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ABSTRACT

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- *Copyright law requires balance. While under-protection discourages authors, over-protection discourages innovation, impairs competition, and injures the public. The fair use doctrine serves to protect this balance and should not be undermined.*
- *Protecting content doesn't mean protecting business models; the law should penalize pirates, not pioneers.*
- *Just as unbalanced U.S. copyright law threatens competition within the United States, so too can unbalanced foreign copyright law threaten competition for U.S. businesses overseas. The U.S. Government must therefore promote fair use, online safe harbors, and related copyright limitations in international trade negotiations.*

As the Supreme Court has repeatedly ruled, protecting copyright interests must be balanced against promoting innovation. Copyright policy must recognize and reflect this balance, thereby accounting for the interests of all industries, all innovators, and all end-users. Unbalanced copyright law can impede technological advancement and threaten the open Internet.

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

Background: Fair use encourages unauthorized, transformative copying of protected works in certain cases. This permits crucial economic activities like search-engine indexing, without which Internet users would be unable to navigate the World Wide Web, and reverse engineering of software, without which many computer programs would be unable to interoperate. As Chief Judge Kozinski of the Ninth Circuit once observed, “[o]verprotecting intellectual property is as harmful as underprotecting it... Overprotection stifles the very creative forces it's supposed to nurture.”¹ In short, copyright law must balance the right to innovation against copyright owner incentives.

Fair use is more than a statutory right, however. According to the Supreme Court in *Eldred*, fair use is one of the “traditional First Amendment safeguards” that ensure the constitutionality of copyright law.² In *Eldred*, the Supreme Court observed that fair use was one of copyright's

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

² See *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003).

“built-in First Amendment accommodations,” without which copyright law might not survive First Amendment scrutiny.

Fair use also promotes competition in technology markets. Courts have repeatedly held that fair use also permits reverse engineering of copyrighted software programs to ensure interoperability between software and hardware products. Whether it is software that runs on top of some other company’s operating system or a toner cartridge that fits inside someone else’s printer, this “interoperability” is central to the health of the competitive market. Copyright policy should advance this crucial principle.

CCIA’s Position: The erosion of fair use threatens crucial economic activity and treads on thin constitutional ice. Copyright law must not be applied so broadly as to prevent interoperability or undermine competition, which hurts businesses and consumers.

B. Promoting the Internet Economy Abroad: *Copyright trade policy should promote balanced copyright norms, including fair use and safe harbors for Internet services and online platforms in bilateral and multilateral trade negotiations promote the doctrine of fair use.*

Background: Just as unbalanced U.S. copyright law threatens competition within the United States, so too can unbalanced foreign copyright law threaten competition for U.S. businesses overseas. The limitations and exceptions that are essential to technology industry innovators in the United States will become equally important abroad as nations respond to the U.S. effort to strengthen global IP norms and increase enforcement of U.S. rights in other jurisdictions. However, because all international intellectual property treaties and most major trade agreements pre-date the Internet economy of today, they fail to reflect the realities of new technology. As a result, they must be modernized to ensure that innovative U.S. businesses are not subjected to liability in other countries, particularly those with an interest in keeping U.S. content out, or in protecting domestic constituencies from the creative disruption of the Internet.

CCIA’s Position: The time when copyright trade policy was relevant only to a narrow set of rights-holder interests has long passed. Today, copyright policy must reflect the interests of numerous stakeholders, including the technology industry. Accordingly, the U.S. position when negotiating free trade agreements should therefore promote U.S. intellectual property law, including Copyright Act provisions on fair use and related limitations and exceptions that are essential to the Internet economy.