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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. Exceptions to copyright protect this balance and should not be undermined.*
- *Policy responses to online intellectual property rights infringement must be rational and measured. Rational responses are those that do not threaten Internet security, regulate or censor Internet content, or undermine the carefully structured safe harbors of the Digital Millennium Copyright Act (DMCA). The rejection of SOPA and PIPA in early 2012 was warranted for these reasons.*
- *Just as unbalanced U.S. copyright law threatens economic interests and competition within the United States, so too can unbalanced foreign copyright law threaten the ability of U.S. businesses to compete overseas. The U.S. Government must therefore promote fair use, online safe harbors, and related copyright limitations in international trade negotiations.*

A. SOPA, PIPA, and Internet Censorship

Background: The process for formulating copyright policy is challenging and controversy-prone, requiring the careful balancing of competing economic interests, free speech considerations, and competition policy. This challenge was starkly apparent in January 2012, when the world witnessed an unprecedented Internet protest and blackout in response to highly controversial legislation introduced in the U.S. Congress: the Stop Online Piracy Act (SOPA, H.R. 3261) and the PROTECT-IP Act (PIPA, S. 968).

SOPA and PIPA aimed to regulate Internet intermediaries and enable plaintiffs to initiate intellectual property litigation against these services. Both bills were ostensibly aimed at preventing IP infringement by imposing compliance obligations on various intermediaries, and liabilities on infringers, as well as companies deemed not to “do enough” to protect IP rights-holders from infringement by third parties. These proposals would have enabled the federal government, and in some cases private actors, to compel various online intermediaries to censor or otherwise restrict access or support to online content alleged to infringe intellectual property rights.

CCIA’s Position: CCIA opposed SOPA and PIPA on the grounds that these bills were poorly tailored to address the stated problem, and would have regulated and censored Internet content, interfered with Internet security, and undermined the Digital Millennium Copyright Act’s crucial safe harbors while pursuing an ineffective strategy against online infringement. Regulations and

ensorship of Internet content, even for ostensibly benign purposes is antithetical to the political and economic interests of the United States, particularly when authoritarian governments that resent the openness and democratic nature of the Internet are seeking justifications to regulate it in international fora.

B. Promoting Balanced Copyright

Background: 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.

The Copyright Act balances the rights-holder's ability to exclude others from using his/her/its copyrighted material with legally established exceptions for the use or copying of protected works in certain cases. These exceptions permit crucial economic activities like search-engine indexing, without which Internet users would be unable to navigate the World Wide Web, reverse engineering of software, without which many computer programs would be unable to interoperate, and the first sale doctrine, which allows copyrighted works to move through the economy after their 'first sale' without being encumbered by undue restrictions on distribution. 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. This balanced framework of modern copyright law thus depends greatly on fair use and related limitations and exceptions.

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

CCIA's Position: The Copyright Act's exceptions protect vital economic activities, and allow copyright law to coexist with the First Amendment's hostility to restrictions on speech. Exceptions for activities such as fair use, temporary reproduction, and the first sale doctrine help maintain a balance between authors' incentives and the innovative use of information, ideas, and technology. Attacks on balanced copyright threaten crucial economic activity and tread on thin constitutional ice. Copyright law must not be applied so broadly as to prevent interoperability or undermine competition, which hurts businesses and consumers.

C. Promoting the Internet Economy Abroad

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

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).

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: 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.

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.