Testimony of

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Introduction

Thank you, Mr. Chairman, Senator Hatch, and members of the Committee for inviting me to appear before you today to talk about the continuing saga of copyright and digital technologies. During the past few years, I've had the honor and pleasure of working with many people in this room on intellectual property and Internet issues, although these days I spend more of my time trying to teach the law Congress has written in this area.

By way of disclosure, I should say that, technically speaking, I'm an employee of the State of California. Which means that my salary is paid by both Intel and Disney, Viacom and Qualcomm, Technicolor and technology start-ups. So, in what I'm going to say, there will probably be something for everyone to hate.

I. Challenges to Copyright Holders And Appropriate Responses

There is no question that we face an enormous problem today with unauthorized copying and distribution of digital versions of copyrighted works. Copyright holders face this problem and we all face this problem as an increasingly information and media driven economy. The worst part of this problem is probably outside the U.S. and is "traditional" physical media piracy - as when you can buy a dozen CDs for $5 about 100 paces from the U.S. Embassy in Beijing. Then comes piracy from peer-to-peer network systems that respects no national borders - Napster, Gnutella, Free Net, and the many variations of Fast Track. Web-based piracy in the form of warz sites; that is, Internet piracy from hosted sites is another level of problem. Finally, there is a certain level of unauthorized activity done by people at home - typically, until very recently, in the form of taping works onto cassettes and videocassettes.

We need to distinguish among these different sorts of activity for two reasons. First, the problem of digital piracy of works - on physical media and through unauthorized networked distribution - does threaten the incentive system that copyright is supposed to create.

But, second, a certain amount of unauthorized copying by private citizens - at home, for their own use, and not distributed beyond family and a small circle of friends - does not threaten the incentive system that copyright creates. And it does serve valuable goals in a civil society. In short, it should not be lumped with the other activities; it is not "piracy" -- indeed, much of this unauthorized copying has been expressly sanctioned by our highest court.

To date, the efforts to fight digital piracy of copyrighted works has been twofold. First, head-on efforts to shut down unauthorized Internet distribution -- as in the Napster litigation. Second, the content industry and the consumer electronics industry have worked together in private,

voluntary, industry-led collaborations to design protection measures: measures to keep unauthorized digital copies of works from being captured, so there would be nothing illicit to distribute on the Net. These can be industry standards - as with the CSS encryption for DVDs - or competing technological approaches to security, such as the differing digital rights management (DRM) systems of RealNetworks and Microsoft.

At times, these processes may not have produced the most consumer-friendly protection protocols. There are some people who believe that encryption systems like CSS impinge upon "fair uses" under copyright law (I will say more about that shortly).

But at least these are not digital locks regimes designed by bureaucrats and enforced by diktat. The message now from some voices in the copyright community is that if the computer, electronics, and telecommunications companies are not cooperative enough in crafting a new round of standard control technologies, then the federal government should step in and mandate which particular security technologies must be deployed. The intent of some of these controls would -- like streaming technology or CSS -- be to prevent digital copies from being made by individuals. But unlike those existing digital locks, the design of future digital locks would be regulated by the government.

I think that would be a troubling development. Congress should be cautious in how much it is willing to defer to the policy decisions - and legislative drafting -- of private parties. A member of the House is reported to have said that the House Subcommittee on Courts and Intellectual Property "has a history of preferring that commercial disputes be resolved between the parties rather than through the legislative process, which may favor one interest group over another."

That's all good and well, but this risks being private resolution blessed by the legislative or regulatory process without any way to be sure that the private discussions took account of all the relevant social interests. How digital copyrighted works are distributed and used is a matter of enormous interest to consumers too. Users of copyrighted works have distinct privileges in the balanced scheme of the copyright law - fair use and the first sale doctrine chief among them. An "agreement . . . brokered through private, voluntary, industry-led negotiations, and then blessed by Congress" may fail to address those concerns.

II. The importance of fair use

Codified in 1976, but tracing its roots in American law back to at least the 1840s, 17 U.S.C. § 107 fair use is about as far from a bright line test as statutory law should wander. There is no question that what counts as "fair use" has changed over time. As reproductive technologies became more and more widely available to end users in the second half of the 20th century, fair use expanded to include a certain, undetermined amount of "non-transformative" copying for personal, non-commercial uses. On the only occasion when the Supreme Court considered non-transformative, private copying, it concluded in the Sony v. Universal Studios case that at least one form of such copying -- "time-shifting" to watch a broadcast show at another time -- was protected activity.

Let me say a few things about that Sony 'Betamax" decision that one rarely hears.

First, despite the clamor of some of academics, the right to make near perfect or perfect non-transformative copies of pop culture works is not at the core of our democratic freedoms. It isn't even at the core of fair use. Some people forget that the Betamax decision was a 5-4 vote and the dissent thought that (near) perfect, non-transformative copying of audiovisual works was NOT fair use. That dissent included Justices Blackmun and Marshall -- surely two of the last century's most vigorous defenders of free speech and all the values that make a civil, democratic society worth living in.

But, second, it's been a long time since the Betamax decision. Twenty years. A lot has changed in that time -- lots of the factors which built the slim, five member majority have changed. Yet the studios have never challenged the Betamax conclusion that making non-transformative copies for "time-shifting" (a personal, non-commercial use in the home) is fair use. A whole generation of consumers is now accustomed to a certain amount of personal copying being a protected, legal activity.

I think it's worth mentioning what is now an open secret. People at home make copies of TV programs for more than "time-shifting." People build up libraries of their favorite series, they copy children's programs to play again and again for the kids; they even sometimes share these recorded programs on their clunky videocassettes with neighbors and colleagues. [And this is often genuine "sharing" as we are taught the concept as children, not Napsteresque "sharing" in which a person gives without giving up anything.]

That's important for one simple reason -- courts have identified customary practices as being relevant in determining what 'markets' copyright holders are entitled to and, in turn, what kinds of copying may be fair uses. Consumers have become accustomed to making some limited amount of non-transformative copies for personal use. This applies to all sorts of copyrighted works and across all sorts of machines and appliances.

Having said that fair use has evolved in the past, the corollary is that we don't know where fair use will go in the digital future. But if we don't know where fair use will go, we definitely should not allow anyone to unilaterally determine that fair use should go away. There have always been a few people who, in Professor Brown's 1963 description, "treat fair use as though it were some grudging toleration of an annoying public." That's wrong. Fair use and other limitations on the rights of copyright owners - like the first sale doctrine - are part and parcel of the social bargain of copyright.

The 1998 Digital Millennium Copyright Act (DMCA) reflects reasonable concern for "fair use" in the digital, networked era. Section 1201(c)(1) expressly provides that the new law does not affect fair use under section 107 and the prohibition on "digital lock picking" in section 1201(a) does not extend to digital locks that control any rights or privileges of the copyright holder beyond "access" - precisely because some unauthorized uses will be fair uses. Only time will tell whether this arrangement in the DMCA workably preserves fair use, but the intent is clear.

In that same spirit, the European Union has also recognized the importance of preserving "personal uses" and "fair dealing" limitations and exceptions from copyright liability under various European laws. The European Union's new Copyright Directive takes a slightly different tack from the DMCA, but with the same intent: under Article 6(4) of the Directive, if a member

state of the European Union determines that digital locks deployed by copyright owners are inhibiting consumers ability to enjoy certain "personal uses" (what we would call fair uses), that country may take "appropriate measures" to ensure such uses are available to consumers.

The smartest people in the audiovisual industry realize this too -- that a certain amount of non-commercial, personal copying definitely does not harm and may even benefit their businesses.

III. Forcing Us to Define How Much Use is Fair Use

For this reason, if there has to be any regulatory structure imposed on digital, networked systems to protect copyrighted works, it should be one that focuses on stopping unauthorized distribution over the Internet and leaves alone what some people have called the "home net" -- the integrated system of personal computers, display devices, and audio equipment that private homes will increasingly have. The focus should be on technology that addresses commercial and commerce-substituting broadband distribution, not on technology that could be used to stop Aunt Mary from copying her favorite soap opera for herself or a friend.

More importantly, if the copyright industries want particular security technologies mandated by law, then instead of pursuing private, industry negotiations, we should all be prepared to sit down and do what we have not been willing to do in this country: establish exactly how much unauthorized, personal use is fair use. Perhaps additional security protocols like broadcast flags and watermarking might be legally mandated at least for some machines and appliances if the content community is willing to accept a limited, defined zone of personal, private, unauthorized use of copyrighted works. That would be a system in which we defined a minimum amount of copying a private individual would be allowed to do for herself, her family, and her immediate social circle.

This could be a kind of Audio Home Recording Act (AHRA) writ large -- covering more appliances and broadly extending its basic ideas, including the recognition that consumers can make some digital copies for personal uses. There is, of course, an important lesson in the AHRA: Congress legislated, but the market decided to go another direction and the statutory technological mandate was a technological dead-end.

IV. A Sea Change from the DMCA

Which brings me to a final, couple, broad concerns. While today's hearing is intended to be a general discussion of these issues, Senators Hollings and Stevens have recently proposed legislation on this topic, the Security Systems Standards and Certification Act (SSSCA). We might as well talk about this, because we all know nothing focuses a lobbyist, legislator, or staffer's attention in DC like a draft bill.

In at least one version, the SSSCA would require the specification of "certified security technologies," either by an industry-only forum or by the Secretary of Commerce. In either case, the particular security technologies would be specified in law (regulation) and all "interactive digital devices" would be required to include such security technology - all to the goal of preventing the making of digital copies.

As best as I can tell, the SSSCA's sweeping definitions would require specified technology to be built into every piece of software; PC, video card, hard drive, CPU, motherboard; PDA; DVD or CD player; and every monitor manufactured or distributed in our country. The security technology would be specified in a process that apparently has little or no safeguards for the traditional balance of copyright rights and privileges.

Moreover, the government's best intellectual property, information policy, and competition experts - at the USPTO, the Copyright Office, the Justice Department, and the science agencies - don't have a leading role in the "specification" process. It's hard to understand this. I think Congress ought to rely more on the expertise it pays for every year and less on the "experts" to be found at so many Washington fundraisers.

But more importantly, the SSSCA or anything like it would represent a dramatic reversal of Congress' approach to the digital world. To date, Congress has wisely understood that the government should not try to pick technological "winners" and "losers." Government should stay out of the business of imposing technological solutions to problems which move much faster than bills through Congress or regulations through the Federal Register.

In that spirit, the DMCA wisely includes a "no mandates" provision, making clear that consumer electronics, computer, and telecommunications equipment systems do not have to be designed to respond to any particular technological measure. The development of effective technological protection measures and their successful deployment was left up to the private sector. Congress' thoughtful effort to stop government from picking technological winners has extended far beyond intellectual property. For example, the E-Signatures bill, the work of the Judiciary and Commerce committees in both houses, is technologically neutral. It does not pre-empt states passing their own electronic signatures legislation, except that pursuant to section 102(a)(2)(A), the federal law does pre-empt any state government that tries to pick a particular technological solution to the problem of electronic signatures, documents, and record-keeping.

V. How would we explain this around the world?

I have another concern about such a quick revisiting of the issue of technological protection measures - just months after some of the key provisions of the DMCA have come online.

Since the ratification of the WIPO Copyright Treaty (WCT) and the WIPO Phonograms and Performances Treaty (WPPT) in 1996, the United States has been at the forefront in advocating that countries ratify these international agreements and implement them through strengthening and improvement of domestic copyright legislation. Since the passage of the DMCA, the U.S. Government has held up the DMCA's balanced, hands-off approach as a model for how countries should implement international copyright norms for the digital, networked age.

If we suddenly do a volte-face and decide that government must mandate the particular security devices and protocols needed to protect copyright works, it gets considerably harder to tell other countries that we know what we're doing. Frankly, such a policy change could make us look a little clueless. Having been in many of these conferences, discussions, and negotiations, I can easily imagine a savvy technocrat from another country noting such a change in U.S. policy and

asking hard questions about American understanding of this Internet phenomenon, this digital universe of our own creation.

In short, there may be international reasons for such a change in policy to be a last option.

Conclusion

There are tough decisions to be made in copyright policy. And those decisions may not be too far down the road. How the first sale doctrine survives in a digital world, how fair use evolves, how geography-based arrangements for royalties are transmuted into the Internet - all these issues are as important as they are fascinating.

Many of the people in this room remember the hearing on Napster and other peer-to-peer file sharing systems which this committee held in 2000. At that hearing, Chairman Hatch posed a couple hypotheticals to Hillary Rosen, head of the RIAA. Chairman Hatch asked, if he made a tape copy of a CD to play in his car, whether or not that would be a fair use. He then asked if he made a copy of a CD for his wife to play in her car - would that be a fair use? Ms. Rosen demurred from giving a direct answer to Senator Hatch's questions and - given her job - I completely understand that.

But let me answer those questions, a couple years late. Are those fair uses? My very theoretical, law professor answer is this: if the Chairman of the Senate Judiciary Committee and the ranking minority member think something is a fair use, it is probably a fair use or soon will be.

And I close there for a very simple reason -- whatever legislation is introduced in other quarters, whatever negotiations are conducted privately, this committee should not abdicate its traditional job in deciding the proper balance in copyright law of the interests of creators, distributors, consumers, and citizens.

Thank you.

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