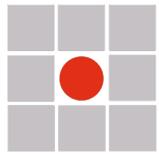


Copyright Reform Act

Prepared on behalf of



Public Knowledge

Introduction to the Copyright Reform Act

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by

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This Report serves as an introduction to the Copyright Reform Act, a project created on behalf of Public Knowledge as a client of the Stanford Cyberlaw Clinic and the Samuelson Law, Technology & Public Policy Clinic at UC Berkeley.

Public Knowledge is a Washington, D.C., based public interest organization that works to protect the rights of citizens and consumers to communicate and innovate in the digital age. Ensuring these rights requires a copyright law that does not unduly restrain everyday communications or new sources of creativity, and one that can account for current and future changes in technology.

Introduction to the Copyright Reform Act[†]

Ours is an unprecedentedly interconnected world, in which ordinary people have access to high-quality creative tools and international speech platforms, and creators have access to a vast body of information on which to base new works. In the last thirty years, innovators have developed a myriad of tools that allow access to creative works in more forms than ever before;¹ give artists

[†] The Copyright Reform Act is in large part due to the excellent work of Stanford Cyberlaw Clinic students Jake Freed, Charlin Lu, and Marc Williams. This Introduction was developed by Samuelson Law, Technology & Public Policy Clinic students Pan C. Lee, Daniel S. Park, and Allen W. Wang, under the supervision of Jennifer M. Urban. We wish to thank Jonathan Band, Bruce Joseph, Paul Levy, Fred von Lohmann, Jason Schultz, and Tara Wheatland for their thoughtful feedback on the CRA and/or these Reports. The opinions herein should not be attributed to them; and mistakes, of course, remain our own.

¹ The Internet, in conjunction with digital compression technologies, has enabled tools which facilitate instant music purchasing through sites like iTunes.com, instant video programming through sites like Youtube.com, and instant access to books, news, and other periodicals through online libraries. Tools such as laptop computers, MP3 and DVD players, and eBook readers allow constant access to these works.

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and others the ability to create, collaborate, remix, and distribute their works in new media;² and give ordinary citizens the means to record and globally share unfiltered information regarding significant events, along with their perspectives on those events.³ These recent leaps in technology have powerfully altered the way we innovate, create, and communicate with one another.

The new usage norms brought about by technological change sometimes challenge legal frameworks created decades ago, prior to the advent of digital technologies. It is no secret that copyright law in particular has not always adapted smoothly to the digital world. For example,

² Tools once reserved for industry in fields such as desktop publishing, software modeling, music recording, and video editing are now commonly available to the public. A number of artists use tools such as Apple's GarageBand or Digidesign's ProTools, in addition to the media platforms listed in note 1, *supra*, to comment on or make avant-garde uses of copyrighted works. See Apple: GarageBand, <http://www.apple.com/ilife/garageband/> (last visited Feb. 7, 2010); Digidesign: The Pro Tools Family, <http://www.digidesign.com/index.cfm?navid=349&langid=100&itemid=33116> (last visited Feb. 7, 2010). For examples of these works, see, e.g., Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 6, 2008, available at <http://www.nytimes.com/2008/08/07/arts/music/07girl.html> (describing the artist GirlTalk, who "makes danceable musical collages out of short clips from other people's songs," and who argues his work should be covered under fair use in opposition to the opinions of music industry executives); Jonathan McIntosh, *Total Recut Interview on Buffy vs. Edward*, REBELLIOUS PIXELS, Dec. 29, 2009, <http://www.rebelliouspixels.com/2009/total-recut-interviews-me-on-buffy-vs-edward> (describing his remix of two vampire-related works to deal with "the subtleties of gender and romance in mainstream media").

³ See, e.g., Caroline McCarthy, *With Iran Crisis, Twitter's Youth is Over*, CNET NEWS, June 18, 2009, http://news.cnet.com/8301-13577_3-10267946-36.html (describing Twitter's usage in situations including the U.S. Airways Hudson River landing, the Mumbai terror attacks, and the Iranian elections crisis); Alan Boyle & Suzanne Choney, *Iran's Internet Battle Hits New Heights: Amid Demonstrations, a High-Stakes Cat-and-Mouse Game Plays out Online*, MSNBC.COM, June 17, 2009, http://www.msnbc.msn.com/id/31411475/ns/technology_and_science-tech_and_gadgets/ (describing how "the burden of reporting on Iran's post-election crisis [fell] increasingly on online channels ranging from blogs and video sites to Twitter and Facebook"); Greg Mitchell, *Twitter and Web Carry the Day (Once Again) on Haiti Earthquake*, HUFFINGTON POST, Jan. 12, 2010, http://www.huffingtonpost.com/greg-mitchell/twitter-carries-day-once_b_421128.html (describing the early images of the disaster from Twitter, followed by "[c]ountless updates from the scene" in Facebook); Demian Bulwa, *BART's Shooting Probe Missteps*, SF GATE, Jan. 30, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/01/30/MNOP15JI6F.DTL> (identifying a cellphone video posted to a news website of a fatal transit rider shooting by police as the source of controversy surrounding the investigation regarding the incident).

though the most basic mechanism of copyright law restricts the right to reproduce copyrighted works, contemporary everyday practices require nearly constant copying. Just using a computer to access or manipulate information necessarily creates multiple transitory copies in the computer's memory. Other widespread activities, like incidentally capturing a copyrighted song in a family video,⁴ using circumvention tools to copy a legally acquired DVD onto an iPod,⁵ or even just using a popular song as a cellphone ringtone,⁶ each raise copyright questions. By Professor John Tehranian's calculations, "[o]n any given day, for example, even the most law-abiding American engages in thousands of actions that likely constitute copyright infringement."⁷ While at least some of the uses Professor Tehranian describes may be allowable under fair use or other exceptions to copyright,⁸ at present, copyright law offers a regrettable lack of clarity on these and many other issues that influence our daily lives. In addition to creating

⁴ See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008) (describing a situation where a mother's video of her child dancing to a Prince song was taken down from YouTube).

⁵ See, e.g., Fred von Lohmann, *Movie Studios Sue to Stop Loading of DVDs onto iPods*, EFF DEEPLINKS BLOG, Nov. 16, 2006, <http://www.eff.org/deeplinks/2006/11/movie-studios-sue-stop-loading-dvds-ipods>. The case ultimately settled in February 2007, leaving no guidance on how to address this type of circumvention activity. See also Electronic Frontier Foundation, *Unintended Consequences: Ten Years under the DMCA* 8, Apr. 2006, <http://www.eff.org/files/DMCAUnintended10.pdf>.

⁶ Cellphone providers license the right to reproduce and distribute ringtones to their customers. In re Cellco P'ship, No. 09-cv-07074-dlc, at 5 n.3 (S.D.N.Y. Oct. 14, 2009), available at http://www.eff.org/files/filenode/US_v_ASCAP/ASCAP%20v%20Verizon%20Order.pdf (stating that Verizon pays ASCAP a royalty of twenty-four cents per ringtone download). However, ASCAP recently claimed that cellphone providers should also have to license the public performance right. *Id.* at 7. The district court held otherwise. *Id.* at 34. See also Robin Wauters, *Ridiculous: Verizon Pays ASCAP \$5M Interim License Fee For . . . Ringtones*, TECHCRUNCH, Sept. 25, 2009, <http://www.techcrunch.com/2009/09/25/ridiculous-verizon-pays-ascap-5m-interim-license-fee-for-ringtones/>. While ASCAP did not prevail in this case, Verizon had to go to court in order to vindicate its position on the public performance question.

⁷ John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543 (2007). Professor John Tehranian also provides an example of an average day full of seemingly unremarkable activities, such as forwarding email, that could result in a "mind-boggling \$4.544 billion in potential damages each year" if rights holders were to enforce to the maximum extent possible. *Id.* at 543-48.

⁸ For example, Professor Tehranian describes the potential copyright implications of reading a poem out loud to his class, which, fortunately for him, is likely covered under the exemption for face-to-face classroom discussion. See *id.* at 545.

fear of legal ramifications for creators and consumers, this lack of certainty risks chilling the innovation that has historically brought valuable new consumer and business tools to market.⁹

Change is required to adapt copyright law to the needs of the present, while preserving its underlying purpose: “[t]o promote the Progress of Science and useful Arts.”¹⁰ Copyright law must, even in the face of rapid technological change, strike a balance between rewarding authors with temporary control over their creations and securing the public’s access to creative works, which comprise our cultural heritage, our history, and the foundation on which new works are created. Unfortunately, although the Copyright Act of 1976 was intended as a flexible, adaptive piece of legislation,¹¹ the recent speed and unpredictability of technological advances have sometimes outpaced the courts’ ability to address all of the relevant issues reactively through common law.¹² At the same time, copyright policy debates have long been influenced by entrenched interests protecting traditional distribution models, who have argued for ever-longer copyright terms,¹³ ever-greater penalties for infringement,¹⁴ and more severe limitations on use.¹⁵

⁹ See, e.g., Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 863 (2008) (“The prospect of massive statutory damages for miscalculation of the outcome of a fair use determination could chill a wide range of innovations . . .”).

¹⁰ U.S. CONST., art. I, § 8, cl. 8.

¹¹ Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 551 (2007) (“The drafters of the Copyright Act of 1976 (1976 Act) intended it to be flexible and adaptable.”).

¹² See, e.g., *id.* at 551-52 (“The only new subject matters added to the copyright realm since 1976 have arrived through statutory amendments, not through common law interpretation of the 1976 Act’s broad subject matter provision. Virtually every week a new technology issue emerges, presenting questions that existing copyright rules cannot easily answer.”).

¹³ See, e.g., *A Plea for Keeping Alive the U.S. Film Industry’s Competitive Energy: Hearing on Copyright Term Extension Act S.505 Before the S. Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Jack Valenti, Chairman and Chief Executive Officer, Motion Picture Association of America) (“Copyright term extension has a simple but compelling enticement: it is very much in America’s economic interests.”); Kevin A. Goldman, *Limited Times: Rethinking the Bounds of Copyright Protection*, 154 U. PA. L. REV. 705, 705 & n.2 (2006) (stating that “each time the term of copyright protection has been due to expire, Congress has passed another extension” and that by some counts, it totals up to eleven times since 1962) (citing LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 134 (2004)). The most recent extension was the Sonny Bono Copyright Term Extension Act in 1998. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

Gigi Sohn, president of Public Knowledge, characterized the increasing disconnect when she described that “[a]s our communications system has become more open and accessible to the public, access to the copyrighted content that travels over that system has become more closed and proprietary.”¹⁶ Copyright law is out of balance. Change is necessary to restore copyright law to its original purpose.

There is a broad consensus that reform is needed.¹⁷ Further, some scholars and advocates are currently undertaking broad efforts to overhaul copyright law for the twenty-first century.¹⁸ For

¹⁴ See, e.g., *Intellectual Property Act: Hearing on Prioritizing Resources and Organization for Intellectual Property Act H.R. 4279 Before the Subcomm. On Courts and Intellectual Property and the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Richard Cotton, Executive Vice President and General Counsel, NBC Universal) (describing the need to “toughen penalties” by “increasing the availability of treble damages in counterfeiting cases, and doubling statutory damages for counterfeiting”); *Electronic Copyright Piracy: Hearing on No Electronic Theft (NET) Act H.R. 2265 Before the Subcomm. On Courts and Intellectual Property and the H. Comm. on the Judiciary*, 105th Cong. (1997) (testimony of Fritz E. Attaway, Senior Vice President, Government Relations and Washington General Counsel, Motion Picture Association of America) (“[E]nactment of this bill will significantly enhance the ability of the Justice Department, F.B.I., and other law enforcement agencies to crack down on copyright piracy wherever it occurs—on or off the Internet.”). The NET Act made criminal prosecution for copyright violation possible even if the alleged infringer did not profit financially from the violation. No Electronic Theft (NET) Act, H.R. 2265, 105th Cong. (1997) (enacted).

¹⁵ See, e.g., Press Release, MPAA, MPAA Seeks FCC Okay for Transmission of First Run Movies Directly to Consumers (Nov. 4, 2009), available at http://www.mpaa.org/press_releases/mpaa%20seeks%20fcc%20ok%20for%20transmission%20of%20first%20run%20movies%20directly%20to%20consumers.pdf.) (describing the MPAA’s request for a waiver to the FCC’s 2003 order prohibiting selectable output controls).

¹⁶ Gigi B. Sohn, *Six Steps to Digital Copyright Sanity: Reforming a Pre-VCR Law for a YouTube World*, Presented to the New Media and the Marketplace of Ideas Conference (Oct. 26, 2007), at 3, transcript available at <http://www.publicknowledge.org/pdf/gbsohn-speech-20071026.pdf>.

¹⁷ Academics have elaborated on many issues in which copyright law requires improvement. See generally, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004) (describing how technological protections and the law inhibit cultural development); Alan N. Braverman & Terri Southwick, *The User-Generated Content Principles: The Motivation, Process, Results and Lessons Learned*, 32 COLUM. J.L. & ARTS 471 (2009) (discussing the legal uncertainty of how the DMCA applies to user-generated content sites); Niva Elkin-Koren, *Making Room for Consumers under the DMCA*, 22 BERKELEY TECH. L.J. 1119 (2007) (describing how DMCA anti-circumvention threatens consumer rights); Jessica Litman, *Real Copyright Reform* (U. of Michigan Law & Economics, Olin Working Paper No. 09-018, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474929 (proposing copyright reform in

example, Professor Pamela Samuelson, a recognized pioneer in copyright law, is presently working with other copyright experts to propose a model statute that will bring copyright more generally in line with the digital age.¹⁹ The model statute will address an expansive set of issues and balance a multitude of interests. Such comprehensive reform is welcome and necessary, but may take considerable time to fully implement. In the interim, a more incremental set of reforms would help to adjust copyright law back toward the balance that it was intended to achieve. As such, Public Knowledge has undertaken to develop a more limited, targeted set of changes to the present copyright statute. These reforms focus on areas where an imbalance is both clear and amenable to incremental change.

Specifically, we propose five sets of targeted reforms—together, the Copyright Reform Act of 2010, or “CRA”—to help realign copyright law with technological reality and to help buttress its original purpose to promote the creativity for public benefit. We plan to release the proposed reforms sequentially over the coming months. Each set of reforms will be accompanied by an explanatory whitepaper to open a dialogue among stakeholders, and we look forward to a meaningful discussion with all interested parties.

light of technological change); Peter S. Menell, *Indirect Copyright Liability and Technological Innovation*, 32 COLUM. J.L. & ARTS 375 (2009) (analyzing the chilling effects of indirect copyright liability on technological innovation); Samuelson, *supra* note 11 (describing thoughts on long-overdue copyright reform in response to advances in technology); von Lohmann, *supra* note 9, at 852 (describing why copyright law should permit private, non-transformative copying as a fair use). Advocates have also called for copyright reform. *See, e.g.*, Electronic Frontier Foundation, *Digital Millennium Copyright Act*, <http://www.eff.org/issues/dmca> (describing the EFF’s efforts to oppose the DMCA). Likewise, some policymakers have proposed bills to reform copyright. *See, e.g.*, Rick Boucher, *Reps. Boucher and Doolittle Introduce the FAIR USE Act of 2007*, http://www.boucher.house.gov/index.php?option=com_content&task=view&id=1011&Itemid=75.

¹⁸ *See* Pamela Samuelson, Address at the Free Culture Conference 2008, Oct. 11, 2008, transcript available at <http://www.bunsnip.com/2008/11/free-culture-conference-2008-pamela.html> (describing copyright reform efforts by the National Academy of Sciences, the EFF, and Professor Samuelson’s own group of copyright experts).

¹⁹ Arc Centre of Excellence for Creative Industries and Innovation: Copyright 2010, <http://cci.edu.au/content/copyright-2010> (last visited Feb. 7, 2010) (describing the Copyright Principles Project as “an international working group of 20 copyright experts led by Professor Pamela Samuelson of Boalt Hall Law School at the University of California, Berkeley” which “aims to produce a set of guiding principles for copyright reform by 2010”).

A brief overview of the reforms in the CRA follows:

Fair Use Reform:

The fair use doctrine excludes from copyright infringement a variety of uses that are understood to derive value from or otherwise build on copyrighted works in a way that contributes to society,²⁰ providing balance between exclusive rights and public values such as free expression,²¹ the preservation of history and cultural artifacts,²² and access to knowledge generally.²³ With such changes to copyright as repeated term extensions,²⁴ anti-circumvention provisions,²⁵ and expansion in secondary liability,²⁶ more and more of the burden of preserving copyright's balance rests on the fair use doctrine. While the flexibility of the doctrine generally has allowed it to cover new uses over time—such as recording TV programs²⁷ or using thumbnail copies of photos in search technologies²⁸—such flexibility can create unpredictability.²⁹ Also, recent

²⁰ See 17 U.S.C. § 107 (2006) (describing how a beneficial use “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”).

²¹ See *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003) (describing how the fair use defense allows the public to use expression in certain circumstances, and how the “CTEA itself supplements these traditional First Amendment safeguards”); Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275, 1291 (2003) (stating that courts have “used the fair use defense to diffuse the tension between copyright law and free speech concerns”).

²² See 17 U.S.C. § 108(a)-(c) (2006) (describing exemptions allowing library reproductions for non-commercial purposes and reasons of preservation, security, or deposit for research in other libraries or archives, and where new replacements cannot be obtained at a fair price).

²³ See 17 U.S.C. § 107 (describing teaching, scholarship, and research as purposes leading to fair use, and specifically highlighting “nonprofit educational purposes” as a valid purpose in the first fair use factor).

²⁴ See Goldman, *supra* note 13, at 705.

²⁵ Digital Millennium Copyright Act, § 103, 112 Stat. 2864-76 (1998) (current version at 17 U.S.C. §§ 1201-1205 (2006)).

²⁶ Jacqueline D. Lipton, *Secondary Liability and the Fragmentation of Digital Copyright Law* (Case Western Reserve University, Working Paper 09-5, 2009) (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005)).

²⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

²⁸ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

²⁹ See Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540 (2009). See also David Nimmer, “*Fairest of Them All*” and Other Fairy Tales of Fair Use, 66 LAW &

technologies may not have sufficient case law in place to create certainty as to what constitutes fair use. This lack of predictability can chill activities that are socially beneficial.³⁰ As such, we propose extending the list of explicitly favored uses in the preamble to section 107 of the Copyright Act to include incidental uses, non-consumptive uses, and uses that are both personal and non-commercial; these uses, which have great social benefit and which do not unduly undermine rights holders' abilities to realize their investments, should be allowed and encouraged.

In addition, a major barrier to authors making a fair use of a work is the risk of exposure to statutory damages or attorney's fees as a consequence of litigation, which can make fair use an expensive and risky defense.³¹ We recommend changes to sections 504 and 505 addressing these structural problems involving damages and attorney's fees, and encouraging authors to use works in ways that bring value to society.

Updating the Exemptions and Limitations to Copyright Protection:

In addition to fair use, the Copyright Act contains various specific exemptions for certain uses or users—for example, section 110 exempts face-to-face teaching from infringement of the performance right³²—and limitations on copyrightable subject matter. Such specific exemptions or limitations are most appropriate when a certain type of use should simply be carved out of infringement entirely rather than balanced under fair use's four-factor test, or when a certain type of information should not be eligible for copyright in the first place. We propose two instances where new exemptions or limitations are appropriate:

CONTEMP. PROBS. 263, 280-83 (2003) (describing the unpredictability that exists in fair use, even when all four factors individually lean in favor of fair use).

³⁰ See, e.g., von Lohmann, *supra* note 9, at 863.

³¹ Scott F. Turow, *On Intellectual Property*, 29 SOCIETY 73, NOV. 1991 (describing that fear of litigation “threatens to rob secondary works of vividness and of the accuracy of direct quotation”).

³² 17 U.S.C. § 110(1) (2006).

- incidental or transient copies necessary to technological processes, such as running computer programs, transmissions over a network, or other automatic processes, should not be considered infringements of copyright; and
- copies of works made by a service provider for the purposes of developing or maintaining information location tools should not be considered infringements of copyright.

Regarding the first proposed limitation, digital computing technologies require many instances of copying for their operation. For example, accessing files requires temporary copies to be created in computer memory. Such temporary copies are fundamental to the operation of computers and have little or no consumption value in themselves.³³ As such, they should have no effect on the incentives created by copyright, and should not be considered infringing. Congressional guidance on this point would help ensure certainty for innovators of digital computing technologies and users of those technologies.

Regarding copies made for information location and retrieval, modern directories, indexes, and other information location tools are fundamental to our ability to take advantage of the expanded access to information created by digital technologies. As the Ninth Circuit Court of Appeals explained in holding the use of thumbnail images in search results to be a “highly transformative” fair use, “a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool.”³⁴ Copying of indexed works is required for the operation of these valuable tools,³⁵ which serve merely to locate and retrieve

³³ Federal Register, *Section 108 Study Group: Copyright Exceptions for Libraries and Archives*, 71 FR 70434, 70436 (Dec. 4, 2006) (“As a practical and technical matter, producing a digital copy generally requires the production of temporary and incidental copies, and transmitting the copy via digital delivery systems such as e-mail requires additional incidental copies.”).

³⁴ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir. 2007). The Ninth Circuit has twice held that using thumbnail images of copyrighted works in search engine results is fair use. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

³⁵ CHRISTOPHER D. MANNING ET AL., *AN INTRODUCTION TO INFORMATION RETRIEVAL* 69-72 (2009), available at <http://nlp.stanford.edu/IR-book/pdf/irbookonlinereading.pdf> (describing the process of structuring data to construct an index that enables searching through a database of 800,000 Reuters newswire documents).

information, and do not trade on the creative or expressive purposes of the copied works.³⁶ In fact, they often serve the purpose of facilitating legitimate access to copyrighted works on a faster and broader scale. The particular “social benefit” they provide is nothing less than the ability to find and use information in digital form—this benefit is sufficiently important that an exemption should be codified to ensure freedom for innovators who create information location tools.

Digital Millennium Copyright Act (DMCA) reform:

The anti-circumvention provisions of the Digital Millennium Copyright Act have been widely criticized as overbroad, in significant part because they lack an exception for the use of circumvention tools to enable fair or otherwise lawful uses.³⁷ Further, distributing tools to enable circumvention of technological protection measures (TPMs) is separately prohibited by the anti-circumvention provisions, and this prohibition is not eligible for the temporary exceptions to liability granted by the Copyright Office in triennial rulemakings.³⁸ Therefore, those lacking sophisticated technical knowledge can be prevented from accessing a work, even

³⁶ See *Perfect 10*, 487 F.3d at 721 (“Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.”); *Kelly*, 336 F.3d at 820 (finding that thumbnail copies used by a search engine did not infringe copyright because they “[did] not supplant the need for the originals . . . [and] they benefit[ed] the public by enhancing information-gathering techniques on the [I]nternet”).

³⁷ See, e.g., Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1, 3 (2008) (describing the uncertainty that results from courts attempting to apply fair use to the DMCA through “divining . . . legislative intent in the face of statutory silence”); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 519 (1999) (stating that the “DMCA’s anti-device provisions are . . . overbroad and unclear, especially on the question whether it is legal to develop a technology necessary to engage in a privileged act of circumvention (e.g., a fair use)”); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 364 (2005) (criticizing the prevailing judicial interpretation of the DMCA anti-circumvention provisions). This defect has also been recognized by lawmakers. See, e.g., Digital Media Consumer’s Rights Act of 2005, H.R. 1201, 109th Cong. (2005) (proposing, among other amendments, to restore fair use in 17 U.S.C. § 1201(c) by inserting “it is not a violation of this section to circumvent a technological measure in order to obtain access to the work for purposes of making noninfringing use of the work”).

³⁸ 17 U.S.C. § 1201(a)(1)(C), (E) (2006).

for a use that the Copyright Office has held to be lawful, because distribution of tools that facilitate that use is separately prohibited. For example, though it may be a lawful use to translate an eBook into a format that is accessible by the blind, doing so often requires bypassing some form of digital restriction. However, those making or distributing tools enabling access, even for legitimate use, can face liability under the DMCA.³⁹ This creates a situation where rights holders are effectively given greater control over their works than copyright law intends.

Innovators and follow-on creators looking to build new works on top of accessible, copyrighted material can find themselves unfairly impeded by these measures. For example, the DMCA has been used to prevent consumers from making legitimate backup copies of CDs and DVDs they have purchased;⁴⁰ it has been used to block innovation against competitors, and even customers, who improve upon or customize a product;⁴¹ and it has even been brandished against academic researchers seeking to study and improve upon digital security measures.⁴² As such, the DMCA is a primary unbalancing force in copyright law, and any attempt to address the present imbalance between rights holders and the public requires updating it. We propose to do so via a very simple change: amending the statute to allow the use or distribution of circumvention tools for solely non-infringing uses. This aligns closely with the Digital Media Consumers' Rights

³⁹ While the most likely risk is civil liability, in at least one instance, a company that circumvented technological protection measures in order to facilitate a use that was legal in its home country was criminally prosecuted in the United States, but was ultimately acquitted. See Matt Richtel, *Russian Company Cleared of Illegal Software Sales*, N.Y. TIMES, Dec. 18, 2002, at C4, available at <http://www.nytimes.com/2002/12/18/business/technology-russian-company-cleared-of-illegal-software-sales.html>.

⁴⁰ See, e.g., Electronic Frontier Foundation, *supra* note 5, at 6-7 (last visited Feb. 7, 2010) (generally describing the interference of CD copy-protection and DVD encryption with making copies for fair uses); Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2001); Electronic Frontier Foundation, *Sony BMG Litigation Info*, <http://www.eff.org/cases/sony-bmg-litigation-info> (last visited Feb. 7, 2010).

⁴¹ Electronic Frontier Foundation, *supra* note 5, at 9 (describing how Tracfone still uses the DMCA to sue resellers who unlock their handsets, despite the exemption for cell phone unlocking granted at the 2006 triennial DMCA rulemaking); *id.* at 10 (describing how LexMark attempted to use the DMCA to prevent competitors from releasing aftermarket toner cartridges that worked with LexMark's printers by reverse engineering their authentication routines); *id.* at 11 (describing how Sony invoked the DMCA against a customer who had circumvented encryption for the Aibo robotic dog to make new dance moves).

⁴² *Id.* at 3 (describing how Blackboard Inc. used the DMCA to stop the presentation of student research on security flaws in its products).

Act introduced in the House of Representatives first in 2002 and again in 2003 and 2005,⁴³ and continues its effort to protect consumers through DMCA reform.

Copyright abuse and notice:

Through the notice-and-takedown procedures set forth in section 512(c) of the DMCA, rights holders have a legitimate avenue for enforcing their rights via notices to online service providers to take down infringing material.⁴⁴ The takedown provision also protects platform providers who offer innovative services by granting safe harbor from some secondary liability to online service providers who comply with these notices. Unfortunately, the system as it stands is also susceptible to abuse because rights holders can in some instances employ takedown notices without significant accountability.⁴⁵ This can chill otherwise valid uses of their works, particularly those made by nonprofessional follow-on users, who are unlikely to understand the full extent of their rights.⁴⁶ The present lack of transparency in the system, and the lack of appropriate repercussions for rights holders that issue such notices excessively or aggressively, have shifted the balance against the targets of notices. We propose to restore this balance by buttressing the remedies available to targets who are the victims of knowing misrepresentations in takedown notices; strengthening accuracy requirements for takedown notices; requiring

⁴³ See Digital Media Consumers' Rights Act of 2002, H.R. 5544, 107th Cong. (2d Sess. 2002). The DMCA was reintroduced in 2003 and again in 2005. H.R. 107, 108th Cong. (1st Sess. 2003); H.R. 1201, 109th Cong. (1st Sess. 2005).

⁴⁴ 17 U.S.C. § 512(g) (2006).

⁴⁵ Rights holders have sometimes been held responsible for sending illegitimate takedown notices. See, e.g., *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203-04 (N.D. Cal. 2004) (holding that Diebold "knowingly materially misrepresented that Plaintiffs infringed Diebold's copyright interest" when they sent takedown notices of a published email archive containing material "not subject to copyright protection"). However, this usually occurs only after takedowns have already been implemented. See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008) (stating that "[r]equiring owners to consider fair use will help 'ensure that the efficiency of the Internet will continue to improve . . . ' without compromising ' . . . the fruit of American creative genius'" (citing S. REP. NO. 105-190, at 2 (1998))).

⁴⁶ See, e.g., Mike Masnick, *Abusing the DMCA to Take Down Any Content*, TECHDIRT, Nov. 2, 2006, <http://www.techdirt.com/articles/20061101/231619.shtml> (describing one situation where DMCA complaints successfully pushed ISPs to take down articles that were actually not infringing on any copyrights, and another situation where takedown notices were sent to YouTube for a number of videos, including ones containing only legitimate content).

confirmation of authority to act on behalf of the rights holder whose right is allegedly infringed; requiring additional confirmation that notice has been delivered to the target as well as the Copyright Office or another designated repository; and further updating the provisions governing the removal and replacement of material in the event that legitimate content is taken down to ensure that takedown notices are only employed legitimately so as to avoid chilling effects upon free expression.

Similarly, the common practice of overstating the extent of copyright protection or selling goods and services without fair notice of contractual or technological limitations on use each further shift the balance against ordinary users. One problem is the practice of misleading consumers by using unfair and deceptive notices that describe severe limitations on copying that are absent from the copyright law.⁴⁷ A related problem is the failure to notify customers of contractually imposed or technologically implemented usage limitations,⁴⁸ introducing the possibility of users incurring anti-circumvention liability when trying to make what would otherwise be a lawful use, among other negative effects.⁴⁹ To remove this information asymmetry but still allow rights holders to tailor their product offerings as they see fit, the Federal Trade Commission Act and DMCA should be updated to prohibit unfair and deceptive copyright notices and to require notice of contractual or technological restrictions. Rights holders should not be allowed to deceptively claim limitations that are not actually imposed by the law, and should accurately describe any limitations imposed by contract or technological measures.

Music Licensing:

Finally, the existing system in place for licensing musical work rights has been criticized for being far too complicated to support either the market feasibility of new technological models for

⁴⁷ See, e.g., Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1028-29 (2006) (describing examples of false copyright notices on works ranging from a pocket copy of the U.S. Constitution to greeting card versions of Monet's *Water Lilies*).

⁴⁸ See Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice About Their Use of Technical Protection Measures?*, 6 J. TELECOM. & HIGH TECH. L. 41, 45 (2007) (describing how consumer expectations about being able to platform-shift or make backup copies of digital content can be thwarted by TPMs with no explicit notice of prohibited uses).

⁴⁹ *Id.* at 54-57 (highlighting risks inherent in inadvertent anti-circumvention liability).

music distribution or the creation of new works based on existing songs.⁵⁰ The need for a one-step method to apply for and obtain licenses to non-dramatic musical works has never been as prevalent as it is today, because the formation of online retailers and streaming services with enormous libraries of music has increased the demand for an easy way to license vast quantities of works at once.⁵¹ Our proposal addresses this need by encouraging the consolidation of license management into music rights organizations (MROs), either wholly new institutions or extensions of existing organizations such as the Harry Fox Agency or ASCAP. To further streamline the process, it is important for these MROs to offer blanket licenses for all works they are authorized to license, catalog all of their holdings, and offer fair, nondiscriminatory licensing.

An additional proposed simplification to the complexity of licensing is to exempt digital deliveries from incurring public performance liability; this would allow distributors to offer a music download after only licensing the reproduction and distribution rights, without having to acquire a public performance right as well.

Conclusion

We hope this introduction has brought some attention to the imbalance in the copyright system, and look forward to discussing the Copyright Reform Act. As a first step, the fair use section of the CRA and an accompanying whitepaper are being released simultaneously with this introduction, and are available here: www.copyrightreformact.org. We look forward to thoughtful commentary on them, and on subsequent releases.

⁵⁰ See, e.g., John Timmer, *Music Industry: Licensing is a Problem, But How to Fix it?*, ARS TECHNICA, Mar. 1, 2009, <http://arstechnica.com/media/news/2009/03/musics-copyright-battle-made-worse-by-the-fear-of-change.ars> (describing that one of the major challenges to the music industry discussed at the 2009 Digital Music Forum is that “licensing is a mess”).

⁵¹ *Statement of Marybeth Peters The Register of Copyrights Before the Subcomm. on Courts, the Internet, and Intellectual Property and the Committee on the Judiciary*, 109th Cong. (1st Sess. 2005) (statement of Marybeth Peters, Register of Copyrights of the United States) (“[W]ith the rise of digital music services that seek to acquire the right to make vast numbers of already-recorded phonorecords available to consumers, Section 115 is not up to the task of meeting the licensing needs of the 21st Century.”).