United States Court of Appeals for the District of Columbia last May, is a manifestation of this strategy. The flag scheme requires every device that can receive a digital television signal to read and obey a series of bits embedded in the signal that tell the device whether the content can be transmitted over the Internet. These devices, which include computers, cell phones and personal video recorders, in addition to TV sets, must be pre-approved by the FCC.

The broadcast flag scheme limits fair use in several important ways. For example, if I have a non-flag compliant (and therefore unauthorized) Personal Video Recorder (PVR) hooked up to my flag-compliant (and authorized) digital television set, my PVR will not be able to make a perfectly legal personal copy of a "flagged" digital television program. The flag also prohibits excerpting of digital television programming and redistribution of some or all such programming over the Internet. Thus, if a congresswoman wants to send a digital clip of her performance on *Meet the Press* to staff in her district office, she cannot do so if the show's creator embeds a flag in the signal. Or, if a media watchdog group like the Parents' Television Council wants to post digital TV clips of its favorite and least favorite programs to its website, the broadcast flag would prohibit such activity.

---

[3] *See* http://www.chillingeffects.org/anticircumvention/

Not surprisingly, the motion picture studios are seeking to have the broadcast flag reinstated, and are also asking Congress to consider a technology mandate to close the so-called analog hole. This latter proposal would require every analog device to read and obey two copy protection technologies, and would impose a series of encoding rules that would prohibit certain fair uses of content.[4] Moreover, closing the analog hole would eliminate the one safety valve for making fair use of digital content under the DMCA.

Not to be outdone, the recording industry is seeking its own government-imposed technological mandate for new digital broadcast and digital satellite radio. Like Hollywood, they are seeking to place the FCC in charge of setting a standard for digital radio receivers that would prevent consumers from making recordings of digital radio for personal use.[5] This would not only violate the Audio Home Recording Act, which specifically allows for recording of radio transmissions for personal use, but it would eliminate the decades-old practice of recording songs off the radio.

D. Rise of the Permissions Culture

Perhaps the most radical change with respect to how fair use is viewed and enforced involves neither law nor technology. Instead, it involves the increasingly common business practice of requiring permission for even the most incidental uses of copyrighted works. Sometimes obtaining that permission will require an obscenely high licensing fee. Other times, and particularly where the copyrighted work is to be criticized, a copyright holder will simply deny permission to use it. Often, and particularly if the subsequent work has a measure of success, those who rely on fair use can expect a lawsuit. In this "permissions culture" the copyright balance is turned into one where the copyright holder has complete control and fair use becomes, as some have said, "the right to hire a lawyer." As a result, creators are often forced to change or stop their work.

A good example of the shrinking scope of fair use can be found in Professor Lawrence Lessig's book *Free Culture.* The example involves Jon Else, a documentary filmmaker who made a documentary about Wagner's Ring Cycle. The scene at issue involved stagehands at the San Francisco Opera who are playing checkers. In a corner of the room, the television program *The Simpsons* is playing. When the film was completed, Else sought to "clear the rights" to use the few seconds of *The Simpsons.* It not only took a good deal of effort to find the copyright holder, but when he did, Else was told that it would cost him $10,000 to include the clip. Rather than risk a lawsuit, Else edited *The Simpsons* out of that segment of the documentary, even though it set a particular mood for that scene.

Many more examples of the chilling effect of the permissions culture can be found in an excellent report from the American University Center for Social Media and the Washington College of Law entitled *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers,*[6] and in the book *Brand Name Bullies: The Quest to Own and Control Culture,* written by Public Knowledge Board member and co-founder David Bollier.[7]

FOUR WAYS TO STRENGTHEN FAIR USE IN THE DIGITAL AGE

I agree with those who argue that our copyright law, which was last completely revised nearly 30 years old, is inadequate to address creativity in a world of ubiquitous digital networks. Thus, I would urge this subcommittee to adopt Professor Lessig's recommendation to this subcommittee in May 2004 that it "recommend the establishment of a serious and balanced study, . . . to consider fully how best to adjust the protections of copyright to the digital age."[8]

Regardless of the need to look at our copyright laws more comprehensively, I would like to suggest a number of ways Congress can help to revive fair use and bring back the balance to copyright the founders of our country intended.

---

[4] Draft legislation, entitled the "Analog Content Protection Act of 2005," was discussed at a November 3, 2005 oversight hearing entitled "Content Protection in the Digital Age: The Broadcast Flag, High Definition Radio and the Analog Hole," before the House Judiciary Committee, Subcommittee on Courts, the Internet and Intellectual Property.

[5] Draft legislation, entitled the "HD Radio Content Protection Act of 2005," was discussed at a November 3, 2005 oversight hearing entitled "Content Protection in the Digital Age: The Broadcast Flag, High Definition Radio and the Analog Hole," before the House Judiciary Committee, Subcommittee on Courts, the Internet and Intellectual Property.

[6] available at http://www.centerforsocialmedia.org/roc/index.htm

[7] available at http://www.brandnamebullies.com.

[8] http://energycommerce.house.gov/108/Hearings/05122004hearing1265/Lessig1985.htm

1. Ensure the DMCA permits lawful uses

As DRM tools become more pervasive and government imposed copy protection mandates become a possibility, it becomes increasingly important that those technological protection measures can be circumvented for lawful uses.

This goal can be accomplished in two ways, neither of which is mutually exclusive. One way is for Congress to pass legislation like H.R. 1201, the Digital Media Consumers Right Act, which would permit circumvention of technological protection measures for lawful uses.

A second way to accomplish this goal is for Congress to clarify and strengthen the DMCA's triennial review process. As I explained in great detail when I testified before this Subcommittee in May 2004, when Congress passed the DMCA, it made clear both through the plain language of the Act and the legislative history that it intended to preserve fair use through the "fail safe" mechanism of the triennial review.[9] For the most part, however the Copyright Office, which is tasked with conducting that review, has ignored the express intent of Congress and has placed a higher burden on those seeking exemptions. The Copyright has also construed the term "class of works" too narrowly and favored particular business models over fair use in denying exemption requests.

This crimped interpretation of the plain language of the DMCA has twice caused the Assistant Secretary of Commerce, who is tasked with consulting with the Register on the review, to send a letter of protest to the Register. In 2003, the Assistant Secretary wrote:

> the standard set forth in the Notice of Inquiry (the "NOI") imposes a significantly heightened burden on proponents of an exemption, and is therefore inconsistent with the opportunity that Congress intended to afford the user community.[10]

The result has been that after two triennial reviews, the Copyright Office has granted four extremely narrow exemptions. The Copyright Office has just commenced its third triennial review, and there every reason to expect that they will maintain their crimped view of the exemptions process without Congressional action. Therefore, this Subcommittee should take the opportunity to hold hearings on the triennial review process and to clarify that the burden of proof that should govern the process should be that embodied in the plain language of the DMCA.

2. Reject Government-Mandated Technological Protection Measures

This Subcommittee should reject any and all efforts by the copyright industries to have the government mandate copy protection technologies and/or serve in the role of determining what technologies will succeed and which will fail. Such one size fits all technology mandates limit competition, consumer choice and consumers' fair use rights.

First, I must distinguish government-imposed copy protection mandates like the broadcast flag from marketplace copy protection initiatives. The latter allows consumers to express themselves in the marketplace with regard to the level of copy protection that they find acceptable. This is what happened with computer software in the early 1980's. Consumers rejected software with very restrictive copy protection, and the market adjusted.

Comparing iTunes Fairplay DRM with the Sony-BMG CD rootkit DRM demonstrates why the market is the better determinant of the proper level of copy protection. While like any DRM, Fairplay can be circumvented by the most determined pirates, it provides a speed bump that allows for legal uses while keeping honest people honest. As a result, iTunes has been wildly popular with consumers. In contrast, consumers nearly revolted over the Sony rootkit DRM, which left their computers vulnerable to viruses. In a matter of days, Sony-BMG responded by first attempting to provide a security patch, and have now temporarily halted production of those affected CDs.

3. Fix the "Orphan Works" Problem

Changing the permissions culture will be a long process, necessitating changes in business practice more than in the law. Strengthening fair use will certainly help—the more creators, educators and consumers feel comfortable relying upon fair use, the more they will be willing to do so, and so far, at least, the courts have largely ruled in favor of the user.

---

[9] http://energycommerce.house.gov/108/Hearings/05122004hearing1265/Sohn1995.htm

[10] Letter from Nancy J. Victory, Assistant Secretary of Commerce to Ms. Marybeth Peters Register of Copyrights, (Aug. 11, 2003), *available at* www.ntia.doc.gov/ntiahome/occ/dmca/dmca2003/dmcaletter_08112003.html (footnotes omitted).

One way that Congress can limit the negative effects of the permissions culture is to ensure that creators have access to so-called Orphan Works—works under copyright for which the rights holder cannot be found. Currently, the law does not protect an individual who conducts a good faith search for a copyright holder, but cannot find him. If the individual uses the work, and the copyright holder resurfaces, the user is subject to the full panoply of penalties the copyright law provides.

Earlier this year, the Copyright Office undertook a procedure for collecting public comments on how to fix the orphan works problem, and their recommendations are due at the end of the year. Remarkably, the vast majority of commenters, representing large content companies, college artists and public interest groups like Public Knowledge, largely agreed that the copyright law should provide a defense for those who engage in a "reasonable effort" or "good faith" search for the owners of orphan works. While there was some disagreement around the edges, for the most part, the participants agreed that Congress should ensure that the inability to find a copyright holder should not be a deterrent to creators seeking to use those works.

4. Clarify Fair Use with Respect to Search Engines

I trust that the members of the subcommittee are well aware of the debate and lawsuits surrounding the Google Print program. To review: Google is making digital copies of copyrighted and public domain works housed in five major libraries so that those copies can be searched using words and phrases from the books. When a search is requested for a work under copyright, a brief excerpt from the book appears, which includes the requested phrase surrounded by several lines of text. If Google were to digitize anything less than the entire book, the program would become useless —if you were the unlucky searcher who used a phrase that was not in the included text, you would not get the result you sought. The searcher is entitled only to a limited number of searches in the same document, and links to purchase the book are on each page of text.

In Public Knowledge's opinion, the prospect that millions of books may soon be available to be indexed and searched is incredibly exciting. It not only promotes the founders' intent by increasing access to knowledge, but it also helps authors and publishers to promote their works by exposing them to anyone with an Internet connection. The Authors Guild and the American Association of Publishers disagree, and have sued Google alleging copyright infringement.

This is not an open and shut legal case for either side. While it is generally understood and the courts have ruled that if a search engine gathers and indexes information already on the World Wide Web, that use is not infringing, the law is less clear with respect to information that is not already online. But the consequences of a court decision against Google could be staggering not only for that company and other search engines, but also for the future of the Internet itself. The Internet has become our virtual library—it is where we come to expect to find information about anything and everything. It has also become the great equalizer—bringing knowledge to rural and urban, rich and poor areas alike. If we limited access over the Internet only to that information that is only already available online, it would be like going to the Library of Congress and only being able access half of the books.

Thus, I would urge this subcommittee to keep a close eye on the Google litigation to see if adjustments may need to be made in the future to protect the future of Internet searching and indexing and as a result, consumers ability to use the Internet to obtain the information they need and desire.

CONCLUSION

Fair use remains vital to maintaining the balance in copyright law that has long benefited consumers, creators, innovators and the content and technology industries. But fair use threatened with extinction unless Congress acts to revive and strengthen it for a world of digital technology and digital networks. I thank the Subcommittee for the opportunity to testify, and I look forward to your questions.

Mr. STEARNS. Thank you.

Mr. DeLong?

STATEMENT OF JAMES V. DELONG

Mr. DELONG. Thank you, Mr. Chairman, and members of the—is that on now?

Mr. STEARNS. Yes.

Mr. DELONG. It is an honor to be here today. My name is James DeLong. I am a senior fellow with the Progress and Freedom Foun-

dation which is a free market oriented think tank that studies the digital revolution and its implications for public policy. Within that context, I am the director of a project called the Center For the Study of Digital Property which is devoted to analyzing policies devoted or concerning intellectual property and we also go under the name IPCentral.Info and as a commercial, I urge you all to visit our website where we are engaged in spirited debates on many of these issues.

My message here today is fairly simple and that is over the past 200 years, the U.S. has developed a system for producing creative works of all kinds that depends on institutions and property rights and markets. And you may recall I was here about 3 weeks ago discussing Kelo and in my mind, these are all one big happy sort of continuum there.

In the legal literature, you have certainly heard it from some of my legally oriented colleagues here today. There is a lot of obsession about the need for balance between creators and consumers of intellectual property. It is sort of as if the two groups were engaged in a zero sum game and what one gained the other must lose. I regard this focus is misleading and we do not talk about the need for balance in most areas of national or economic life. We do not talk about the need to balance the interests of automobile manufacturers and drivers or farmers and food consumers and such. We assume that we can establish rules governing markets and promoting markets and that within this structure producers and consumers can find their own balance. And you know the balances differ from individuals. You know, that is the great thing about a market. The idea that you find very much in the academic literature that a court is supposed to sit there sort of a super weigher of costs and benefits and then allocate things according to the social good is a nightmare.

Now this system has served us very well not just in producing automobiles and food but in producing creative works, an explosion of creativity in this country. And I might add that in those areas in which we have departed from the market system are those areas where we seem to be getting in the biggest trouble. You know areas like healthcare and like education and where you gentlemen and ladies are being held most responsible by the public for the failures in. Now obviously in the area of creative works technology is presenting us with new challenges.

And creativity used to be protected by a combination of technological impossibility and law. You know it was not possible really to steal a book because it cost you more to copy it on the copying machine than to get it via printout. You know you could not copy music. Movies on film might as well have been locked in a vault.

Technology has made perfect replication possible and very cheap and a very important block of our protective system is eroding. You know, it is simply an impossibility and we are struggling to develop new forms of protection both technological and legal.

Now in my view, fair use is best viewed within this context of the market system in creative works. It is a doctrine designed primarily to smooth out the workings in the market where it really might now work. And this isn't a novel idea. I have an article in my files by Wendy Gordon going back to 1982 suggesting market

failure is an organizing principle here. So it has some political content, you know, keeping authors from suppressing bad reviews is an important component, encouraging dissemination of news, encouraging political discussions. But I think for the most part when you look back a the cases, you find that fair uses usually exist when the transaction costs of getting permission to use something are out of all proportion to the economic value to the user or out of all proportion to the harm of the producer. You know, occasionally you hear sometimes uses where somebody doing a TV show accidentally showed a snippet of a television program playing in the background and then had to cut it out because they could not get the licensing. Well that should be fair use. There is no harm to the producer in all and the costs are just inordinate.

Now one of the main things going on in technology, the internet is ringing transaction costs out of the system and so to a great extent this leaves much of fair use of the doctrine sort of in search of a rational. I mean the combination of digital rights management and consumer pressure is providing marketplace solutions to the problems that used to have to be resolved by the courts. And, you know, as Gigi was mentioning, one of things quite extraordinary is the speed of reaction on this whole Sony business. You know a couple weeks and problem seems to be—I only know what I read in the news but the problem seems to be pretty well on the way to solution. You know, that is good. It is called the market working.

But in this context, I think it is very important to emphasize two points, one, free use is or fair use is not necessarily free use. I was looking for the quote this morning, I could not find it from a guy who is the Director of University Press and thus is on the pro-author's side who was saying all active colleagues seem to think we get everything for free, that is called fair use. We you know that is not the way it is supposed to work.

But it seems to me the most important thing in this is to urge the committee not to try to freeze rules based on the old technologies and the old ways of doing things. This will really only cripple things. And now for several years we hear comments about the content companies and their obsolete business models and all that sort of thing but in the real world as opposed to the world of academic extractions it seems to be the reverse of the truth, you know. As Ms. Blackburn and Ms. Bono pointed out the content field is electric with excitement and innovation and people pulling out all sorts of new things and figuring new things to sell you and all that. And, you know, people talk about the need for snippets of film and all that sort of thing. We are in a world where ring tones have suddenly become a multi-billion dollar industry.

And believe me, you know, the happy thing about this is producers want to sell just as much as consumers want to consume and they will find a way. So in my mind, the people defending the old doctrines are actually the ones mirrored in old models and fearful of change. I think you should be very careful about imposing any rules on this. You should let the market work it out. And I think there need to be some rules on letting it work it out better but I think we will succeed and obviously I do not think you should codify existing doctrines of fair use.

Thank you.

[The prepared statement of James V. DeLong follows:]

STATEMENT OF

JAMES V. DeLONG

SENIOR FELLOW & DIRECTOR
CENTER FOR THE STUDY OF DIGITAL PROPERTY
THE PROGRESS & FREEDOM FOUNDATION
WASHINGTON, DC

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

ON

FAIR USE: ITS EFFECTS ON CONSUMERS AND INDUSTRY

NOVEMBER 16, 2005

James V. DeLong
The Progress & Freedom Foundation
1444 Eye St., NW -- Suite 500
Washington, DC 20005
202-969-2944 Direct
202-289-8928 Main
jdelong@pff.org
www.IPcentral.Info
www.pff.org

It is a pleasure to be here today to discuss fair use, a concept that is, by consensus, one of the most perplexing in the galaxy of intellectual property issues.

My starting point is the fundamental nature of national policy and law on intellectual property.

Much of the legal literature starts from the premise that the purpose of the Copyright Clause is to promote the interests of consumers, not creators, and that the needs of the latter are to be taken into account only to the degree necessary to keep them working. In this orientation, most obvious in law reviews and legal briefs but spilling over into the general press, the purpose of copyright law is to dribble out as little as possible to creators. There is also great emphasis on a "balance" between consumers and creators, as if we were in some zero-sum game in which the two quarrel over a limited pie.

This framework is bad history, bad economics, bad law, bad morality, and bad policy.

At root, creative products are like any other goods and services. Producers want to produce them; consumers want to consume them. The link between these complementary desires is property rights and the market system. We do not speak of the need for legal doctrines that fine tune the "balance" between automobile manufacturers and drivers. We rely on the interests of all parties in interacting. We have some general rules to protect against fraud, some special rules to protect against problems of monopoly, and other than that we rely on the market to enable consumers and producers to fine tune that balance for themselves.

This is, and should be, our model for intellectual property as well. Creators want to create, and they are desperately anxious to find markets for their works. Consumers want access to the works. The fundamental need is not for a "balance," whatever that might be, but for a working market system.

Indeed, one of the best things about the Supreme Court's recent opinion in *Eldred* was its forceful rejection of this pernicious idea that the rights of consumers and creators are in conflict:[1]

> As we have explained, "[t]he economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954). Accordingly, "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge... . The profit motive is the engine that ensures the progress of science." *American Geophysical Union* v. *Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), aff'd, 60 F. 3d 913 (CA2 1994). Rewarding authors for their creative labor and "promot[ing] ... Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides ... with the claims of individuals." The Federalist No. 43, p. 272 (C. Rossiter ed. 1961). *Justice Breyer*'s assertion that "copyright statutes must

1 Eldred v. Ashcroft, 537 U.S. 186, 212 fn. 18 (2003) .

> serve public, not private, ends" *post*, at 6, similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones. [Brackets in *Eldred*.]

This system of intellectual property and markets has served American society very, very well. Several recent studies examine the economic pay-off, and they probably understate the case.[2] In my view, those wanting to depart from this model of using property rights and markets as the incentives and organizers of creative effort bear a heavy burden of proof. And I have yet to see them meet it. They tend to argue in abstractions. For example, they simply assume that intangible products are different from tangible goods. In fact, the two are different in some ways, not different in others, and in some instances those differences cut in favor of more extensive property rights in intangibles and in some they argue for the reverse.[3] But the legal literature contains little work analyzing these distinctions in any depth.

Another argument is that because of the Internet things are different, and the need for property in creative products somehow lessened. The technology may be changing rapidly, but the laws of human nature and of economics are not, and as the investment gurus note cynically: "The four most dangerous words in the English language are, 'This time it's different.'" The circumstances may be different, but the fundamental values and principles are not.

An indispensable part of any system of property in creative products is that the works must be protected. Something that cannot be protected cannot really be property, and cannot be produced through any system that depends upon payment.

In the past, protection for creative works could be provided reasonably well by a combination of law and technological impossibility. Even the mighty copying machine did not result in wholesale book piracy because it remained cheaper to print books than to use copying machines. (Though it did result in considerable copying of academic materials, and turned the journals market upside down.) Audiotape degrades with repetitive copying, so it was not a serious threat to music. Movies on film might as well have been in a vault.

---

2. Stephen E. Siwek, *Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries*. Economists Incorporated (2005) (Commissioned by NBC Universal) [http://nbcumv.com/corporate/Engines_of_Growth.pdf]; International Chamber of Commerce, *Intellectual Property: Source of innovation, creativity, growth, and progress* (Aug. 2005). [http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/Statements/BASCAP_IP_pub.pdf]; Robert A. Shapiro & Kevin J. Hassett, *The Economic Value of Intellectual Property*. USA for Innovation (Oct. 2005) [http://www.usaforinnovation.org/news/ip_master.pdf].
3. James V. DeLong, "Defending Intellectual Property," in Adam Thierer & Clyde Wayne Crews, Jr. (eds.), *Copy Fights: The Future of Intellectual Property in the Information Age*. Cato Institute (2002) [http://www.pff.org/issues-pubs/books/020101defendingip.pdf].

The combination of digitization and the Internet have changed this situation, of course, by making possible the once impossible. The capacity for perfect digital replication of music, movies, and software renders the old forms of protection inadequate. Printed works books are still protected by printing costs combined with people's distaste for reading works on a screen, but that is changing as e-paper develops, and authors and publishers will soon face the same problems as other creators. Indeed, the recent controversy over Google Print indicates that the day is already at hand.

This description of the property-and-market basis of intellectual property law and policy and of the problems both legal and technological is the starting point for analyzing fair use.

If one views the purpose of the various doctrines that fly the flag of fair use, and the role of a judge implementing them, as being to allocate property rights among various sets of creators, consumers, and middlemen according to some gut sense of fairness, one will quickly sink in a swamp of gooey generalization.

Unfortunately, "swamp of gooey generalization" does indeed seem to be the best description of the state of this law. In 1990, Judge Pierre N. Leval noted that the fair use provisions in the 1976 Copyright Act were pretty much the summary of the law stated by Justice Story in 1841 ("In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work"), and this was itself a rationalization of common law doctrines that had developed since the Statute of Anne in 1709.[4] He added that "These formulations, however, furnish little guidance on how to recognize fair use," and that:

> Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns. Justification is sought in notions of fairness, often more responsive to the concerns

---

4. Pierre N. Leval, "Toward a Fair Use Standard," 103 *Harvard Law Review* 1105, 1106-07 (1990). The statutory provision is 17 U.S.C. 107:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

of private property than to the objectives of copyright.

Instead of bogging down in "intuitive reactions to fact patterns," it makes the most sense to examine fair use as a set of doctrines developed to make a market system for creative works function better by putting some oil in the joints when necessary, when there are good reasons for thinking that the system will break down. This is not a novel framework. My files have a 1982 article by Professor Wendy Gordon analyzing fair use doctrine in terms of market failures, and there may have been other suggestions along the same lines.[5]

One probably should start with a couple of doctrines not classified as fair use but very closely related: the rules that neither facts nor basic ideas can be copyrighted. One can copyright only particular expressions of ideas or particular arrangements of facts.

These two limitations on the assertion of property rights are important. They ensure that no one encloses the intellectual commons, so to speak. And some fair use principles are closely related to these rules: the right of news stories to use snippets of copyrighted material, for example, or the right of a biographer to quote copyrighted but unpublished correspondence to make a point about the subject. It is a *fact* that such and such was said. Often, a debate that seems to be about fair use is actually a debate about facts or ideas -- is the material eligible for protection at all?

Turning to core fair use issues, in developing copyright doctrine it is usually reliable to assume that producers want to disseminate their work, since creators need to support both their bodies and their egos. But this is not foolproof, because producers may well wish to discourage some types of dissemination. Most authors would cheerfully deny the right to quote from their works to anyone who wants to write a bad review. Creators often lack a sense of humor about their efforts, too, which makes them unsympathetic to satire and parody. If such forms of expression are to occur, they require special protection, because the joints of the marketplace will be a bit stiff.

Related problems can arise when the creator of a fictional universe is reluctant to let anyone else enter it. A couple of years ago there was a brouhaha about *The Wind Done Gone*, a retelling of the *Gone With the Wind* saga from a slave's point of view. Fan sites on the Internet present a related situation. Here again one can analyze the situation in terms of a breakdown in the normal market incentives. The creator of a fictional universe has a legitimate claim to control of its exploitation, on the one hand. On the other, as in the case of satire and parody, the creator may resist riffs that push the situation in some new direction.

The most important issues of fair use, though, fit well into the market paradigm because they revolve around transaction costs. In many situations, the time and effort involved in obtaining permission to use material would be so out of proportion to the value of the use or to any

5. Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors," 82 *Columbia Law Review* 1600 (1982) [Note: *Betamax* here meant the Court of Appeals decision, not the case in the Supreme Court].

possible harm to the creator that the only reasonable answer is, "forget it." The concept of transaction costs has received little explicit attention in the cases, but it seems to underlie much fair use analysis. It was used explicitly in *Texaco*.[6]

The transaction cost framework certainly governs day-to-day life. Which of us, upon reading a news article that might interest a friend, would even think about seeking permission from the newspaper before making a copy? We regard space shifting -- such as putting a copy of a CD onto a computer -- as a natural thing to do, without seeking permission from the music publisher. (The music industry agrees. Its website specifically approves such action, even though it stops short of classifying it as "fair use.")

The CD example is particularly interesting because it embodies an intuitive public sense of the distinction between the price of the content and the price of the delivery mechanism. When I buy a CD, much of the cost is due to the physical distribution costs of CD pressing, shipping, inventory, wastage, and so on. If I have a copy, after paying these costs, and the costs of making another copy from it are small, then it makes little sense for me to be forced to pay those physical distribution costs all over again, and I rebel.

On the other hand, if the music company were to offer me a variety of price points, such as paying $20 for a CD that works in a CD player and can be downloaded onto a computer and a personal device, or paying only $15 for one that works only in my CD player, I would change my mind about fair use. The transaction cost rationale would have disappeared, and why should the light user subsidize the intensive one?

Focusing on fair use as a transaction cost issue might diminish its scope in the above example, but it would expand it the doctrine in other areas. The *Eldred* litigation highlighted the problem of orphan works -- those which are under copyright, but for which the owners cannot be found with reasonable effort. Judge Richard Posner has suggested a system whereby using orphan works would be classified as fair,[7] and submissions in the ongoing Copyright Office proceeding

---

6. American Geophysical Union *v.* Texaco Inc., 802 F. Supp. 1, 27 (SDNY 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994). See also Williams & Wilkins Co. v. United States, 487 F. 2d 1345 (Ct. Cl. 1982), *aff'd by an equally divided Court*, 420 U.S 376 (1985):

> The supply of reprints and back numbers is wholly inadequate; the evidence shows the unlikelihood of obtaining such substitutes for photocopies from publishers of medical journals or authors of journal articles, especially for articles over three years old. n17 It is, moreover, wholly unrealistic to expect scientific personnel to subscribe regularly to large numbers of journals which would only occasionally contain articles of interest to them. Nor will libraries purchase extensive numbers of whole subscriptions to all medical journals on the chance that an indeterminate number of articles in an indeterminate number of issues will be requested at indeterminate times. The result of a flat proscription on library photocopying would be, we feel sure, that medical and scientific personnel would simply do without, and have to do without, many of the articles they now desire, need, and use in their work.

However, the court in *Williams & Wilkins* was unwilling to adopt the idea that fair use could be contingent -- that a use might be fair if no licensing system were in place, but changes status when such a system becomes available. Given its analysis, this rejection seems irrational.

7. Richard A. Posner & William F. Patry, "Fair Use and Statutory Reform in the Wake of Eldred," 92 *California*

on orphan works lend support to this view.[8]

In a particularly striking case, the American Historical Association wanted to publish an online version of a collection of Civil War newspaper editorials, originally published in 1931, with copyright renewed in 1959 by the editor, Dwight Dumond:[9]

> Obituaries confirmed that Dr. Dumond passed away in 1976 and that a wife and two children survived him. We then consulted with Dumond's former colleagues to help locate his relatives and their possible whereabouts (we knew his son was living in Guam in 1976 and his daughter in California, due to searches of older city/state directories—no newer information, however could be found). Contact was made with university libraries, Masonic lodges (to which Dumond belonged), and even veterans' associations (since Dumond fought in World War I). The AHA staff even contacted the Washtenaw County Probate Office to request a copy of Dumond's will, in which we discovered that his financial effects had been ceded to a trust company (who would presumably control any royalties generated by the book) that no longer exists. These numerous problems forced us to abandon our project since we could not protect ourselves from infringing upon the possible copyholder's rights. Despite considerable expense and effort, we were unable to make available work that is only of historical and scholarly, rather than commercial, interest.

It would be difficult think of a stone left unturned by the AHA in this instance. Furthermore, Dwight Dumond was reasonably prominent; www.abebooks.com (a used book site) lists several of his works. If title could not be traced in his case, it is an indication of a serious underlying problem.

A crucial point is that *fair* use and *free* use are not the same thing. Consumers' interest is in having creative works readily available, in the same sense that consumers have a strong interest in having a good supply of decent food available in the supermarket. In neither case does this mean that the cost should be zero. Indeed, to the extent that payment systems would encourage the development of new delivery techniques, consumers are much better off to be able to pay than to hold out for free on the basis of some abstract concept of "fair."

To return to the newsclip example used above: In fact, making a copy of a news story is not free; the copying costs me a few cents, plus my own time at the machine. Would I have any legitimate objection if the newspaper wanted a payment, too? Suppose it made available a service whereby I got the article online and could email it to a friend for a $0.10 micropayment -- would my copying of the article still be a fair use? I suggest not. The high-transaction-cost rationale no longer exists. Furthermore, in the long run, I as a newspaper reader am better off if newspapers develop this added source of revenue, because if they do not there soon may be no newspaper

---

Law Review 1639 (2004).

8. Library of Congress, Copyright Office, "Orphan Works," 70 Fed. Reg. 3739 (Jan. 26, 2005)

9. Comment of the American Historical Association, March 25, 2005 [http://www.copyright.gov/orphan/comments/OW0676-AHA.pdf].

articles for me to copy. *New York Times* columnist Joseph Nocera wrote recently:[10]

> As a business journalist, I've tended not to have a lot of sympathy for music executives trying to salvage their broken business model. My general view has been that if they can't adapt to the Internet deserve their fate. But in the six months I have been in the newspaper business, I've learned to have some sympathy for those who are staring down the barrel of the Internet.

There is something fundamentally perverse about a concept of fair use that says, "Well, we would have a right to get it for free if there were anything to get, so we will stand on our 'rights' even at the cost of keeping us from getting anything at all."

Thinking in terms of transaction costs illuminates many of the complaints about fair use in the public press. One reads of the problems of students or professors who want to put a music or film clip into a report or teaching module, and who are frustrated by the inability to download snippets of material. My reaction is "pay for it." Ring tones are now a multi-billion dollar business; if there is a market for snippets of material to be used in reports, then it will be easy enough for the owners of the content to supply them, if appropriately rewarded.

Again, "free" and "fair" are not the same thing, and, as Judge Leval also noted, in connection with the argument that artists should be able to make free use of the work of other artists:[11]

> Artists, no matter how great, must pay for what they use in making their works. They pay for paint, for canvas, for steel, for clay, for a model's time. Why should they not also pay a reasonable fee for the use of another artists work as part of a new work?

These points, and especially Joseph Nocera's point about a "broken business model" is a good segue into my final point. Yes, the old business models for selling content are broken, but the content industry is now roaring back with élan. One is hard put to keep up with the flood of innovation. Any content company could provide an impressive list of the deals it is making to deliver new packages of content and, indeed, new kinds of content.

The common characteristic of all these deals is that they require that the property involved be protected by some form of DRM. The terms and conditions of the access granted will vary with each stream, of course, but the overall objective is to offer consumers a cornucopia of choice, matching particular desires with varying price points. All of this is greatly to everyone's benefit.

In sum, fair use is a doctrine that has outlived much of its usefulness. Properly understood, much of it is based on problems of high transaction costs at a time when the Internet is wringing

---

10. Joseph Nocera, "Staring down the barrel of the Internet," *International Herald Tribune*, Nov. 13, 2005 http://www.iht.com/articles/2005/11/13/yourmoney/mjoe12-web.php
11. Pierre N. Leval, "Copyright in the Twenty-First Century: Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use," 13 *Cardozo Arts & Entertainment Law Journal* 19, 24 (1994).

transaction costs out of the system. Fair use still has a role in those areas where creators have positive incentives not to disseminate. It has a role where markets have not yet been constructed, as in the orphan works situation. But for the most part, it should be left to atrophy as the magic of technology makes new forms of content available.

So, is it fair use to copy music to a portable device, as discussed earlier? The answer should be "yes," under the old technological regime; but under the new one, the correct answer is, "Who cares"? Consumers have made clear that they expect such functionality, and the techies quickly supplied DRM that fulfills their wish. Consumers are getting these rights from the market. Perhaps in the future, as everyone gets more sophisticated, the rights granted and the price points will be calibrated more finally. Perhaps not. But it simply does not seem to be an issue with which the law, or the Congress, should be concerned. `

There is an irony here. For several years, we have been hearing pejoration about the content companies and their obsolete business models. But in the real world, as opposed to the world of academic abstraction, this is the reverse of the truth. The world of the content industries -- the marketplace -- is electric with excitement and innovation. The people defending the old doctrines are actually the ones who are mired in old models, fearful of change, and, to be blunt, trying to cling to obsolete privileges that might have been appropriate under old technologies, but not under the new.

Mr. STEARNS. Mr. Hirsch?

STATEMENT OF FREDERIC HIRSCH

Mr. HIRSCH. Mr. Chairman, Ranking Member Schakowsky and members of the subcommittee, thanks very much for holding this hearing.

I appreciate the opportunity to testify on behalf of the Entertainment Software Association regarding the fair use doctrine and how it impacts our industry and its consumers. It is the position of the ESA that current law properly balances consumer interest in using copyrighted works with the protections content owners needs to continue creating innovative entertainment products to consumers.

The ESA members are the world's leading publishers of video and computer games including games for videogame consoles, personal computers, handheld devices, and the internet. ESA members produce more than 90 percent of the $7.3 billion in entertainment software sold in the United States in 2004. With annual worldwide revenues now exceeding $28 billion, our industry is one of the fastest growing entertainment sectors. The industry has more than doubled in size since the mid 1990's generating thousands of highly skilled jobs in the creative and technology field. Our industry makes a tremendous investment in its intellectual property, developing and launching a top game often required to a team of more than 100 professionals working for more than 3 years with development and marketing costs often running $10 million or more and in the coming years they foreseeably range as high as $25 to $40 million. Unfortunately, many of these titles fail to achieve profitability.

Still the new generation of game consoles that will be launched over the next several months will require entertainment software publishers to risk even more significant levels of investment in gain development as the processing power of these new machines will permit more complex and realistic game design for further enhancing consumer's game playing experience.

Having now told you a little bit about our industry, the real question I am here to answer is how the fair use doctrine relates to the entertainment software industry and its consumers. Fair use doctrine is a legal defense under copyright law that allows for limited uses of copyrighted materials in certain cases that would otherwise constitute infringement. Fair use has always been determined on a case-by-case basis. The fact of each case must be evaluated under the copyright statutes four various factors to determine if a particular use of copyrighting materials entitled to the fair use defense.

It is important to be clear about what the fair use doctrine is not. Fair use is not a right. It is a defense. Fair use provisions in the Copyright Act codify nearly 200 years of judicial experience in balancing the rights of copyright owners and social interests in areas such as research and scholarship. And when Congress passed the Digital Millennium Copyright Act or the DMCA in 1998, it provided a similar balancing mechanism when it created a rulemaking process to issue exemptions when it is determined that non-infringing uses of copyrighted materials are being harmed or threatened by the DMCA's circumvention prohibition.

Since the DMCA was enacted, two separate rulemakings have been conducted resulting in the prime location of a number of exemptions for certain uses and classes of work including two specific to the entertainment software industry. Perhaps more importantly since the DMCA's enactment, we have seen an explosion in the number and variety of innovative entertainment products and services that are available to consumers.

The entertainment software industry has been a leader in using new technologies to develop creative business models to provide consumers a wide array of options for accessing games. Consumers can access and sample games through rental outlets, game websites, demo disks in game magazines, or play games on a variety of platforms and services such as online game environments, pay to play sites, or an episodic game format, and in many cases without even purchasing a full game. Consumers can play games on their computers, their television sets, dedicated handheld devices, their PDA's, and on their cell phones.

Thus we think it is clear that the balancing mechanism by Congress widely adopting the copyright statute's fair use provisions and the DMCA are properly servicing the communities of copyright holders and consumers. Critics to the DMCA argue that its enforcement constrains the exercise of so called fair use rights and that consumer expectations are not being met. In the case of the entertainment software industry, this cannot be further from the truth. The protections reported by the DMCA are essential to the vitality and continued growth of our industry. This industry has invested heavily in technologies that both prevent or reduce game piracy and enable the industry to place games in the hands of consumers through many different platforms and modalities. Without the DMCA's protection for such technological measures, game publishers multi-million dollar investment in the development and marketing of new game products would become an exceedingly daunting proposition as our games would become immediately exposed to copying and abuse. And as this increased risk would undoubtedly inhibit the development of many new games, consumers would lose as well.

ESA believes that the marketplace is where industry consumer expectations of our product use or access should be resolved. The entertainment software industry is a prime example of this marketplace principle, the fact that a product includes protection measures to prevent unauthorized copy and distribution has not affected its longstanding positive relationship with its consumers who have made our industry the fastest growing segment in the entertainment industry.

Thank you.

[The prepared statement of Frederic Hirsch follows:]

PREPARED STATEMENT OF FREDERIC HIRSCH, SENIOR VICE PRESIDENT, INTELLECTUAL PROPERTY ENFORCEMENT, ENTERTAINMENT SOFTWARE ASSOCIATION

On behalf of the Entertainment Software Association (ESA) and our member companies, I thank you, Mr. Chairman, for this opportunity to discuss the Fair use doctrine and how it impacts the video game industry and its consumers. It is the position of the Entertainment Software Association that current law properly balances consumers' diverse interests in using copyrighted works with the protections content owners need to retain the incentive to continue creating and producing innovative entertainment products for consumers to enjoy.

The ESA is the trade association serving the public affairs needs of the world's leading publishers of video and computer games, including games for video game consoles, personal computers, handheld devices, and the Internet. ESA members produced more than 90 percent of the $7.3 billion in entertainment software sold in the U.S. in 2004. In addition, ESA's member companies produce billions more in exports of American-made entertainment software, driving the $28 billion global game video game market. Entertainment software is a vibrant and growing segment of the American economy, providing highly skilled jobs and ever-increasing exports.

Entertainment software companies invest significant amounts of capital in each of their games and the intellectual property that these represent. Developing and launching a top game often requires a team of more than 100 professionals working for more than three years, with development and marketing costs often running $10 million or more and may foreseeably range as high as $25-40 million in coming years. As with any hit-based industry, not all of these titles actually achieve profitability. Nonetheless, the demands of the game-playing market compel ESA members to continue to work even harder to develop faster and more exciting software, requiring larger investments in the programming and technology that will produce the effects and challenges that consumers seek. The new generation of entertainment software consoles that will be launched over the next several months will require entertainment software publishers to make even more significant levels of investment as the processing power of these new machines will permit more complex and realistic game design, further enhancing the game-playing experience for consumers.

I. WHAT IS THE FAIR USE DOCTRINE?

"Fair Use" is a legal defense under copyright law that allows for limited uses of copyrighted materials in certain cases that would otherwise constitute infringement of copyright. The fair use defense, one of the few exceptions to rights holders' exclusive rights, balances the public interest in scholarship, research, commentary and the like with the artist's interest in having the exclusive right to reproduce and distribute his or her work. When the use of a copyrighted work for such a purpose has been judged a "fair use," it is not an infringement of the copyright, even if the use was made without permission of the copyright owner. Originally created by the courts, the fair use doctrine was codified in the 1976 Copyright Act.

Fair use has always been determined on a case-by-case basis. There are no hard-and-fast rules that dictate that certain uses are always fair (or never fair). The statute lists four factors (although others can also be used) that must be considered in determining whether or not the use is fair:

- The purpose and character of the use. Title 17, Section 107 recites examples such as copying for purposes of criticism, news reporting, teaching, scholarship or research. But those purposes do not automatically make a particular use a "fair use" under the statute. Not every use by a library or educational institution is necessarily a fair use under the law;
- The nature of the copyrighted work in question;
- How much of the work is copied or otherwise used; and
- The effect of the use on the potential market for the work. This includes not only the impact on the current market, but also whether allowing the use (and others like it) could prevent a new commercial market from developing.

In examining particular circumstances of copying, courts consider the statutory defense using the four factors listed above. It was on this basis that the Supreme Court *Betamax* decision in 1984 ruled that private copying of over-the-air TV broadcasts for the purpose of time-shifting was fair use. However, even that case did not apply the same rule to private taping of cable television or pay-TV broadcasts, nor did it address the copyright status of "librarying" (the practice of making a permanent copy of a television program), and no later court has cited the *Betamax* case as a basis for permitting "private copying." Aside from a specific statutory provision that Congress enacted in 1992 regarding non-commercial home recording of music on cassette decks and the like, any other instance of personal copying must be evaluated under the statute's four factors, in light of the particular facts in the case at hand, to determine if it is entitled to the fair use defense.

The same is true of so-called "space shifting" or "platform shifting"—for instance, copying a video game so that it can be played on a different technological platform than originally intended by the copyright owner. Here too, the fair use defense applies only after consideration of all four statutory factors, in light of the particular facts of the case.

II. FAIR USE IS AN EXCEPTION, NOT A RIGHT

The fair use doctrine codifies nearly two hundred years of judicial experience in balancing the rights of copyright owners with social interests in research, scholarship and the like. The doctrine has worked work well to accommodate these goals while retaining incentives for creators to create and for publishers to invest in bringing new copyrighted products to market. It was for this reason that Congress adopted the principles of the fair use analysis into the copyright statute.

In recent years, with the emergence of digital technologies and the rapid deployment of the Internet, consumers have seen their ability to access, use, copy and transmit digital material vastly expanded. Consumers' use of these digital technologies has been a huge boon to the entertainment software industry, which benefited from consumers' increasing comfort with using computers and the Internet. Unfortunately, it has also led many computer and Internet users to abuse digital materials protected by copyright.

In 1998, Congress enacted the "Digital Millennium Copyright Act" (DMCA). The DMCA was the foundation of an effort by Congress to implement United States treaty obligations and to move the nation's copyright law into the digital age. The DMCA implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The foundation of this effort was to make digital networks safe places to disseminate copyrighted works for the benefit of consumers and copyright owners.

Specifically, the treaties require legal prohibitions against circumvention of technological measures employed by copyright owners to protect their works. Congress determined that current law did not adequately protect digital works and that to promote electronic commerce and the distribution of digital works, it was necessary to provide copyright owners with legal tools to prevent widespread piracy. As a result, the DMCA implements the treaty obligations by creating new prohibitions in title 17 on the circumvention of technological protection measures that protect access to a copyrighted work and the manufacture or sale of devices that permit such circumvention.

The most common critique of the DMCA has been that its enforcement constrains the exercise of fair use "rights." However, no such rights are defined in the copyright statute, nor have any such rights been identified in U.S. case law. What U.S. law does provide for, through its codification of the fair use doctrine, is a certain degree of flexibility with respect to certain uses of copyrighted works that, although they may be infringing, may qualify for an exemption for the people engaged in such uses. This is the balancing mechanism that Congress wisely adopted and has served the communities of copyright holders and consumers so well over many years.

Congress continued to retain the balancing of competing interests when legislating in the area of copyright protection. When Congress enacted the DMCA, it balanced the new provisions against circumvention of copyright protection measures by ensuring that consumers would continue to have the ability to make non-infringing uses of copyrighted works in the digital environment. Congress created a tri-annual rule-making process to be conducted by the Librarian of Congress in conjunction with the Copyright Office to determine whether non-infringing uses of copyrighted materials are being harmed or threatened as a result of the circumvention prohibitions in the DMCA and to formulate exemptions as necessary.

Since the DMCA was enacted, two rule-makings have been successfully conducted. In each rulemaking, the Copyright Office held numerous hearings around the country, reviewed evidence and testimony from hundreds of interested parties and considered numerous proposals for new exemptions. In both proceedings, it found evidence that certain users were not able to make certain non-infringing uses of certain classes of works that it deemed, on balance, likely to benefit certain consumers and unlikely to impact copyright holders. As a result, the Librarian issued exemptions for such uses of those classes of works from the prohibition against circumvention of technological protection measures. Specific to the entertainment software industry, exemptions were granted for 1) malfunctioning or old computer programs failing to permit access and 2) video games in obsolete formats to the extent libraries and archives wish to make preservation copies.

Unfortunately, because of the use of the term fair use "rights" in attacks on the DMCA, fair use and the DMCA are often contrasted as reflecting oppositional doctrines. Some point to recent cases, such as efforts to break the encryption of DVD movies and the well-publicized DMCA criminal case against a Russian programmer accused of circumventing the copy protection for Adobe System's e-books, as reasons to re-examine fair use. However, neither case has anything to do with that doctrine. In both cases, the defendants were charged with trafficking in tools that strip off encryption and leave formerly protected material "in the clear" for any use, fair or

piratical. In fact, both fair use and the DMCA reflect Congressional efforts to adopt a level of protection for copyright, balanced against certain uses by consumers that may qualify either as exempt under fair use or non-infringing under the DMCA.

III. WHAT EFFECT DOES FAIR USE HAVE ON THE VIDEO GAME INDUSTRY AND ITS CONSUMERS?

In our view, any debate in Congress over these issues should be predicated on a complete understanding of the ways the entertainment software industry has sought and succeeded in meeting the legitimate needs of our consumers. The video game industry is a leader in successfully meeting consumer expectations for access to, and use of, video game content.

Our industry has always been digital and did not need to convert from older formats to the digital environment. As a result, entertainment software companies have, for years, been leaders in developing creative business models that provide consumers a wide array of options to sample and play games. Without built-in marketing vehicles like radio, film trailers, and music television, the video game industry has had to develop innovative marketing strategies to generate excitement in new game products. As a result, the industry has used a variety of approaches to allow consumers to sample and play parts of games and, in some cases, entire games prior to purchasing:

- *Rental:* Under federal law, console video games are the only form of software that may be rented without the permission of the copyright holder, and over the years video game rentals have become a big business for retailers, allowing millions of people to play games without purchasing them and generating nearly $7 million dollars at retail in 2004.
- *Game Websites:* Our companies routinely make "levels" of games available for free download on their own company sites, or through independent game websites. Through these sites, consumers can enjoy free access to games for a period of time to play and to sample prior to purchase.
- *Demo Disks:* Game companies provide several levels of games to publishers of gaming enthusiast magazines prior to or soon after release in the form of CD-ROMs that are inserted into the game magazines. From these demo disks, consumers can then sample literally dozens of new and popular games for free on their PCs.

The video game industry has developed additional means and technologies to deliver game product to consumers for use in a variety of formats to accommodate different consumer preferences:

- *Massive Multiplayer Online Games:* An entire gaming culture has been built around massive multiplayer games involving hundreds of thousands of individuals. Consumers pay a monthly subscription fee, usually between $10 and $15, to play with and against players from all over the world.
- *Free Games:* More than 30 million Americans now play board, card, trivia, and other casual games online at least once a month, typically for free.
- *Pay to Play:* Other games are available online to play for an hourly or daily fee.
- *Episodic Games:* Some games are delivered to consumers in episodes, with players paying a fee to receive each new level.

The entertainment software industry has a strong and proactive track record in voluntarily providing information about our products to customers. Consumers of video games have known and accepted for years that video game hardware systems and computer and video game software are copy-protected in various ways. For example, there is no legitimate expectation on the part of consumers to copy a PlayStation game for use on a GameCube or an Xbox, or to copy a PC game for use on a dedicated game console. Our industry's consumers know that the games they purchase are embedded with certain technological restrictions. The use of technological protection measures has not interfered with the entertainment software industry's ability to meet consumer expectations with regard to access, play, portability, and ability to make full use of a game title.

A key factor to bear in mind is that game publishers are able to meet consumer demand for game products in these different forms and modes of access through the use of technologies that permit qualified or conditional access. Without such technologies, and most importantly, the ability to protect the integrity and use of such technologies, game publishers would be unable to respond to the increasing diverse consumer demand for game software on these many different platforms and modalities.

The protections afforded by the DMCA are essential to the vitality and continued growth of the entertainment software industry. It prohibits: 1) the circumvention, or "hacking," of technological measures that game publishers use to control access

to and/or prevent piracy of their products, and 2) the development and distribution of tools to enable such hacking. Without this protection, the development and digital distribution of new game products would become an exceedingly daunting proposition because publishers would be placing at considerable risk the tens of millions of dollars spent in developing and marketing game products.

Because of the nature of the game software business, technological protection measures are a critical element of game publishers' ability to distribute and market their products. Unlike some of the other content industries, where products either pass through a sequence of media or enjoy prolonged life cycles, the active sales cycle of a new game release is often only a few months long. It is therefore critical that the game industry provide its products maximum protection from piracy during the short window in which they have to sell copies of their games after release and recoup the millions of dollars invested in the development and marketing of these game products.

This is the reason that our industry has invested heavily in technological protection measures, as these help to limit the damage that game publishers suffer from pirate versions of their games. For example, video game consoles have built-in access controls designed to prevent the playing of counterfeit versions of the games. These self-help protection methods act as "digital locks" that regulate unauthorized access to the game content. The DMCA's legal protections for these measures provide additional remedies for our industry to use against those who would undermine the use of these measures by promoting their circumvention.

Unfortunately, game publishers' technological protection measures are often circumvented and an unprotected version of a game may become available in the days following its release. The resulting copy is a perfect copy that can be available for any purpose, not just non-infringing uses. In the digital world of today, the "single copy" will quickly become thousands (and ultimately, millions) of equally high-quality copies distributed instantly around the world. Billions of dollars worth of pirated entertainment software products are present in worldwide markets today and there are illegal devices such as "mod chips" and "game copiers" which circumvent access controls and allow for play of counterfeit games.

The entertainment software industry remains concerned about attempts to chip away at the protections afforded by the DMCA and other statutes in the name of fair use. As noted earlier, the DMCA provides those interested in seeking exemptions to the application of its circumvention provisions with a process for doing so. Many have taken advantage of the last two rulemaking processes to proffer suggestions for exempt uses and some have obtained the exemptions they were looking for. Indeed, a new DMCA rulemaking process has recently begun and new proposed exemptions will undoubtedly be considered. The process works; there is no need to undermine the DMCA or other applicable statues at this time.

Those who seek to weaken the DMCA's anti-circumvention provisions in order to promote so-called fair use "rights" may not be aware of the dangers that this poses to copyright holders, particularly the entertainment software industry. No technology exists to ensure that circumvention is done for only legitimate or non-infringing purposes. Any technology or device capable of "enabling significant non-infringing use" may also be capable of permitting rampant piracy. More to the point, should Congress enact proposals to allow circumvention for purposes of making fair use or the making and distributing of circumvention devices for purposes of making fair use, "mod chips" and "game copiers" will be legal and this would be devastating to the video game industry.

IV. CONCLUSION

The ESA and its members strongly endorse the Congressional judgment that led to the codification of the Fair Use doctrine in the U.S. copyright statutes and the enactment of the DMCA. Each reasonably accommodates the needs and interests of copyright holders and the consumers of their products. We believe that the marketplace is where legitimate industry and consumer expectations over product use or access should be resolved. The entertainment software industry is a strong example of this marketplace principle—an industry whose products include protection measures to prevent unauthorized copying and distribution and whose positive relationship with their consumers since the inception of the industry has made us the fastest growing segment of the entertainment industry.

As an industry that uses technology extensively to meets the challenge of ever-changing consumer demands, our industry would be unnecessarily and unfairly harmed by legislation aimed at altering the delicate balances embodied in Fair Use and the DMCA. Accordingly, we urge Congress to reject any efforts to erase the legal protections on which our members rely to bring innovative new entertainment

software and technologies to the marketplace in forms and modalities designed to produce the highest levels of consumer satisfaction.

Mr. STEARNS. Thank the gentleman.

Mr. Aiken?

STATEMENT OF PAUL AIKEN

Mr. AIKEN. Mr. Chairman, I am the Executive Director of the Authors Guild, the largest society of published authors in the country and we have a 90-year history of contributing to debates before Congress on the proper scope and function and copyright law. It is an honor and a privilege to be here today for the Authors Guild to continue to serve that role before this committee.

When people discuss policy issues about copyrights, they often talk about balancing the public's interest against that as a rights holder. The public's interest is frequently cast in terms of the public domain. As is the overriding public benefit of copyright is the creation of materials that can be used for free. The public domain does provide a benefit to society but that is not the primary means by which the public benefits from copyrights, not by a long shot.

Copyright allows authors and other rights holders to work in a free market economy. Copyright transforms author's creative efforts, their investment of countless hours of work on their manuscripts into marketable goods, licensable products. A fortunate and talented minority of prospective authors find publishers for their works. A published book of course is no guarantee of success. The authors and publisher's investments may be for naught but authors and publishers accept those risks and with a good book, some luck and a bit of marketing skill the authors and publishers investments will pay off in the marketplace and readers will value the book. That book and other books like it, the books that readers value, the books that the public, academic, and corporate libraries choose to acquire for their collection are the primary public benefit of copyrighting. I am speaking now of the book publishing industry but the same paragon applies to the newspaper, magazine, music, movie, and software industries. It is the products that result from the market created by copyrights that are the fundamental and appropriate public benefit of the copyright system that primarily and powerfully fulfills copyright's constitutional purpose of promoting the progress of science and the useful arts.

It seems so obvious but people seem to lose their bearings when discussing copyrights. There is a market for food in this country which functions pretty well. No one seriously doubts that there is a public good in the existence of this system that one has to pay for a sack of potatoes does not mean that there is not a tremendous value to the public and the investments and the efforts of the farmer, distributor, and grocer in getting those potatoes to the store. We may wish those potatoes were cheaper, we may even want them to be free but none would argue the public benefit of a market for food is dependent on the availability of free potatoes.

So it is with public domain. Public domain is a fine thing but it is and always has been merely a nice byproduct of the copyright system. The real public benefit of copyright easily 90 percent of the value is the creation of progress promoting rights that the marketplace values.

What does all of this have to do with fair use? The same sorts of arguments are brought to bear in fair use debates. We are told essentially that in order for copyrights to fulfill its constitutional purpose and provide a real public benefit, we have to make sure that their use is adequately bought. This misapprehends primary value of copyright and the role of fair use in the copyright system. Fair use has traditionally helped define the boundaries between commerce and free expression. Between the commercial incentives secured by copyright and the rights of free expression protected by the first amendment.

Section 107 mediates between protected expression and free expression by setting forth four factors for the court to consider whether use is fair. Factors intended to permit the except, you know, copywriter rights needed for new creative expression so long as the effect on the commercial market for the work is minimal. And unfortunate use, result of the use of four factors to determine the balance of fair use is that fair use appears to be a bit mushy. Advocates of all stripes can and do read into fair use what they care to read into it.

Search engine firms have discovered books. All the major firms now have book digitalization's under way. Google is looking at hooking with major American libraries and one British library in its massive book scanning and storage effort. Some of these libraries are offering Google only public domain books but the University of Michigan and reportedly Stanford are offering up works still protected by copyright. Google seems to have figured something out. There is a demand for searching these books, a demand that warrants the investment of a reported $200 million, a demand that Google is determined to satisfy because Google is a sensible profit seeking enterprise believing its investment will pay off and increase visitors to its sites and increased ad revenues.

Google senses a competitive advantage in making copyrighted books searchable but Google says that is copying of these books, that its scanning of countless copyrighted volumes, and using optical character recognition technology to digitize the text of those works to create files to assemble into a new unimaginably vast data base that all that copying and use of these works would be fair use so it does not need a license from anyone for this copying. For good measure, it is handing over a digital copy of its—to its partner libraries and telling them it is okay to post the works on their website. That too it appears is to be considered fair use. And since no license is needed in Google's view, Google does not have to give rights holder contractual assurances of the security of the data base. Could a back up tape go straight from Google or one of its partner libraries unleashing a couple hundred thousand copyrighted works sent to the internet? It sure seems possible. We will have to trust that that is under control. The list of companies——

Mr. STEARNS. I just need you to sum up.

Mr. AIKEN. Sure. That lose critical data grows daily. We do not believe the courts will share Google's radical expansive and devastating view that the scope of fair—of the scope of fair use. At some point, we believe that Google will do the right thing and look to a licensing solution for the use it wants to make of these millions of works. That would be good news. A negotiated license could

pave the way for a real online library, something far beyond the excepts Google intends to offer to its Google library program.

Thank you.

[The prepared statement of Paul Aiken follows:]

PREPARED STATEMENT OF PAUL AIKEN ON BEHALF OF THE AUTHORS GUILD

Mr. Chairman, I represent the Authors Guild, the largest society of published authors in the country. The Guild and its predecessor organization, the Authors League of America, have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912. Among our more than 8,000 current members are historians, biographers, poets, novelists and freelance journalists of every political persuasion. Authors Guild members create the works that fill our bookstores and libraries: literary landmarks, bestsellers and countless valuable and culturally significant works with unfortunately modest sales records. We have counted among our ranks winners of every major literary award, including the Nobel Prize and National Book Award, as well as United States Presidents, members of the Senate and, no doubt, distinguished members of the House of Representatives.

We have a 90-year history of contributing to debates before Congress on the proper scope and function of copyright law. It's an honor and a privilege to be here today, for the Authors Guild to continue to serve that role before this committee.

Copyright and the Public Interest

When people discuss policy issues about copyright, they often talk about balancing the public's interest against that of the rightsholder. The public's interest is frequently cast in terms of the public domain, as if the overriding public benefit of copyright is the creation of material that can be used for free. The public domain does provide a benefit to society, but that's not the primary means by which the public benefits from copyright. Not by a long shot.

Copyright allows authors and other rightsholders to work in a free market economy. Copyright transforms authors' creative efforts, their investment of countless hours of work on their manuscripts, into marketable goods, licensable products. A fortunate and talented minority of prospective authors finds publishers for their works. These authors enter into essentially joint venture agreements with their publishers, licensing the right to print and sell their works in exchange for an advance and the prospect of shared profits in the form of royalties. (Contrary to widely held belief, the advance is generally modest, merely defraying some of the author's investment of time and money in creating the manuscript.)

A published book is no guarantee of success, of course, the author's and publisher's investments may be for naught. That's how it is in an entrepreneurial system, not all efforts pay off. But authors and publishers accept those risks, and with a good book, some luck and bit of marketing skill, the author's and publisher's investments will pay off in the marketplace, and readers will value the book.

That book, and other books like it, the books that readers value, the books that public, academic, and corporate libraries choose to acquire for their collections, are the primary public benefit of copyright. I'm speaking now of the book publishing industry, but the same paradigm applies to the newspaper, magazine, music, movie and software industries. It's the products that result from the market created by copyright, the newspapers and movies and software programs that are still under the protection of copyright, that are the fundamental and appropriate public benefit of the copyright system, that primarily and powerfully fulfill copyright's constitutional purpose of "promot[ing] the progress of science and [the] useful arts."

This seems so obvious, but otherwise clear-thinking people seem to lose their bearings when discussing copyright. There's a market for food in this country which functions pretty well. No one seriously doubts that there's a public good in the existence of this system. That one has to pay for a sack of potatoes doesn't mean there's not a tremendous value to the public in the investments and efforts of the farmer, distributor and grocer in getting those potatoes to the store. We may wish the potatoes were cheaper, we may want them to be free, we may even think that potatoes want to be free, but none would argue that the public benefit is dependent on free potatoes.

Or take the Ford Foundation. It does, I'm sure, much good work. Some might argue that this is the public good that resulted from Henry Ford's company, that he and his family were able to endow this charitable institution. But the Ford Foundation's good works, significant as they are, pale in comparison to the public benefit of the Ford Motor Company's products, automobiles. Ford revolutionized the indus-

try, bringing independent, speedy transportation within the reach of working families, and the public valued this product tremendously, responding by buying Ford's cars by the million. (Ford's other great product, of course—it's other great benefit to our society—is good-paying, benefit-rich jobs.) The real public benefit of Ford is a direct result of the automobile market—cars that people value and the jobs to build those cars—the charity is just gravy.

And so it is with the public domain. The public domain's a fine thing, but it is, and always has been, merely a nice by-product of the copyright system. The real public benefit of copyright, easily ninety percent of the value, is the creation of progress-promoting works that the marketplace values.

Fair Use & Authorship

What does all this have to do with fair use? The same sorts of arguments are brought to bear on fair use debates. We're told, essentially, that in order for copyright to fulfill its constitutional purpose and provide a real public benefit, we have to make sure fair use is adequately broad. This misapprehends the primary value of copyright, as we've seen, and the role of fair use in the copyright system.

Fair use, originally a judicial doctrine, now codified in Section 107 of the Copyright Act, has traditionally helped define the boundary between commerce and free expression, between the commercial incentives secured by copyright and the right to free expression protected by the First Amendment.

Authors are big fans of copyright, of course, because authors like to get paid, but they're also big fans of traditional, transformative fair use.

Say an author is writing a history of The Great Depression and finds a recent article in which some scholar says that the Depression was caused by the stock market crash of 1929. This drives the author nuts, because she believes it's well established that the stock market crash was only one of several factors causing the Depression. She wants to quote from this article to show just how wrong-headed it is, but the article is protected by copyright and its author may not be inclined to grant her permission to excerpt the work. What does our historian do? She uses it anyway. She copies a reasonable amount of that article, enough to make her point, and puts it into her own book, surrounding it with her commentary and criticism. She demolishes that scholar's thesis, using his own words against him, and there's nothing that author can do about it.

That author can do nothing about it, at least in terms of her use of his copyrighted work, because this is classical, transformative fair use of the original author's work. She's taken part of his copyrighted work and transformed it, including it in a new creative expression, something completely unlike his work. As a society, we see real value in this sort of transformative borrowing from another's work, it's a vital part of the marketplace of ideas that free expression is meant to encourage, and it's everywhere: book and movie reviews, of course; biographical and historical works; novels and plays; poetry and songs.

Section 107 mediates between protected expression and free expression by setting forth four factors for a court to weigh in considering whether a use is fair, factors intended to permit the excerpting of copyrighted works needed for new creative expression, so long as the affect on the commercial market for the work is minimal. An unfortunate result of the use of four factors to determine the bounds of fair use is that fair use appears to be a bit "mooshy." Advocates of all stripes can and do read into fair use what they care to read into it.

Fair use is now often seen as another flavor of public domain, and that's perhaps one way to think of it, but it's of an entirely different nature than copyright's real public domain. Fair use doesn't mean free use of entire works—that's the realm of genuine public domain. Fair use, in fact, has been transmuted by some into free use or good use or any other use that some interest group, industry or corporation wants to make of copyrighted works without paying for them. This isn't, and shouldn't be, what fair use is about. If we keep our eye on the true role of fair use—permitting the creation of new creative expressions without harming the commercial market for the work—we won't lose our way.

The Idea/Expression Dichotomy

I should mention one other important way in which copyright law accommodates the First Amendment. Courts have interpreted copyright law to protect creative expression in copyrighted works, but not the ideas contained in those works. When people speak of copyright preventing the free flow of ideas, they are wrong, flat out. Copyright encourages and speeds the flow of ideas.

One prominent copyright scholar, Paul Goldstein of Stanford Law School, describes the idea/expression dichotomy as creating a vast commons coursing through every copyrighted work—the publicly held and freely copyable ideas the work con-

tains. If a particular author has creatively expressed an idea so well that another feels compelled to copy that particular expression, then one needs permission, that is, a license. That's as it should be—well-crafted expression should be compensated, or the borrower should simply limit the excerpt to the bounds of fair use.

The Internet & Fair Use

The Internet is often described as a disruptive technology. There's no doubt that that's true—just ask travel agents or those in the music industry. Authors and publishers have had a taste of this disruption, as used bookselling, a somewhat quaint enterprise before the Internet, has seen explosive growth online, certainly displacing some royalty-paying sales of new books. That displacement will only grow with time.

But the Internet also offers opportunities. Search engine firms have discovered books: all of the major firms now have book digitization efforts under way. Earlier this month, Microsoft announced an agreement with the British Library to scan 25 million pages from the library's collection. Those pages will be made available at MSN's Book Search site next year. It's just the start for Microsoft and the British Library, we're told, Microsoft is investing a reported $2 million, just to get the ball rolling. Yahoo is also in the game, announcing last month that it's working with a group called the Open Content Alliance, which includes Adobe Systems, Hewlett-Packard, and the libraries of the University of California and the University of Toronto, to scan books that will be made available through Yahoo's search engine. Since that announcement, Microsoft has signed on, to make the books accessible through its search engine as well. In building their databases of books, the Microsoft and Yahoo efforts are properly sticking to scanning works that are in the public domain or those for which they receive permission.

Not so with the mother of all book scanning and storage initiatives, Google Library. Google is working with four major American libraries, the libraries of Harvard, Stanford and the University of Michigan and the New York Public Library, and one British library, Oxford University's Bodleian Library. Some of these libraries are offering Google only public domain books, but Michigan and reportedly Stanford are offering up works still protected by copyright.

Google seems to have figured something out: there's a demand for searching those books, a demand that warrants the investment of a reported $200 million. A demand that Google is determined to satisfy, because Google, a sensible, profit-seeking enterprise, believes its investment will pay off in increased visitors to its site, and increased ad revenues. Google senses a competitive advantage in making copyrighted books searchable.1We bet Google is right. If books were digitized and searchable on the Internet, we bet Google could turn a good profit by allowing its legions of users to search that database. And what a mind-boggling database: an assemblage of the nation's copyrighted books, the result of the efforts and investments of hundreds of thousands of authors and thousands of publishers, served up in handy excerpts by Google's computers.

But here's the bad part. Google says that its copying of these books—that its scanning of countless copyrighted volumes, then using optical character recognition technology to digitize the text of those works to create files to assemble into a new, unimaginably vast database, surely one of the largest databases ever assembled—that all of that copying and use of these works, would be fair use, so it doesn't need a license from anyone for this copying. For good measure, it's handing over a digital copy to its partner libraries, and telling them it's OK to post the works to their websites. That, too, it appears, is to be considered fair use.

Since there's no license needed, in Google's view, Google doesn't have to give rightsholders contractual assurances of the security of their database. Could a backup tape go astray from Google or one of its partner libraries, unleashing a couple hundred thousand copyrighted works onto the Internet? Sure seems possible. We're asked to trust that that's under control. The list of companies, meanwhile, that lose critical data grows daily. What successes do hackers have at breaking in to the sites of Google and its partner libraries? There'd be no contractual need to report this, so it would likely go unreported. Security experts tell us that most data losses to hackers go unreported, and we don't doubt it. No contract, no reporting, no control. "Trust us" security.

What about other companies that want to do the same thing? When we first filed suit against Google, we mentioned to reporters our concern that others would see the same business opportunity and join in. Microsoft and Yahoo, as I've discussed, have since jumped in, but in a manner that appears to respect copyright. But if Google gets away with its vast database, Yahoo and Microsoft won't stand still. They'll make their own databases of copyrighted works, just to keep pace. They probably would be joined by Amazon, which has been investing heavily in its search engine, and has a strong interest in protecting its position in online bookselling.

So we might have four or more companies, each pursuing private gain, digitizing the stacks of libraries. We'd have to trust each of them, naturally, and no doubt their partner libraries, not to misplace backup tapes or let down their guard against hackers.

Specialized databases wouldn't be far behind. WebMD might want to digitize a couple medical libraries for excerpting by its users. Fair use, naturally. Veterinarians, chemists and electrical engineers have their needs and websites, too. Harry Potter readers, science fiction fans and Civil War buffs wouldn't be far behind. All one needs is a scanner and a few hundred dollars worth of software to get going with a workable system. These digital databases would all be secure, not to worry. Trust us, but don't audit us.

What remedy would authors and publishers have if these databases are deemed to be fair use copies but one of them is hacked into or its collection of digital books otherwise finds its way onto the Internet? If we're fortunate, the negligent party would have substantial resources, but stating a claim against that entity might well be impossible. There's no license, so there's no breach of contract. We're postulating that the copy is a non-infringing fair use copy, so there'd be no remedy under copyright. And the defendant would have a strong argument that copyright law preempts any state law cause of action. Plaintiffs might well find themselves shut out.

What about uses by the partner libraries? The only contractual obligation imposed on libraries—at least in the sample available to us from the University of Michigan contract with Google—allows the University of Michigan to use the works at its website. No mention in the contract of limiting browsers to so-called fair use snippets. The contract also contemplates sharing the works with other academic libraries. The threat to the market for academic books couldn't be clearer or more direct. If Google and the University of Michigan are correct in their interpretation of fair use law, then profit-minded publishers and royalty-seeking authors would be wise to abandon that market.

What if the University of Michigan is wrong, and its uses overstep the bounds of fair use? Authors and publishers could just sue for damages, right? No, we'd probably be out of luck, as a state institution protected by the 11th Amendment, the University of Michigan is immune from damages claims under copyright law.

Fair Use & The Market for Online Delivery of Books

Recent developments make it appear likely that Google intends to leverage its interpretation of fair use into more than just ad revenue profits. In the past few weeks, there has been a spate of announcements, from Amazon, Random House and Google, of various schemes for selling and renting the right to view books online. Whether readers will accept these business models is anyone's guess, but at some point, someone will likely discover the equivalent of iTunes for books, and online book sales or rentals will take hold.

If Google can scan all copyrighted books into its databases as a fair use, then it may well establish its search engine as the dominant and unassailable portal to online books, the portal that readers and prospective buyers of online books would turn to first. It's not too much of a stretch to imagine that Google might do as any right-thinking corporation would, use that dominance to extract favorable terms, a high percentage of all proceeds derived from the sale or rental of books through its portal.

In this way, and the irony certainly won't be lost on the publishing industry, Google could turn authors' and publishers' own works, their own vast libraries of works, against them, securing the upper hand for the indefinite digital future. All it takes is a couple hundred million dollars, and an expansive view of fair use.

The Role of Licenses

Fortunately, it need not come to that. We don't believe the courts will share Google's radical, expansive, and devastating view of the scope of fair use. At some point, we believe that Google will do the right thing, and look to a licensing solution for the use it wants to make of these millions of works. It's too early to discuss what such a license would look like, but its general outlines might be guessable. Revenues, in the form of some reasonable split of advertising income, could be paid to authors and publishers. Rightsholders would have the right to review Google's security protocols, and Google would be obliged to contractually guarantee the security of its database. And a negotiated license could pave the way for a real online library—something far beyond the excerpts Google intends to offer through its Google Library program.

I would like to thank this Committee for holding this hearing and inviting us to participate.

Mr. STEARNS. I thank the gentleman.

I will start with the questioning here and Professor Jaszi, let me start with you. I am in my home and I have got a CD or a DVD, do I have the right to make a single copy in your opinion, for my own personal use? It turns out that I have a—I live in Washington, DC, and I have a home in Florida and occasionally I want to listen to music in Washington and I find it is in—up here and so I will make a copy. Can I make a copy either for a DVD or a CD? Do you think that is a legitimate use that I should have a right to do?

Mr. JASZI. Insofar as copyright law which incorporates the principle of fair use is concerned, I think the answer to that question is unqualifiably yes.

Mr. STEARNS. Okay. Do I have right to do more than one copy because I also, perhaps let us say, I am just postulating, I have another house, a beach house. Can I make a third copy, a second copy? So then I would have the original plus a copy in Washington and now I have a copy at my beach house.

Mr. JASZI. Again, as long as you are working within the zone of personal use, I think the answer is yes.

Mr. STEARNS. Could I go so far to extend, extrapolate that and say that I have a right depending upon my location, my car, my iPod, my homes, can I continue to make copies for my personal use forever for the different locations?

Mr. JASZI. We are talking here about your own personal——

Mr. STEARNS. Okay. What about my family, my sons, I have three boys. Let us say, you know, I have got this neat song I think you would like, can I make copies and give it to them?

Mr. JASZI. I think that is a much more difficult case.

Mr. STEARNS. Okay. And so you would not think that that is not correct.

Mr. JASZI. Not necessarily.

Mr. STEARNS. Okay. Ms. Bono had mentioned all these iPods that she and her daughters have. And my son, each of my sons has an iPod and right now they cannot go from iPod to iPod with their songs so Scott cannot give his collection to one son and he cannot give to another but Sony as I understand it, the—their MPT 3 you can do that. Is that acceptable for my sons to trade songs between them? I do not mean one song to download maybe 100 songs from one——

Ms. BONO. Would the chairman yield?

Mr. STEARNS. Yes.

Ms. BONO. Excuse me, but you can go iPod to iPod absolutely with the use of one PC.

Mr. STEARNS. Okay.

Ms. BONO. So you connect both iPods to that same PC.

Mr. STEARNS. Okay. So I stand corrected, you can go from iPod to iPod. I mean is that acceptable in your opinion that her daughters or my son can go from iPod to iPod?

Mr. JASZI. Again, I think that as long as we are talking now about copying for use outside the personal media space of the original consumer, wholesale copying along those lines cannot easily be justified under the doctrine of fair use. I would make, I would reach a different conclusion if the question were related to the sharing of a single song that was of particular interest to one user who wanted——

Mr. STEARNS. Okay.

Mr. JASZI. [continuing] affirmatively to make——

Mr. STEARNS. Jack Valente, he is head of the Motion Picture Association at our last hearing said he says it is incorrect and it is against the law. He wants to be sure that it is fully understood that you cannot even make one copy and he mentioned not even for one for personal use. So you seem to be disagreeing. Does anybody disagree with the Professor here strongly and would like to comment?

Mr. DeLong?

Mr. DELONG. Yes. It seems to me that this problem which is obviously very difficult under fair use doctrine where you are trying to assess the costs and benefits and everything is very easily solvable in a market and that is that if you want one copy, you are going to pay less than the person who wants 2, 3, or 20. And, you know, problem solved. If your children each want copies, you know, they will pay a little more than the person who only wants one. It is simply trying to see that——

Mr. STEARNS. Your solution is to say you cannot make any copies unless you get reimbursed from—that there should be a flag in the CD, a DVD that——

Mr. DELONG. Yes.

Mr. STEARNS. [continuing] says bingo my son wants to make a copy, he has got to get the password and pay, instead of 99 cents, he can pay 50 cents.

Mr. DELONG. Yes. Believe me they will event ways of doing this. They will event two for one. There could be all sorts of ways of doing this. But the fundamental question is well two, one why should the person who needs very light use subsidize the whole family of somebody else. And second, why get embroiled in it as a legal doctrine? Why get the courts embroiled in it when the market will solve it——

Mr. STEARNS. Well, Mr. DeLong, your point is well taken because my sons then go to their friends and they pretty soon if they are visualizing themselves after the Thanksgiving dinner downloading to their iPods or their MP3 iPod type Sony's then they would probably do it with their friends.

You know I have said from the beginning, I said it in my opening statement, there must be some technological way to solve this problem with a flag so that maybe if we have the final solution that you can do one copy, if you try to do more than one copy, then you have to go ahead. Does anybody care to—yes, Mr. Shapiro?

Mr. SHAPIRO. Yes, Chairman Stearns, the Audio Recording Act actually it was a negotiated agreement if you will between the music industry and the technology industry and they basically agree that you can make an unlimited number of copies off an original but no copies from that copy. Now this was done before the internet and it was a reasonable compromise which everyone agreed upon and Congress actually enacted and it kind of set the standard. But I think moving to distinguish here, the law, although I would like to agree with Professor Jaszi, the law is basically unclear. We do not know. I was at—a reporter asked me the question yesterday at a press conference, the exact same question you asked, you know, can I tell my readers that they can make copies? Well

before the Supreme Court, the content industry lawyer argued that you can of course you can make a copy of your own CD. And indeed when Congress considered earlier legislation, they talked about the right to record off a radio. There was a four colloquy where it was absolutely clear that you had the right to record off the radio. But some in the content community have taken a legal position that is absolutely unacceptable to make any authorized copies and there is really no such thing as fair use in that area. I think there is a better way. The law can resolve some things but I think Congressman Bono said it well. I mean there are certain issues in morality stealing is stealing is stealing. And morality sometimes takes over here and is not—the law can only go so far. Sharing some music with a friend to the extent that it exposes that friend to a new artist is not a bad thing. They may go out and buy that CD. It also may displace the sale. It is a balancing test but you need the ability to do that and you do have to have the constraint of morality.

Mr. DELONG. But sharing a new taste is a good thing too and we don't say you should get the ingredients for free. I mean, you know, fair use and free use are entirely different things and the fact is, you know, when technology is ringing the transaction costs out of these, we are far better off just to rely on markets than to put courts in position as being central planners as to what is fair.

Mr. STEARNS. My time has expired.

Ms. Schakowsky?

Ms. SCHAKOWSKY. Although one can copy a Martha Stewart recipe and pass it on to others freely.

Mr. DELONG. Well there are—I did not say we were going to solve all the tough issues.

Ms. SCHAKOWSKY. Okay, all right. I wanted to ask Ms. Adler, I am very concerned about lots of uses but primarily I am concerned about libraries which I think are fundamental to our democracy in so many important ways and to our history. And so I wanted to follow up on some of the things you said.

You stated that libraries are being forced to shift from purchasing work to getting access licenses from—for use from publishers. Are publishers stopping libraries from buying books? Are you being pushed into license agreements because of fear of copyright infringement? So if you could explain that a bit?

Ms. ADLER. Certainly, I think it is a combination of factors as we saw the rise in the availability of information in electronic form particularly in the context of journals. Publishers move from predominately print based offerings to electronic particularly we also see the rise of E-books, electronic books that are beginning to be introduced more and more in libraries. That is not to say we still do not have large number of volumes and tangible books in our libraries but predominately the use is licensing and as I mentioned, it is because it provides greater certainty to the publisher as to how that information will be used and protected. Typically you will see in our libraries that we will be negotiating licenses on behalf of an individual institution or through Consortia and it is in that context that we will try and imbed in our license agreements as many exceptions that match or mirror what is in the Copyright Act as possible but that is a very, very difficult and uphill battle for us to achieve.

Ms. SCHAKOWSKY. And is it possible that these licenses may end up requiring that you charge patients fees for services that otherwise you provide for free? I mean do you foresee that as a potential problem or not?

Ms. ADLER. That is not—the way the library fortunately or unfortunately, the library community seeks to make access to information as transparent as possible to our users. Our goal is for them to have the most effective and easy access as possible. And so what we try and do through our license agreements is to make sure that they do not have problems accessing that information and that there would be additional charges then for example. We will absorb those in the license agreement on behalf of our user community so that we do everything that we can to make sure that there are not additional——

Ms. SCHAKOWSKY. Well let me ask you this. Would that put additional financial burdens then on libraries?

Ms. ADLER. Absolutely.

Ms. SCHAKOWSKY. Okay.

Ms. ALDER. Without question.

Ms. SCHAKOWSKY. And you also raised the issue of preservation of materials. Could you elaborate on that a bit? I mean that ought to be a concern I think to all of us if that is a major function of libraries and that we could potentially lose that function.

Ms. ADLER. It is an enormous concern for the library community. The library community, that is our charge, that is our mission to provide long-term effective access and preservation of all information regardless of format from cuneiforms on up to electronic resources and it has become such an issue for us as we move to licensing these resources where we do not have the tangible item per se to preserve. And if there are conditions in a license that prohibit us from preserving those electronic resources, there is nothing that we can do about that. And most recently, the Mellon Foundation came out with a call to the community that they see this as a crisis and that they are hoping that all sectors both private and public and foundation, the foundation community deal with this crisis and preservation of our information resources.

Ms. SCHAKOWSKY. Thank you.

I wanted to ask Mr. Aiken or just have him comment on something. My understanding is that in addition to consumers that there actually are authors who seem to support the Google print project. I just wanted to read you a quote from a Chicago author. I represent a part of Chicago. It says "Dear Google, your search engine is the primary way that people find their way to my website and consequently my book. I asked my publisher for my book to be included in Google print. I was told they did not do that. Lack of exposure is the primary reason that at book like mine would fail in the marketplace. Please let me know if I can do anything to help." And I understand there are dozens of testimonials like this on Google's website and on the bloggs and so I am wondering why we cannot just deal with this opt out for authors and allow others who would support this idea to go forward?

Mr. AIKEN. There are of course tens of thousands of authors out there. It is no surprise that Google has been able to find a dozen or two that that——

Ms. SCHAKOWSKY. Well, first of all, let me say that some I think have found Google. I mean you are making it sound like they have scouted around to find those so——

Mr. AIKEN. I do not know the circumstances under which those——

Ms. SCHAKOWSKY. Okay.

Mr. AIKEN. [continuing] appeared at Google's website.

Ms. SCHAKOWSKY. Right.

Mr. AIKEN. There is nothing inconsistent with having works be available on line and being licensed for that use. We are not opposed to the idea of making books searchable online. We are opposed to it being uncontrolled without a proper license. Because a Google collection copyright is a search engine exception to copyright and any search engine large and small and there are dozens would be able to take advantage of it. And the security concerns are real and on the internet we think it could easily lead to widespread piracy.

Ms. SCHAKOWSKY. Thank you.

Mr. STEARNS. The gentleman from Texas.

Chairman BARTON. Thank you, Mr. Chairman.

I mean it is obvious I am a supporter of fair use and my name is on the bill along with Congressman Boucher and Congressman Doolittle so I am biased here.

But I have a question to those of you that oppose the bill. If I go to Wal-Mart or Best Buy or Home Depot, almost anyplace that sells video and audio equipment, I can get home recorders, I can get CD burners, I can get blank tapes, I can get blank CD's. Should we outlaw those devices? Anybody think we ought to outlaw them? Let the record show nobody said we ought to outlaw them.

Ms. BONO. Can I answer since I am opposed to the bill?

Chairman BARTON. Well if we cannot outlaw those, those can all be used. Those of you that oppose the concept of fair use those can be used to make a copy of something. And according to the most radical opponents of the bill, you cannot make a copy of anything. There is no fair use. And that just flies in the face of reality. It flies in the face of the marketplace. It—you know, everybody in this country is a criminal and I just do not believe that. So I do not know why we cannot agree to find a compromise where—I do not want the folks that Ms. Blackburn and Ms. Bono and others supports so strongly, the creative people in this country, I want their copyrights protected. I want their creativity protected but current law codifies that you can make a limited number of copies of certain things for your own personal use. I just do not see why we cannot somehow find a meeting of the minds on this.

Let me ask my friend, Mr. Shapiro, is it technologically possible for your industry to create and manufacture and sell equipment and the materials that are used in that equipment that would technologically allow a small number of copies but it would be a small number. Is that technologically possible?

Mr. SHAPIRO. I will answer that of course, I just want to answer your first question actually but I will answer both very quickly.

Chairman BARTON. Well I appreciate that. It is so kind of you.

Mr. SHAPIRO. You know what has happened in the last couple of weeks is emphasized the importance of 1201 because now the fixes

that are being put up by Microsoft and things like that, they are actually, I believe they are violations of the Digital Millennium Copyright Act because you have to circumvent the copyright protection scheme just to basically save your computer. So I think if 1201 was ever important, it is much more important in these last 2 weeks because a lot of people's computers are in jeopardy. And in a sense, some companies are in a sense violating the law to protect people's computers. Now that is not the observed result that Congress intended but it does make 1201 more important.

In terms of the ability of any of our 2,000 member companies of the Consumer Electronics Association to actually come up with the types of products you are talking about, there are technologies which I am sure can be—and products can be built to limit the number of copies. There are challenges though obviously because you could always somehow make an analogue copy of something and pass it along and things like that and there is always, you know, if you build a better mousetrap you do get smarter mice. I think you really have to rely upon the fact is distinguishing what is a commercial purpose from a private purpose.

Chairman BARTON. But even if it is a private purpose, I agree you cannot make unlimited copies. If I have for Christmas if I—it's not legal for me to go buy one CD and then burn it for all 40 of my relatives. You know, that is a private use but, you know, I think it is okay if I buy one and burn one for my home and one for my car or one for my condo in Washington and, you know, but I am not trying to let people under fair use set up a commercial operation. That is not what this bill is about.

Mr. SHAPIRO. Under the Audio and Recording Act, Congress has decided that for digital audio copies at least you can make an unlimited number of copies off of one CD but you may not make any copies of those copies but actually the equipment is now designed and set up that way. Plus when you buy a digital audio home recording product, you are actually paying a royalty that goes to the copyright owners. You are paying for the hardware and that money is collected and divided among copyright owners. So in a sense, Congress has actually addressed the question about directly in the Digital Home Recording Act. I think the questions are coming up now because those that entered that deal want to look at it again and obviously the internet has had an impact.

Chairman BARTON. I want to ask Mr. Hirsch a question. First it is just a personal question. Are you any relation to a Steve Hirsch who went to Johns Hopkins and went to graduate school with me at Perdue?

Mr. HIRSCH. No, I do not believe so.

Chairman BARTON. Okay, well, he is a good guy so. I am sure you are good guy, too. That was not to imply that you were not.

My question to you is your trade association, the products that the folks that are in your association manufacture and sell who gets royalties from their sale? Royalties or residuals or things like this?

Mr. HIRSCH. It is the people who own, the creators of the game, the people who own the copyright in the game.

Chairman BARTON. But if their licensed in other countries, the creator gets that, I mean does everybody who participates in the creation get a royalty or just a very few of the people?

Mr. HIRSCH. Well it is a—copyright is a collective enterprise in the game development business and it is generally the game developing company or the——

Chairman BARTON. Well for example if you have the Madden football game, does Mr. Madden get a royalty? Does every NFL player who's represented in the videogame get a royalty or does the creator of the software package get a royalty or do all of those people?

Mr. HIRSCH. Well, I mean the royalty schemes for various games operated differently. Obviously to some extent, to the extent that third party intellectual property, their likenesses, the trademarks, et cetera that are being incorporated into a game, there are royalties that are generally paid out to the owners of this——

Chairman BARTON. But the point I am driving at in the video industry, if Tom Cruise does a movie or Lucille Ball did the I Love Lucy Show, their contracts allow that if that is shown on TV or repeated or shown in the movies again, they can get some residual or some royalty. But in the music business if George Strait records a song and it is played on the radio, the songwriter and maybe the producer gets the royalty or the residual but Mr. Straight does not. He only gets when they sell his record or sell his CD or whatever it is he gets a one time payment but he does not get, it does not keep coming over and over again. And in your—so in your business, these fees that are accrued, I am just trying to figure out who gets them? Is it just the producer that gets them or does everybody in the chain get them?

Mr. HIRSCH. It is the company that created the game so that the employees of that company would obviously benefit to the extent that that company is able to recoup its investment.

Chairman BARTON. Okay. My time has expired, Mr. Chairman, thank you.

Mr. STEARNS. Mr. Gonzalez?

Mr. GONZALEZ. Thank you very much, Mr. Chairman.

And let me start off I guess with an observation. We are talking about the anti-circumvention clause and the exception carved out for fair use and I do not see why we have to do violence to either and I know the chairman of the full committee would like for some sort of technological fix or compromise and hopefully we can do that. For you all, the interested parties and with vested interests to rely on us to come up with that, I think can be a little dangerous experiment. But we did recognize one thing. I think we call agree that when it comes to proprietary rights, it is going to be very difficult for someone to go out there to protect them by trying to sue them or enforce them, millions of times over because that is what we are talking about now is that technology has empowered individuals to collect, copy, and disseminate information like never before. So it is real hard legally to try to enforce that right in that type of environment.

So my first question will go to the Professor and then the second question everyone for their own opinion and read on the thing. And I'm looking here at Mr. Band's written testimony. The Supreme

Court explains that intellectual property system requires a "balance between the interests of authors and inventors and the control and exploitation of the writings and discoveries on one hand and society's competing interests in the free flow of ideas, information, and commerce on the other. The question to the good professor is can technology by empowering individuals, millions and millions with the ability of course to copy, disseminate, store, reproduce, do all these things, at some point, do you just reach this particular juncture where fair use is rendered or let's say protecting or proprietary rights is rendered meaningless by fair use. That is going to be the question. I mean can technology move us forward to where you have so many individuals that are capable of compromising whatever this proprietary right was in the past that the environment is totally changed. That the law and the principles that underlie proprietary rights is actually going to be changed fundamentally. Can technology do that in this particular instance? I say no but I want to hear your opinion.

And then to the rest of you and quickly of course because—but I was given the additional time because I had no opening statement and I appreciate that, Mr. Chairman. What is the objectionable behavior we are really trying to address? I heard individuals today saying that you know this could impact artists, teachers, students, librarians, documentary filmmakers, but really is that the case? Now I have heard Mr. Shapiro and I think he said well the distinction would be between private and commercial use. And that sounds good and I am not real sure where we would go with that but that does sound pretty solid. But then I heard Ms. Adler say that the technological or tech controls do impact the practical use and application of fair use. So that is something else that we never think about. Well and maybe this is a way that we can protect it but by allowing that, then it does impact legitimate fair use. So that question goes what is the objectionable behavior we are really trying to address realistically and I do not want you all to go and use Chairman Stearns' son and his iPod and such. I really want to know what we are here all about. But first, Professor, is it Jaszi or——

Mr. JASZI. Jaszi, yes.

Mr. GONZALEZ. Jaszi.

Mr. JASZI. Thank you very much. It is a wonderful question and I think the answer may put me a little bit at odds with some of my colleagues at this table and perhaps with some of the members here today as well because I do not believe, in fact, that information environments or copyright law are undergoing a fundamental cataclysmic change as a result of changes in technology. There have, in fact, been changes in technology including changes in technology which have put greater and greater power to reproduce and to distribute into the hands of individuals throughout the history of information markets. And copyright law has not had to be remade in each of those cases. In fact, I think, the enforcement problem that you reference in your question is part of a much larger issue like the income tax system. The copyright system works and functions only on the basis of ultimate respect by consumers. No amount of enforcement whether it is technological or legal will ever make those who wish not to disobey or who choose to disregard

copyright into law-abiding citizens. That is, I think in the end a hopeless project whether it is to be accomplished by draconian technological or by draconian legal means. The greatest risk as far as I can see in the current arms race that is taking place between copyright owners and copyright users around technologies and digital rights management is that gradually the public is losing its respect for this critical aspect of our legal system. And when that respect is gone, then no amount of enforcement and no amount of technical ingenuity will bring it back.

Can I take a crack at your other question, too, because I think that the concern that I tried to articulate is precisely the concern that resides with the practices of a wide range of user groups who have always been able in the past to make use of fair use, to add value to what has gone before and to control new content to the commonwealth of available material. And I gave the example of the teacher who wants to use film clips in a classroom as an example of a situation in which traditional copyright fair use would apply but no exception is likely to be available under the Digital Millennium Copyright Act. So one can multiply those examples in terms of students, in terms of young musicians who are coming up and trying to learn their trade by imitating and copying the styles of others before they develop styles of their own. We can multiply those examples.

I want if I can to take a certain amount of issue with Mr. DeLong's earlier statements that this is really all about markets and transaction costs. That vision of fair use really approximates where the courts and the academic world were 20 years ago. And since then over the last two decades there has been a consistent movement in the courts and in the academic world toward a recognition that fair use is not simply about greasing the wheels of the market but about promoting cultural progress in all of its forms. And that is why the courts have moved more and more to the formativeness standard in their analysis of fair use issues. So I think it would be a mistake to think of this only in terms of anti-piracy enforcement on the one hand or the facilitation of markets on the other. Much more is at stake here. What is at stake is literally the future of our culture.

Ms. BONO. Would the gentleman yield for clarification?

Mr. GONZALEZ. Sure. I have only 16 seconds but if the others would still attempt to answer the underlying question of the objectionable behavior, yes, Ms. Bono.

Ms. BONO. Yes or no, I'm sorry to—has there ever been a case brought against a classroom for showing a snip of a film?

Mr. JASZI. I am sorry I——

Ms. BONO. Has there ever been a case brought against a teacher for showing a clip of a film in a classroom?

Mr. JASZI. No, but there were many who bought——

Ms. BONO. Thank you.

Mr. JASZI. Can I finish the answer, please? There were many law-abiding features——

Ms. BONO. I'm sorry——

Mr. JASZI. [continuing] forego the practice because of the DMCA.

Mr. STEARNS. The gentleman's time has expired.

Ms. Blackburn?

Ms. BLACKBURN. Thank you, Mr. Chairman.

I am going to see if the voice will hold out for this a couple of points about Chairman Barton's questions on equipment. No one is seeking to outlaw equipment that allows creators and inventors to grow in craft and bring forward an idea and craft a trade to create a product like a songwriter or a musician to create something to get it ready to move to the marketplace where it can be a commodity that does have an economic value. We also want to be sure that those that create that product such as individuals that Mr. Shapiro works with have the ability to retain the right to be paid and compensated for their ideas that do become tangibles and commodities and deserve to be paid.

Professor Jaszi, I think if I had been one of your students you and I would have feisty debates. I think that when I hear someone use the word draconian and apply that in a constitutional framework that it is of concern to me. I do not think there is anything draconian about the constitution of this Nation or about the Fifth Amendment and I would, a yes or no will do on this, I would think that you probably agree with the Kelo decision if I am understanding what you are saying today.

Mr. JASZI. I am sorry, what——

Ms. BLACKBURN. Do you agree with the Kelo decision from the Supreme Court? Are you not familiar with that decision?

Mr. JASZI. What? I am not hearing very well, I am afraid.

Ms. BLACKBURN. Kelo, K-e-l-o.

Mr. JASZI. No, I am not familiar with that decision.

Ms. BLACKBURN. You are not familiar with that. I would recommend to you and Mr. Chairman, I would like to submit for the record, I do not think this has been submitted, an article by Mr. DeLong that I actually read last night and I have got it on my desk pertaining to the Kelo decision. I would like to submit that article for the record.

[The article follows:]

[Release 1.7 August 2005]

ONE DEGREE OF SEPARATION: KELO & H.R. 1201

By James V. DeLong

Everyone knows the game *Degrees of Separation,* where one finds the connection between two seemingly distant people.

The same game works for seemingly unrelated policy issues. For particular example: it takes only a single hop to get from the recent eminent domain case *Kelo v. New London* to H.R. 1201, a bill on intellectual property and technological protection measures (TPM) in the U.S. House of Representatives.

The Fifth Amendment to the Constitution says that private property may be taken for public use only if just compensation is paid. The phrase "public use" has always been assumed to be a limitation, meaning that a state cannot take for a strictly private use, simply transferring property from A to B, even if it compensates A.

In *Kelo,* the Supreme Court addressed the issue whether this long-standing assumption has any real content, and its answer was "not much." New London took Ms. Kelo's house because it wanted to transfer the property to a redevelopment authority, which had some grandiose plans for the area. This was good enough to meet the public use requirement, said the Court, since: "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."

Of course, it would be pretty hard to fail a test that requires nothing but some sanctimonious verbiage. As Justice Scalia said in an *earlier case:* "Since [a harm-

preventing] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff."

Kelo has been met by a rush of criticism from both left and right, most of it refreshingly Adam Smithian. The gist is that it is simply not a proper function of government to decide that B can make better use of property than A. If this happens to be true, then the free market provides the perfect remedy—let B buy it.

Perhaps there is also a growing sense that the government raven for pork to distribute to favored constituencies is already out of control in spending tax money, and that giving it carte blanche to redistribute property in general is the road to perdition. (If this sense is not growing, it certainly should be.)

But at least Ms. Kelo got paid for her property. Pending before the U.S. Congress at this very moment is a bill designed to take property from a bunch of As and give it to a bunch of Bs, only without paying a cent to the As. And it, too, relies on a test composed of sanctimonious verbiage that could be failed only by the deeply stupid.

The bill is H.R. 1201, the Digital Media Consumers' Rights Act of 2005, and the background is the Digital Millennium Copyright Act, which is section 1201 of the Copyright Act (hence the H.R. number). The DMCA makes it illegal to crack technological protection measures (TPM)—commonly called encryption—used to protect copyrighted content. The DMCA also makes illegal the distribution of code cracking tools.

H.R. 1201 would repeal this ban insofar as the code cracker or the toolsmith wanted to obtain, or help others obtain, access for purposes of making "noninfringing use" of a work.

There are indeed lots of noninfringing uses of copyrighted works, most of them created by the courts under a doctrine called "fair use." The doctrine is a *grabbag*—it includes such uses as excerpts for book reviews; some transformative uses, whereby a work forms a foundation for broader efforts; political commentary. There is a dash of transaction cost thinking—it can be fair to photocopy an article for educational purposes if getting permission is a long and arduous process.

Because of the variety of purposes crowded into the doctrine of fair use, it would be is a dull code cracker indeed who could not attach a plausible claim of fair use to almost any work. Want to write a class essay on "Images of the Mafia in American Art?" Surely this commentary entitles you to get *The Sopranos* by hacking into the encryption that protects HBO. Want to compose "Variations on a Theme of the Grateful Dead"? Then hack your iPod to access the raw code of their music.

Note that such arguments would justify not just hacking by the nerd elite, but mass distribution of code-cracking tools. And, of course, once the tools are available, or the decrypted copies are available, then there is no way of controlling them. And the IP involved has then, for all practical purposes, been seized from all the As who used to own it and redistributed to all the Bs.

No one, including the backers of H.R. 1201, is so dumb as not to know that this would be the effect. Their precise goal is to abolish IP rights in favor of some mystical commune wherein all IP is free as the air and creators are compensated by government. Like the New Haven Redevelopment Authority, they have a grandiose plan.

Current fair use doctrines were invented in a different technological age. They need to be rethought to fit contemporary circumstances, and this is indeed happening in the marketplace. Consumers are making known that they want some ability to copy CDs, for example, and the TPM people are setting up systems that allow it, to a limited extent.

Other new divisions of property rights between creators and consumers are being negotiated out through marketplace experimentation. The last thing needed is a heavy-handed legislature deciding that it can decree how this complex territory should be redeveloped, and then trampling over both property rights and market processes.

Ms. Kelo lost in the Supreme Court, but Congress need not replicate the error.

Mr. STEARNS. So ordered.

Ms. BLACKBURN. Thank you. And Mr. DeLong, I thank you for that. I thought it was very insightful and I agree one degree of separation between Kelo and the affront to private property rights there and to intellectual property rights. I think we have to be very, very careful how we approach this issue.

Mr. Shapiro, you can never play poker, my friend, your face tells the whole story.

Mr. SHAPIRO. That is what my poker mates say.

Ms. BLACKBURN. Yes, I am sure. We have—your industry's content and tech industries have been working together for a long time to create products that meet consumer demand and desires and I wish that we could see more participation between you guys and some of the content producers. I would like to see more participation. We would like for everybody to get along and——

Mr. SHAPIRO. Can I respond?

Ms. BLACKBURN. No, you may not. But there is a lot of discussion around to level one which would essentially allow consumers to hack through the content protection in the name of fair use. And sir, that is very—of great concern to me. So I have got to question for you. As we are looking at this and looking to address this issue because sure everybody is concerned about what would be an allowed use and then what oversteps and becomes theft. So do you think that the method currently provides enough flexible options for individuals that want to look at in home use and do you think that we need to actually go in here and legalize hacking tools and theft tools? Do you think we need to do that?

Mr. SHAPIRO. I am not sure I understand your question but I will answer what I think I heard. I think you asked about the marketplace providing solutions to some of these problems.

Ms. BLACKBURN. It seems to provide a lot of options right now.

Mr. SHAPIRO. And I think the market—if you look at Apple iTunes and some of the evolving—and I assume mostly you are talking about the audio world, music services. I think the marketplace is quickly——

Ms. BLACKBURN. Audio and video both.

Mr. SHAPIRO. I am sorry?

Ms. BLACKBURN. Go ahead, I am sorry.

Mr. SHAPIRO. I think the marketplace is quickly providing solutions. I think the music industry made a very bad mistake by just selling CD's and not giving consumers any options on them and fighting the internet. Now they have turned around, it is a little late but it is happening because most people want to do the good thing. And we have worked with the content community. Jack Flint and I set up the group that created the DVD standard which is a basic standard that by all accounts has worked very well. And you did say that no one is seeking to block equipment. That is totally not true. Indeed the RIA is pushing legislation which would make this Delphi-XM product illegal. They are trying to say you can only record for 30 minutes continuously. That would deny me the opportunity to listen to this hearing on XM radio played back later. So there is a whole bunch of products that have been tried to make illegal. I could talk about Clear Play, I could talk about Replay. I could talk about the VCR itself. There are so many products which would have been thrown off the market and some of them were. Replay was in bankruptcy, its product does not exist. Its competitor TiVo does simply due to litigation. So, yes, the content community does want to make all these products illegal.

Thank you.

Ms. BLACKBURN. Okay, thank you.

Mr. Band, if I can come to you for just a moment. In your testimony, you have a sentence in there as the DRM's become more per-

vasive, Congress may need to consider mechanisms for preserving fair use. Does NetCoalition support or oppose H.R. 1201?

Mr. BAND. Congresswoman, NetCoalition currently does not have a position on that specific piece of legislation but we are worried about the general phenomenon of DRM and the possibility that it could have a chilling effect on fair use and other lawful uses so, you know, as the legislative process moves forward, you know, we may have to take a specific position but currently we are more concerned about the general pattern and we are also concerned about things like the broadcast flag which would be again technological mandates. We are concerned about the precedent that that sets for Congress regulating technology. You know we heard a lot about the marketplace but that would certainly be an instance of Congress fiddling with the marketplace.

Ms. BLACKBURN. Okay, thank you.

I yield back.

Mr. STEARNS. Ms. Bono—no, excuse me.

Ms. BONO. Thanks, Mr. Chairman.

Mr. STEARNS. Mr. Ferguson, I beg your pardon, Mr. Ferguson.

Mr. FERGUSON. Let me just give you my thanks. Some of you are really lucky that Marsha Blackburn does not have her voice today. We are not but some of you are.

Chairman Barton asked a question before about technology and VCR's and CD burners and whatnot and asked if we should make them illegal and I have not had a chance to ask him where he was going with that. But clearly nobody thinks we should make illegal devices or technologies that have a perfectly lawful use. It is sort of like asking somebody the question should we make cars illegal because they might be used as a getaway vehicle in a bank robbery. Well of course not, they have a perfectly legitimate use. We should not make them illegal but that does not mean that those devices do not also have an illegitimate use or perhaps a use which is not legal. I just thought that would be worth sharing.

A couple of questions, one for Ms. Sohn, first, thank you all for being here today and this is a really vigorous debate and I am glad that we are having it. Ms. Sohn, you and perhaps others have kind of described this balance between the rights of copyright owners and the rights of consumers and how, I do not know if you specifically have said this but some have said you may subscribe to this that that balance has kind of been thrown out of whack a little bit. And based on that claim, those who are putting forth that claim have asked Congress to kind of correct that imbalance in favor of consumers. I do not see how consumers are being harmed by the current copyright system, by the regime that is currently in place. I mean if anything, current copyright regime seems to have provided consumers with more copyrighted works available in more formats at more varied price points offering greater flexibility than at any time in history. I mean just several years ago you could not go buy a $15 DVD much less get a song for 99 cents from iTunes. You could not get last nights episodes of The Office on demand for a buck. You could not download an audio book. All of these new offerings for consumers depend on digital rights management technology of one kind or another. In light of this, I do not know how someone can contend that DRM's adversely effect fair use. It seems

to me that without DRM's a lot of this content would not even be there. Consumers would not have these products to make fair use of at all.

I just want to ask you if you could perhaps talk about how, explain to me how gutting 1201 can possibly be to the advantage of the consumer when frankly it will discourage industry from placing a lot of these products in the stream of commerce to begin with.

Ms. SOHN. Well I have to say I agreed with just about everything you said.

Mr. FERGUSON. Well we are making progress.

Ms. SOHN. And we are making progress absolutely but there is one caveat to that. And that caveat is that the ability to make fair use is limited by some of those digital rights management tools. Now I will reiterate for about the hundredth time is that my organization does not oppose digital rights management. But the problem is to the extent that some of those tools diminish or limit people's fair use ability, ability to make fair use or products. There needs to be a very narrow exception for lawful uses of the circumvention rule and that I——

Mr. FERGUSON. How is the bill that we are talking about a narrow exception? I mean that is the most optimistic view of, you know, we are talking about—some folks are saying well this bill would just open the door a crack like this but it would do nothing to prevent the next person from kicking that door wide open.

Ms. SOHN. Look, pirates do not rely on fair use, okay. I mean, you know, pirates will do what they do whether there is, you know, fair use or not or whether there is DRM or not.

Mr. FERGUSON. But that—now it seems to be——

Ms. SOHN. What this bill does—let me—if you would not mind if I finished, what this bill does is allow people who want to make legitimate uses of digital products to do so. And the criminals will still be subject to all the strong enforcement, all the strong penalties of copyright law.

Mr. FERGUSON. I have limited time. I want to ask Mr. Band a question. I am going to start a new website. I am going to call it Snoogle. All right. And I am going to copy all of Google's technology and their artwork and their search results verbatim. I am going to make a perfect digital copy except I am going to change the spelling. I am going to call my site something completely different from Google, I am going to call it Snoogle. It is an educational site. Is there a problem with that?

Mr. BAND. Yes, that would be a trademark violation.

Mr. FERGUSON. Have you trademarked Snoogle?

Mr. BAND. No, but I think it would be likely to confuse consumers and then that is the touchtone issue with trademark law is it likely to confuse consumers. Now it is conceivable that you might be able to make a fair use because there is a fair use defense in trademark and, you know, you would be able to try to convince a court that that would be——

Mr. FERGUSON. It is just for me but I mean obviously I would not be able to keep somebody else from using it too. If it is just for me that would be okay, right?

Mr. BAND. No.

Mr. FERGUSON. Why, if there is a fair use, if it is just for my own personal use.

Mr. BAND. Well personal use—there is no—fair use in trademark is different from fair use in copyright.

Mr. FERGUSON. Okay.

Mr. BAND. And there again you are putting it on website.

Mr. FERGUSON. I am not a lawyer as I appreciate your enlightening me on it.

Mr. BAND. In any event, you are making it, you are putting it on a website and making it publicly available so there is a possibility that it would be confusing to consumers and that would be the issue that the court would have to look at.

Mr. FERGUSON. So it is Google's intellectual property?

Mr. BAND. That is right.

Mr. FERGUSON. That they want protected and they do not want to stolen.

Mr. BAND. Under trademark law that is right.

Mr. FERGUSON. Fair enough. I think my time is up.

Mr. STEARNS. The gentleman's time has expired.

Ms. Bono?

Ms. BONO. Thank you, Mr. Chairman.

I have so many notes here, I appreciate it. Mr. Shapiro, you talked about the Delphi little handset you have there which I own a couple myself. But is there not in fact a paradigm of business that allows for the broadcast of music and that is different from the business model of buying music? Does the—does it change? I am listening to broadcast satellite radio, digital radio whatever it is going to be and suddenly now I own this song. Is that perhaps a violation of two different agreements though that I as a songwriter for one, publisher for two, performer for three perhaps, are there not two different sets of rules that adhere to in broadcast as to a purchase of music?

Mr. SHAPIRO. My understanding the rules governing copyright and broadcast are somewhat, in fact, very different than some of the others and there is really two types of digital broadcast. There is a national satellite footprint which is XM and Sirius——

Ms. BONO. Right.

Mr. SHAPIRO. [continuing] in competition with each other and then there is the local emerging one called HD Radio but both are very, very threatened by the proposals before Congress now.

Ms. BONO. Well they are threatened but there is also some sort of confusion again as the copyright holder not a performer but if I were—and something that Chairman Barton was talking about was performance royalties and there is a difference between performance mechanicals, songwriters. There is a whole bunch of different sets. The music business is so very complicated. But you are changing simply by recording that music from a broadcast right to purchase rights. And there is some sort of confusion with that No. 1. But also you are concerned your sole concern when you just spoke was the sale of these gizmos. It is not the sale of—you are not talking about protecting the guy. You are upset because gee we might not be able to market all of these great devices that are going to come to market based upon exploiting intellectual property.

Mr. SHAPIRO. Well Congressman Ferguson talked about all this tremendous growth of intellectual property and creativity. I kept thinking it is all created by technology and that is what allows it. And in a sense they are mutually dependent industries they——

Mr. FERGUSON. What——

Mr. SHAPIRO. Would the gentleman yield? All the creative new intellectual property has been created by technology? It has allowed it to occur. What I am saying is that they are symbiotic industries. This great growth in technology has allowed a renaissance in creativity which has gone a little bit less corporate in more individuals so every American and everyone in the world is a creator. It is phenomenal. And that is what the——

Ms. BONO. That is the point. Reclaiming my time.

Mr. SHAPIRO. I am sorry.

Ms. BONO. It is—no, please do not apologize. It is great ideas. I do not care whether you are creating technology or you are creating music or movies or a book, it is great ideas that we are all trying to protect. You are also trying to protect the sale of hardware based upon the great ideas and that I think is my colleague's point as well. Also the Chairman mentioned earlier iPods and he was trying to explain to me or staff was that technologically I was wrong about iPod to iPod. I said iPod to iPod via a PC or some sort of central dissemination point which is true. Not only that now you can go into BMW, BMW is now marketing a spot for your iPod so nobody, I do not know a single copyright holder, I do not know a single songwriter, single author who is saying I do not want people to enjoy my work. I do not want you to enjoy it in your house, in your car, in your kitchen, on the airplane ride here. I do not know a single person who has said that. And I a little bit take offense to Ms. Sohn saying that we are calling our constituents thieves and pirates because we are not saying that at all.

You know, but my biggest question and I would like to go right down the row yes or no if we can. Is it imperative that we pass this this year or can we give this a year or two to work out and let the market work its place. I will preface that by saying Mr. Shapiro said is it is imperative now because of 2 weeks in light of what Sony did. Sony has a patch out there. They have done a mia copa, we all have it, we have all seen it. There is a patch out there to put that genie back in the bottle. So under you know, sort of removing that argument because of Sony, do we have to do this now? Can the market continue to evolve into answering some of these solutions for us? So if we could start with the Professor and yes or no can we give it a year or two to look at this and work at it a little bit more?

Mr. JASZI. My answer would be that if possible that legislation should be enacted now.

Ms. BONO. Okay, thank you.

Mr. JASZI. We have had 7 years——

Ms. BONO. Okay, if we can do it—I am sorry but a yes or no down the row would be great.

Mr. SHAPIRO. It is never too early to do the right thing.

Ms. ADLER. I would echo the previous two, the answer is yes. Thank you.

Mr. BAND. As I said before, NetCoalition does not have a position on 1201 but if we are taking more time on 1201, we definitely should take more time on the broadcast flag and other digital rights mandates.

Ms. SOHN. Yes, we should pass 1201 and we should let the market work.

Mr. DELONG. 1201 would not only legitimize the idea of fair use it would——

Ms. BONO. Yes or no, I'm sorry. I made the guys I am opposing say yes or no so I——

Mr. DELONG. You should give it another century.

Mr. HIRSCH. We agree. We think that you should let the marketplace work this out.

Mr. AIKEN. The Authors Guild has no position on this.

Ms. BONO. All right, so obviously as one would expect with a—yes, 5 to 2, well gee did it start out that way? We will not mention that. But again, I—my last question is for Ms. Adler.

How do you preserve books? Why—I think that there is really in your argument to me there is a huge underlying issue of the tangible versus non-tangible. How do you—does a publisher give you a second copy of a book or if somebody destroys a book is the publisher—do they have to give you another book for free?

Ms. ADLER. No. The item that is in our collection is what we work with. And we preserve tangible items under very different circumstances. There is Section 108 of the copyright allows us under certain circumstances to preserve books and different formats under different circumstances. And sometimes we look to fair use to preserve as well if there are circumstances under 108 that do not help us preserve those items. But in the case of books where the Copyright Act explicitly gives us that privilege, if you are asking how do we physically go about it, there are a number of techniques that we undertake related to preservation. Many books printed early in the century were printed on acidic paper and they are deteriorating very quickly.

Ms. BONO. Okay. But that is also public domain anyway by now. Correct?

Ms. ADLER. Not necessarily, some are, some are not. And what we are trying to do, there is in fact a program that the National Endowment for the Humanity supports called the Brittle Books Initiative which is now focused on both books microform and digital as a way of preserving these cultural resources in our libraries for future generations of users.

Ms. BONO. So does that—but does that involve the whole copy of that copy where the artist——

Ms. ADLER. Yes.

Ms. BONO. [continuing] does not receive anything?

Ms. ADLER. Yes, because the library has purchased that information resource previously. And we have legitimately purchased it tangibly and have the rights to do that under the Copyright Act.

Ms. BONO. But if you had to buy a new book, would you ask the author to exempt that purchase from his right to earn money off of that new book, if you were to buy a second copy?

Ms. ADLER. We often do buy second copies in libraries.

Ms. BONO. And do you pay the author for that work, the second copy?

Ms. ADLER. Usually we are not buying through—from authors directly in libraries, we are buying through large publishing companies then those royalties will go through the publishing companies back to the author.

Ms. BONO. So you do not ask for some sort of exemption because you have already bought the intellectual property portion of it once before. Correct?

Ms. ADLER. We have not—we have bought the book, we have not bought the intellectual property that the author may have. We have certain exemptions to use it legitimately through the Copyright Act.

Ms. BONO. Thank you. Mr. Chairman, I see that my times has expired. Thank you.

Mr. STEARNS. The gentlelady's time expired.

We have the author of the bill who is not a member of the subcommittee but a member of the full committee and we are going to allow Mr. Boucher to ask questions. Mr. Boucher?

Mr. BOUCHER. Well Mr. Chairman, thank you very much for recognizing me even though not a member of the subcommittee and I also want to thank you and Chairman Barton for scheduling this hearing to examine the importance of fair use to all people in our society. I want to say a particular word of thanks to the witnesses for taking their time with us this morning and particularly thank those who in the course of their comments have mentioned the need to enact H.R. 1201.

H.R. 1201 really proceeds from a fairly straightforward assumption and that is when people purchase digital media, they should be able to use that media for lawful purposes and technical protection measures should not be put in their way as long as the purpose for which they intend to use the CD or the DVD or other media they purchased is entirely lawful and would not in any way violate the copyright law.

I was particularly taken by the comments of Ms. Sohn during her testimony in which she outlined a number of instances in which people who purchase media would need to be able to bypass a technical protection measure to use that media fully and to completely enjoy the rights that should go to the purchaser of that product any time that media is bought. Do you happen to have that list with you again? I would like for you just to emphasize that both for the record and to the members of the subcommittee if you happen to have it handy.

Ms. SOHN. Absolutely, and I would also include Professor Jaszi's example that teachers try to use excerpts of DVD's and cannot do that without violating the DMCA. But let me repeat the list. A consumer cannot rip songs from copy protected CD's to their personal computers or iPods. A consumer cannot make a digital copy of a DVD for playing back on their video iPods, cell phone, or other portable device. A consumer cannot make a backup copy of a copy protected CD or DVD. A consumer cannot play legally downloaded music on a competing mp3 player or computer so if you, you know, buy iTunes, you cannot play it on a Real Player and vice versa. And finally, a consumer cannot remove from a computer malicious

digital rights management tools which may have spyware in them like the now infamous Sony BMG root kit DRM. So that is just, I think that is just six or seven but there are a lot more which I would be happy to provide if the subcommittee would so want.

Mr. BOUCHER. Well thank you very much, Ms. Sohn. I think those are good and graphic examples of why the technological protection measure provisions of Section 1201 stand in the way of the ability of digital media purchasers to use the media in lawful forms in a manner that enhances their enjoyment in the work and therefore the value in the work itself.

Let me get members of the panel to respond to what is typically the argument raised in opposition to H.R. 1201 and that is that somehow if 1201 is adopted and technical protection measures can be bypassed for lawful purposes, that this change in the law rebalancing as I think it is the rights between the owner of the content and the user of the content would somehow encourage piracy. I mean this is the argument that we hear that allowing bypass for a lawful use would therefore encourage people to bypass for unlawful uses. Who would like to respond to that argument? Mr. Shapiro?

Mr. SHAPIRO. I can only respond by saying I have no clue the connection with piracy, it just does not exist. But I do want to add one to Gigi's list which is my personal favorite and one of the reasons I do this with such passion is that when you are watching a movie, a DVD, to fast forward through the ads for the upcoming movies is something you should be able to do. And that is something we hear from a lot of frustrated consumers who buy DVD players and they want to know why they cannot.

Mr. BOUCHER. All right, thank you.

Mr. Band?

Mr. BAND. Even though NetCoalition does not have a specific position on H.R. 1201, I just wanted to note that before we heard about CSS which is the encryption system on DVD's and we heard about the huge market for DVD's which I think someone said was about a $25 billion market now, it turns out that there is an easy way to get around CSS. It is called DECSS, and it is widely available on the internet. If you were to do a Google search, you would probably find, you know, 300,000 sites on the internet where DECSS can be downloaded not withstanding the fact that it is widely available, you still have this $25 billion market. So I think the point is is that most people want to follow the law and even though there are—there is a way to break the law using DECSS to circumvent the DVD's for unlawful purposes, most people choose not to do that.

Mr. BOUCHER. Well let me simply underscore that H.R. 1201 clearly says that the only time a person may bypass technical protection is if they are doing so for a lawful purpose, for example exercising a lawfully protected fair use right. If a person is bypassing for an unlawful purpose in order to commit piracy of the work, that person is just as guilty under H.R. 1201 as he would be under current law. And that being the case, I really do not see any validity at all to the argument that if 1201 is adopted it would encourage piracy. The act of piracy would remain just as unlawful under this bill as it currently is.

The gentleman who raised his hand, I am so far away I cannot see your sign.

Mr. HIRSCH. Rick Hirsch with the Entertainment Software Association.

Mr. BOUCHER. Yes.

Mr. HIRSCH. My job at ESA, among many things, is I am responsible for our enforcement programs with respect to piracy of game product. And, you know, one of the consequences of permitting, I thought the exercise that Chairman Stearns engaged in with the Professor at the beginning was very interesting because we kept moving the line along in terms of the many different copies that could be made. At what point would something cross over the line from fair use into non-authorized use that is not fair. Part of the problem here from an enforcement standpoint is that permitting circumvention of access controls for certain purposes albeit legitimate threatens to open the flood gates to piracy and it is not that every consumer is a pirate, it is just from an enforcement standpoint we cannot be in everybody's homes to determine whether—what purpose they are putting these uses to. And the way we deal with that, and believe me we are—our industry is a real confluence of technology companies and software and content companies so we seek to address that through the use of technology to promote the uses that the game community is seeking.

Mr. BOUCHER. Well I appreciate your comment and my time has expired.

Let me simply say that it is hard for me to imagine that if the law is on the books in very clear form saying that to bypass for an illegal purpose is illegal, that somehow adopting that law allowing bypass for legal purposes would in any way encourage the illegal use.

Mr. Chairman, I thank you again for having the hearing and permitting me to ask questions. And I thank the witnesses for their participation.

Mr. STEARNS. I thank the gentleman.

We are now out of time with—there is no one else that seeks any further recognitions or questioning. We want to thank your forbearance in all the members. I would just note that a parting comment that I have as chairman that if we had a unified DRM system that was clear and conspicuous for consumers, it is a possibility that some of this could be resolved and in all deference to the chairman so I would say to industry that sometimes if you do not want legislation, just work together to get this unified DRM system that all consumers can understand.

With that, the subcommittee is adjourned.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

Before the

Subcommittee on Commerce, Trade, and Consumer Protection
U.S. House of Representatives Committee on Energy and Commerce

Regarding

Fair Use: Its Effects on Consumers and Industry
November 16, 2005

Statement of Edward J. Black
President and CEO
Computer & Communications Industry Association
and the Open Source & Industry Alliance

On behalf of the Computer & Communications Industry Association and the Open Source & Industry Alliance, I appreciate the committee's consideration of this testimony on the fundamentally important issue of fair use in copyright law.

As the Supreme Court reaffirmed in its recent *Grokster* opinion, promoting copyright must be balanced against promoting innovation. The computer and communications industry recognizes this need for balance. Robust intellectual property protection is required to encourage innovation, satisfy consumers and produce profits. Accordingly, CCIA has worked for over 30 years to protect necessary intellectual property rights. At the same time, the right to innovate without persistent litigation sustains the U.S. information technology industry and guarantees its global competitiveness.

The Fair Use Doctrine is one of the primary means by which copyright law vindicates that right. Fair use represents the public's right to engage, without a the

copyright owner's express authorization, in activities such as criticism, commentary, education, parody, news reporting, and research. This right has been codified in Section 107 of the Copyright Act. *See* 17 U.S.C. § 107.

Fair use is more than a "right," however. According to the Supreme Court, fair use is one of the "traditional First Amendment safeguards" that ensure the constitutionality of copyright law. *See Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003). In *Eldred*, the Supreme Court observed that fair use was one of copyright's "built-in First Amendment accommodations." *Id.* at 219. Without the fair use safety valve, the pressure of copyright law on free expression may not survive First Amendment scrutiny. Therefore, copyright restrictions that erode users' fair use rights tread on thin constitutional ice.

Fair Use Promotes Technological Innovation by the IT Industry

Nor should fair use be seen as exclusively a "consumer" right. Fair use is essential to innovators as well. Under the *Sony* Betamax rule reaffirmed in the Supreme Court's recent *Grokster* decision, technological innovators understand that they need not design their products to the whims of copyright holders. Instead, a product with substantial lawful uses cannot be presumed to "induce" copyright infringement, even if the manufacturer knew that incidental infringement may result from the product's distribution. Of course, fair uses expand the scope of potential lawful uses. The "time-shifting" fair use permitted by a VCR encouraged the development of that product, and – litigation by the movie industry notwithstanding – spawned a multi-billion dollar industry in home movie viewing, and many billions more in the market for home theater consumer

electronics. Similar fair uses motivated the design of search engines such as Yahoo and Google; mp3 players such as the iPod, whose popularity has spurred hundreds of millions of legitimate music downloads; and innovative place-shifting technology such as the Slingbox, which allows users to view their own television programming for which they have already paid on devices outside their home. Without fair use, innovators would have assumed great legal risk in designing and marketing these products. Indeed, entertainment-industry championed attacks on fair use threaten these innovative products even today.[1] By increasing liability risks for manufacturers of these products, attacks on fair use threaten the jobs of the Americans that design and produce innovative IT devices and services.

The existence of fair use also guarantees "interoperability" of computer products, which is fundamental to competition in the computer and information technology industry. Fair use promotes competition by protecting the "reverse-engineering" of computer products. Because the information technology industry is incredibly interdependent, two computer products can work together—*interoperate*—only if they conform to the same set of rules, or *interface specifications*. If, for example, a company could exercise proprietary control over interface specifications which are vital to network operation, that company could determine which products made by other firms – if any – could interoperate with the network. Such broad power and control could threaten consumer welfare.[2]

---

[1] *Lawsuits Expected Over TV Slingbox*, UPI Newswire, July 6, 2005.

[2] *See, e.g.*, Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 Stan. L. Rev. 1045, 1082, 1097 n.281 (1989).

Fortunately, U.S. courts in recent years have held that interface specifications fall on the idea (or unprotected) side of copyright's idea/expression dichotomy.[3] But even though the interface specifications are not protected by copyright, a company seeking to interoperate must still learn what those interface specifications are. Companies seeking to develop interoperable products have no choice but to perform painstaking research on the original program to discern the interface specifications.

This research, known as reverse engineering, is a basic tool of software product development. To engage in reverse engineering, some amount of transitive copying is often required. Since the Ninth Circuit's 1992 *Sega v. Accolade* decision, no fewer than five U.S. courts have permitted reproduction during the course of software reverse engineering under the fair use doctrine.[4] Absent fair use, however, such copying would likely constitute infringement.

When the DMCA was pending before Congress, developers of interoperable computer products, including CCIA, explained to Congress that the act of reverse engineering – the uncovering of the interface specifications – could require the circumvention of a technological protection measure, an act which is presently prohibited by Section 1201 of that law. Recognizing that Section 1201 could prevent a developer of interoperable products from exercising fair use privileges, Congress created an exception

---

[3] *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992). *See also Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996); *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366 (10th Cir. 1997); *Lexmark Int'l, Inc. v. Static Control Components Inc.*, 387 F.3d 522, 536 (6th Cir. 2004).

[4] *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832 (Fed. Cir. 1992); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996); *DSC Communications Corp. v. DGI Techs.*, 898 F. Supp. 1183 (N.D. Tex. 1995), *aff'd*, 81 F.3d 597 (5th Cir. 1996); *DSC Communications Corp. v. Pulse Communications, Inc.*, 976 F. Supp. 359 (E.D. Va. 1997), *aff'd in part, rev'd in part, and vacated in part*, 170 F.3d 1354 (Fed. Cir. 1999); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir.), *cert. denied*, 531 U.S. 871 (2000).

to Section 1201 explicitly directed toward the development of interoperable products: Section 1201(f). The Senate Judiciary Committee explained the policy underlying Section 1201(f), stating that the exception was "intended to allow legitimate software developers to continue engaging in certain activities for the purpose of achieving interoperability to the extent permitted by law prior to the enactment of this chapter." *See* S. Rep. No. 105-190, at 32 (1998). The enactment of Section 1201(f) therefore demonstrates that reverse engineering is an economically important fair use and that Congress recognizes that importance. In continuing to protect fair use, Congress will ensure that the information technology industry remains vibrant and competitive.

Fair Use Encourages User-Driven Innovation

The title of this hearing refers to "consumers" and industry. Yet "consumers" is no longer an accurate word for today's media-using public. People no longer 'consume' media; they use it, remix it, and interact with it. People express themselves and communicate with one another through their own new media creations.

This cultural phenomenon is interesting, but it is the phenomenon's economic significance that matters most to companies such as those represented by CCIA. This interactivity is crucial to the vitality of the IT industry because it drives demand for products and service, and that demand in turn drives innovation. When users lawfully share these non-economic creations with each other, it stimulates demand in the consumer electronics and software used to design those creations. It also stimulates demand for the network services to exchange them. If we restrict fair use in the name of preventing infringement – if we lock down ones and zeros to frustrate pirates – we will

stifle this interactivity. Stifling this interactivity will kill consumers' demand for new products and services. Therefore, fair use is not solely a First Amendment inquiry; it stimulates demand and promotes commerce, and should therefore be recognized as an engine of innovation and development.

Possible Legislation to Redress Erosion of Fair Use Rights

Enact the Digital Media Consumers' Rights Act

Any effort to protect consumers' fair use rights should begin by enacting H.R. 1201, the Digital Media Consumers' Rights Act (DMCRA). The DMCRA reforms the DMCA to protect consumers' fair use rights. While the DMCA was being debated, CCIA and others worked to balance the Act to recognize the rights of the public as well as those of copyright holders. Although advocates for fair use rights succeeded in moderating some of the most egregious provisions of the DMCA, the Act nevertheless has been used to frustrate the fair use rights of users, impede innovation, and restrain competition. It is therefore appropriate to correct some of the shortcomings of the DMCA and to reaffirm the rights of the public to access copyrighted work for constitutionally and statutorily authorized purposes. H.R. 1201 would do much to safeguard these vital protections and to promote a robust intellectual property system.

While enacting H.R. 1201 would be a positive start, it is not a panacea for all threats to consumers' fair use rights. Congress should take additional steps to ensure that consumers' fair use rights are adequately protected.

Fair Use Preemption of Non-Negotiable Licenses

Congress should clarify that fair use rights apply to lawfully purchased media, regardless of whether that media is transmitted in analog or digital form. Similarly, Congress should preserve fair use by ensuring that consumers are not stripped of fair use rights in a digital marketplace where media goods are increasingly sold in digital form, and can therefore be bound up by non-negotiable "click-wrap" end-user license agreements. A consumer should not, for example, be forced to contract away the right to critique or review a media product by a click-wrap license drawn up to favor an unscrupulous vendor. Accordingly, Congress should clarify that consumers' fair use rights trump contract restrictions unless the contract is truly negotiable.

Prohibit Unfair Terms in Digital Rights Management (DRM)

Some copyright holders seek to protect content by using "digital rights management" (DRM) technology in order to control and restrict what consumers can do with the media they have purchased. CCIA believes that DRM should not be used unfairly or irresponsibly.

Rights – including copyrights – imply responsibilities. Just as the fair use right must be exercised responsibly, the copy "right" comes with responsibilities as well. Copyright holders have a responsibility to treat users equitably, and to use self-help to protect copyrights judiciously. Congress should act to ensure fairness in electronic transactions involving digital rights management. The recent debacle over Sony's XCP digital rights management spyware exemplifies some copyright holders' failure to take their responsibility seriously. The revelation that Sony may have surreptitiously installed

an application called XCP on the computers of millions of consumers who purchased certain copy-protected discs shocked the computing and Internet community.

Even more alarming was the revelation that the cloaking device Sony used to disguise its spyware from consumers is now being exploited by hackers to launch malicious computer attacks. This use of DRM has abused consumer trust and seriously compromised computer security. Even today, the full scope of the security breach created by Sony's XCP spyware has not been ascertained, and it remains unclear whether any critical infrastructure is threatened.

The XCP spyware demonstrates that digital rights management technology must be deployed in an honest and open way that does not threaten computer security. While H.R. 1201 would not have prohibited the deceptive practices evidenced by the XCP incident, it would have required that the spyware-carrying discs be labeled to reflect that fact. Thus, consumers might have been forewarned as to the risk that the product presented.

To adequately protect consumers from these practices, however, label warnings may prove insufficient. Therefore, Congress should act to ensure that digital rights management technology is not used inappropriately. It must be clear whose rights are being managed: DRM should protect copyright holders' rights, rather than "manage" the rights of users. DRM should not be a vehicle for taking away consumers' preexisting rights for the purpose of selling the same rights back to them.

By taking these steps, Congress will ensure that fair use and the innovation that it inspires will remain vibrant, providing lasting benefits to our information economy.

****

About CCIA

CCIA is an international, nonprofit association of computer and communications industry firms, representing a broad cross section of the industry. CCIA is dedicated to preserving full, free and open competition throughout its industry. Our members employ more than 600,000 workers and generate annual revenues in excess of $200 billion.

About OSAIA

OSAIA, a project of the Computer & Communications Industry Association, represents the interests of open-source developers and users around the world. Members include many of the world's most prominent open-source companies and organizations, all of which support the right to use, develop, modify and share open source software.

November 22, 2005

The Honorable CLIFF STEARNS
Chairman
Subcommittee on Commerce, Trade and Consumer Protection
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515-6115

DEAR MR. CHAIRMAN: Thank you for giving me the opportunity to appear last week at the hearing on the effect of fair use on consumers and industry. In my prepared testimony, I promised to transmit the Documentary Filmmakers' Statement on Best Practices in Fair Use after it was released on November 18. Please find copies attached to this letter for the members of the Subcommittee. In addition, I have transmitted an electronic copy to Mr. Billy Harvard.

Owing to the acoustics in the room, I did not hear the name of the case when Representative Blackburn questioned me. Having reviewed the webcast and of course recognized the Supreme Court precedent about which she asked, I would like to take this opportunity to respond substantively to her.As you know from my testimony, I favor the preservation of copyright fair use through HR 1201, the Digital Media Consumers' Rights Act. But it does not follow that I also endorse the majority's position in *Kelo v. City of New London,* 125 S. Ct. 2655 (2005).

In my view, there is no simply reason to suppose that there should be a correlation between advocacy for American citizen's fair use rights and support for governmental takings of private land.The two legal disciplines, throughout history, have been unrelated, and real property jurisprudence has never been viewed as precedent for copyright (or vice versa). Thus, it is no surprise that experts in the copyright legal community have not given much consideration or credence to suggestions of any impact of Kelo on copyright.

In any event, organizations such as the American Conservative Union, which have been highly critical of Kelo as an invasion of property rights, also have endorsed the approach of HR 1201 as one well calculated to safeguard the person freedoms of American citizens.There is no contradiction here. This is because real property and "intellectual property" are entirely distinct in their origins, their goals, and their subject-matter. Contrary to the suggestions of Mr. DeLong of PFF at the hearing, tangible property and intellectual property are as fundamentally distinct not just as apples and oranges, but as potatoes and poetry.

Copyright is a newcomer to the field of property rights, invented by legislatures and courts over the last few centuries to serve the goal of encouraging creativity in society.By striking contrast, the ancient institutions of real property are grounded in the physical reality of scarcity and the ethical concept of stewardship. Because land is finite in amount and subject to overuse, Anglo-American law always has assigned rights in particular parcels to individuals (the King, a grantee or a purchaser of title) in order to assure that the resource is maintained. Intangible words, music and images are neither naturally scarce nor vulnerable to waste. In fact, the real value of information actually grows when it is shared. As Jefferson put it, mental productions are like a candle flame: "He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me."

Thus, copyright assigns private property rights in only some intangible mental productions, and then only to the limited extent judged necessary to provide incentives for creators. This conservative approach is made manifest in the U.S. Constitution, which, by its terms authorizes Congress to provide intellectual protection only for a "limited term″. (Rights in real property, by contrast, last forever.) Moreover, Congress is authorized to provide no more protection than is necessary to fulfill the goal of "promoting Science and the Useful Arts.″

The bundle of rights that Congress has given copyright owners, as embodied in section 106 of the Copyright Act, is partial and incomplete when compared with the authority enjoyed by landowners. Moreover, even the finite rights that the Copyright Act gave content owners are further limited by the affirmative rights that following sections give to consumers and citizens. These include, of course, the right to make "fair use" of a copyrighted work that was the subject of last week's hearing. Section 106 of the Copyright Act begins by noting that all of the listed rights of a copyright owner are "Subject to sections 107 through 122," i.e., the explicit limitations and exceptions to those rights as enacted by Congress. Likewise, section 107, which codifies fair use, is characterized as imposing "Limitations on exclusive rights" of copyright owners. Thus, fair use is not a "taking" of rights of a copyright owner. Rather, Section 107 clarifies that a copyright owner does not have any right

to preclude, control, or license fair uses. To put it simply, if the right has not been granted to the copyright owner, then fair use remains the right of our citizens.

H.R. 1201 does not create a new fair use right and it doesn't put Congress in the position of deciding now what constitutes fair use. That has been and will remain a decision for judges to make.The bill only assures that American citizens will be able to continue to make the same kinds of educational, personal and artistic uses of existing material that have been permitted for at least the last 165 years. H.R. 1201 preserves the freedom of ordinary consumers to use technology and digital content they lawfully have acquired. It is only fair they enjoy this freedom, especially because its exercise in no way diminishes the commercial value of a Hollywood movie or an RIAA member's music on a CD.

Finally, contrary to Mr. Aitken's assertion at last week's hearing, the "public domain" is not a byproduct of copyright but the natural state of affairs that copyright has partially displaced. If anyone has standing to complain (metaphorically) about government "takings" of rights to art, literature, and music, it is members of the public, who have seen use rights such as "fair use" diminished by recent legislation (including the anti-circumvention provisions of the Digital Millennium Copyright Act).By introducing H.R. 1201, Representatives Boucher, Doolittle and Barton have taken an important step to restore these culturally vital public entitlements.

Thank you again for providing me with the opportunity to participate in the hearing.

Sincerely yours,

PETER JASZI, *Professor of Law and Director,*
Glushko-Samuelson Intellectual Property Law Clinic

cc: Ranking Member Schakowsky
Representative Blackburn

PREPARED STATEMENT OF SUN MICROSYSTEMS, INC.

Thank you for the opportunity to submit our views for the record. Sun Microsystems is an industry leader in the development of highly scalable, highly reliable network systems and services. Our technologies power the world's most important markets. Sun's philosophy of sharing innovation and building communities is at the forefront of the next wave of computing: the Participation Age.

Central to Sun's success has been our commitment to fostering the Internet as a place of innovation, creation, and communication. It is our belief that industry and government should each do their best to keep it that way.

Twenty years ago the Court ruled in the Sony Betamax decision that devices capable of substantial non-infringing uses were legal, even if such devices could be used in copyright violations. As Justice Breyer wrote in a concurring opinion in the Grokster case, "There may be other now unforeseen non-infringing uses that develop for peer-to-peer software, just as the home-video rental industry (unmentioned in Sony) developed for the VCR." His point—stopping technologies when they are young and evolving could kill off great promise and benefits that lie down the road. That is why the Court specifically focused on bad behavior while leaving the old Sony standard alone. Exactly right—don't constrain the technology; constrain bad actors.

Innovation has flourished, and this country has reaped the rewards, because Internet technologies enable the rapid, widespread, and often anonymous flow of information. Combine that free flow with advances in digital media—photography, video, music—and you have an amazing opportunity for wide-scale experimentation and creative expression.

Just think: Two decades ago, home computers brought us a revolution called desktop publishing. Now home users have the tools to create professional-quality movies and music—and a way to share them with others. This has opened up new markets and new revenue streams for content owners and software developers among others. It has also helped us continue the march forward into new realms of expression—artistic, political, academic, and personal. Much of this progress owes its existence to fair use.

Lately, though, the Internet has become a place of conflict and contention. Why? Because people are worried about what happens to content that carries a copyright. If it is easy to copy and transmit, how can we make sure artists are compensated, as they should be, for their creative work?

Just as important, how can we do so without quashing experimentation and innovation?

Artists should be compensated. There is no question about that. But in our rush to defend their rights, we should not overrlook the second question. We believe public policy should encourage innovation and free-speech. It should, as always, seek

to balance the rights of individuals with the greatest public good. As Justice Breyer noted, "copyright's basic objective is creation and its revenue objectives but a means to that end." (That is why, for instance, copyright protection does not last forever. More is gained in the long run from sharing.)

One of the great values of the Internet is that it has become a forum for borrowing, mixing, developing, and tinkering. After all, in both science and art, innovators build on each other's work. In the words of director Martin Scorsese, "The greater truth is that everything—every painting, every movie, every play, every song—comes out of something that precedes it . . . It's endlessly old and endlessly new at the same time." We must not make the mistake of entrenching the endlessly old at the expense of the endlessly new.

So the developing discipline of digital rights management, or DRM, needs to respect experimental, standing-on-the-shoulders-of-giants aspects of the Internet. DRM technology should be designed to respect legitimate needs and current rights of honest users (including backups, format changes, excerpting, and so on).

While the Internet certainly makes managing the rights for movies and music more complex, we believe that it is sounder economic and social policy to foster the architectural, business, political, and public freedoms that have enabled the Internet to be a place of innovation than it is to overly restrict the flow of digital information in an effort to meticulously account for every instance of the use of content.

What's more, the free flow of information is fundamental to democracy. In the shift to new forms of media and communication, neither technology nor law should limit the public's rightful access to information. Again, if we can go back to the intellectual well one more time, Justice Breyer rightly acknowledged that "the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently." Very true. So where do we go from here? We think there is a broad set of solutions in which the rights of content creators can be balanced with the common public interest in order to foster vibrant innovation. To that end, we would like to propose the following principles of digital rights management:

- Innovation flourishes through openness—open standards, reference architectures, and implementations.
- All creators are users and many users are creators.
- Content creators and holders of copyright should be compensated.
- Respect for users' privacy is essential.
- Code (both laws and technology) should encourage innovation.

Fair use is an important value in American jurisprudence. We want to encourage such usage, for academic purposes, for criticism, for parody --- and for uses we have not yet even considered. Yet in a technical world that enables perfect digital copies, fair use can terrify content owners. So there will need to be a balance struck: one that enables fair use, but also enables ways of determining who has abused the system.

Some content owners are pressing for DRM systems that would fully control the users' access to content, systems with user tracking that limit access to copyrighted material. We instead prefer an "optimistic" model whose fundamental credo is 'trust the customer.' Excessive limitation not only restricts consumer rights but also potential, as such solutions strongly interfere with the creation of future works and fair use of copyrighted content.

In an ideal world, solutions should encourage information flow, including the capability for creating future works. Certainly there will always be "leakage" and illegal behavior. Where that occurs there should be diligent enforcement of owners' legitimate rights. BUT, we think it is better that solutions provide auditing and accounting paths that, while respecting privacy of honest users, also permit copying, manipulation, and playback.

Systems that encourage the user to play with digital material, to experiment, to build and create, will be a win for consumers, for technology developers, and for content producers. The Supreme Court has spoken to these issues on various occasions and it did so with restraint most recently in the Grokster case. Now it is up to technologists, artists, developers, users, and rightsholders to move ahead in a balanced and forward-looking manner. If we do, it will be a win for the Internet and for society.