



Hon. Gary Locke  
Secretary of Commerce

Hon. David J. Kappos  
Under Secretary of Commerce for Intellectual  
Property and Director of the United States  
Patent and Trademark Office

Hon. Lawrence E. Strickling  
Assistant Secretary of Commerce for  
Communications and Information

**Consumer Electronics Association**  
1919 South Eads Street  
Arlington, VA  
22202 USA  
(866) 858-1555 toll free  
(703) 907-7600 main  
(703) 907-7601 fax  
www.CE.org

December 10, 2010

**Re: Comments in Response to Notice of Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy (Docket No. 100910448-0448-01, RIN 0660-XA19)**

Dear Secretary Locke, Undersecretary Kappos, and Assistant Secretary Strickling:

In response to the notice in the Federal Register of October 5, 2010, 75 Fed. Reg. 192, the Consumer Electronics Association (“CEA”) submits these comments on the relationship between copyright law and innovation in the Internet economy. In these comments, CEA stresses that users often lead innovation. Attention to their legitimate rights and expectations will help to achieve the policy balance that the Department seeks. Accordingly, to the extent the Department adopts or promotes public education programs addressing copyright and the Internet, it should equally stress the rights reserved to users and to entrepreneurs, and the societal value that these rights represent. Such rights and expectations are foundational, not orthogonal, to copyright. Programs and policies addressing digital rights management (DRM) and copyright education should recognize consumer sovereignty in general and, in particular, the right to make private, noncommercial use of copyrighted works. As the Supreme Court has noted, “broad public availability” is one of the central objectives of U.S. copyright law.<sup>1</sup>

## **I. Interest Of CEA**

CEA is the preeminent trade association promoting growth in the consumer electronics (“CE”) industry through technology policy, events, research, promotion and the fostering of business and strategic relationships. 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, and related services.

---

<sup>1</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

CEA's members account for more than \$165 billion in annual sales in the United States. The CE industry directly employs approximately 1.9 million workers in the United States. Of these, 212,000 jobs are in manufacturing, 574,000 are in retail, 38,000 are in transportation, and 1,073,000 are in the parts of the U.S. economy that depend on the use of CE products, such as the telecommunications, broadcasting, software development, and motion picture and sound recording industries. Many of these jobs are on the cutting edge of technology, including jobs related to research and development of new technologies and the marketing and design of new products. The CE sector directly generates \$1.4 trillion in output, \$325 billion in payrolls and other labor compensation, \$145 billion in tax payments, and 4.4 million jobs in the United States. This economic activity translates into a direct contribution of \$585 billion by the CE sector to U.S. gross domestic product – approximately 4.6 percent of the entire national economy.<sup>2</sup>

## II. Users Drive and Guide Innovation

The Department in its Notice of Inquiry<sup>3</sup> seeks to identify policies that will “increase benefits for rights holders of creative works accessible online ... maintain robust information flows that facilitate innovation and growth of the Internet economy ... and ... safeguard end-user interests in freedom of expression, due process, and privacy.” The Department rightly seeks to balance effective protection of copyrighted works with “the flexibility needed for innovation in the Internet economy.”<sup>4</sup> The NOI recognizes that these goals are equally important and can come into conflict. The Department specifically has requested comment on technologies that are or could be used by Internet service providers to prevent copyright infringement, and initiatives to improve Internet users' and university communities' awareness of “online copyright infringement” and its alternatives.<sup>5</sup> CEA recommends that Department should put equal emphasis on the legitimate expectations and opportunities for user innovation offered by new technologies, as these enable new availability and uses of works.

Consumer electronics products grow “smarter” every day. Their owners make new and creative uses of the Internet. Over a range of personal and home products – not just “computers” – entrepreneurs are developing new applications and consumers are finding new uses, individually<sup>6</sup> and in social and business collaboration.<sup>7</sup> The U.S. government should recognize that user creativity is a value inherent in U.S. copyright law, and that this value has provided a competitive advantage in a world economy in which our leadership in innovation no longer can be assumed. To focus only on certain “rightsholders” to the exclusion of the designers and users of services and technologies would be a costly and shortsighted mistake.

---

<sup>2</sup> CEA research.

<sup>3</sup> 75 Fed. Reg. 192, at 61420 (Oct. 5, 2010) (“NOI”).

<sup>4</sup> NOI at 61421.

<sup>5</sup> NOI at 61423.

<sup>6</sup> Studies have shown that users not only drive but also guide the innovation process. *See generally*, Eric von Hippel, *Democratizing Innovation*, The MIT Press, 2006, available at <http://web.mit.edu/evhippel/www/books.htm>; von Hippel, “the dominant role of users in the scientific instrument innovation process,” *Research Policy* 5, 212-239 (1976), available at <http://web.mit.edu/evhippel/www/papers/1976%20vH%20instruments%20paper.pdf>.

<sup>7</sup> Open source collaboration has been recognized as a primary driver of innovation. *See* Hal R. Varian, Joseph Farrell, & Carl Shapiro, *The Economics of Information Technology: An Introduction*, at 8 (Cambridge Univ. Press 2004).

### **III. The Rights Reserved To Users and Entrepreneurs Promote Innovation and Competition on the Internet**

In its constitutional source, common law development, and modern statutory codification of exclusive rights, the U.S. copyright law has never constrained all uses of creative works. U.S. law reserves only uses that are central to the author's incentive to profit from the work.<sup>8</sup> All other uses are equally open to exploitation by personal and entrepreneurial users, purchasers, and audiences without permission or compensation. Except for rights persisting in works created before codification, there are no residual rights in federal law; uses not reserved to the proprietor have equal dignity with those that are.<sup>9</sup> Had U.S. law not fostered these rights of users, the United States could never have been the incubator for the Internet or the home of its most successful development. Chief among the rights reserved for users are those of private performance, first sale, and fair use.

#### **a. Private Performances and Display**

The Copyright Act reserves to proprietors the exclusive right to perform or display works publicly. But private performances or displays, such as those occurring in "a normal circle of a family and its social acquaintances," are not "public." This reserved sphere of personal autonomy is essential to the Internet and enhances the value of digital goods. Because private performances are outside the scope of the Copyright Act, consumers and innovators have freedom over when, where, and how digital goods can be used personally and privately. Choosing to listen to a digital music file in a car, watch a movie on a portable player, render video or musical works on your home equipment from a remote location, or fast-forward through parts that are boring or objectionable are examples of private performance. These rights are served and enhanced by technologies, devices, and services.

Because entrepreneurs cannot be secondarily liable unless there has been a direct infringement by a user of their product or service, the rights reserved to users are the direct foundation for innovation and economic growth. Innovators do not need authorization to enable or induce private performances.

Some proprietors seek to undermine private performance rights, and thus the services and technologies that enable their constructive exercise. They would classify as a "public performance" the ring of a mobile phone,<sup>10</sup> the authorized download of a song,<sup>11</sup> or the remote storage and playback of a home recording.<sup>12</sup> Uncertainty posed by ambitious legal theories can undermine creativity and economic growth. Accounting for possible out-of-scale statutory damages can chill innovation, even where the proprietor's claims are novel and untested. Unless and until U.S. law definitively expands proprietors' reserved rights, the teaching of the U.S. government should not take an expansive or tendentious view of them.

---

<sup>8</sup> See *Sony Corp. of Am., Inc. v. Universal City Studios, Inc.*, 464 U.S. 417, 430-31 (1984).

<sup>9</sup> *Id.*

<sup>10</sup> *In re Cellco P'ship*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009)

<sup>11</sup> *United States v. Am. Soc. of Composers, Authors, Publishers*, 09-0539-CV, 2010 WL 3749292 (2d Cir. Sept. 28, 2010).

<sup>12</sup> A lower court agreed; the Court of Appeals did not. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

## **b. First Sale**

The “first sale” doctrine<sup>13</sup> gives the owner of a lawful copy the freedom to sell, rent, or give it away, commercially or otherwise. Courts have long recognized that restraints on the alienation of personal property are against public policy.<sup>14</sup> The first sale doctrine recognizes the distinction between a copyright owner’s property right in the creative work and a consumer’s property right in a lawful copy. The law confirms that consumers acquire title, rather than an ephemeral, narrow, and vague “right to use.”

In the Internet context and now increasingly elsewhere, sellers of goods and software often attempt to circumvent the first sale provision of the Copyright Act by including in their packages a writing that characterizes the transaction as a “license” rather than a sale. A Court of Appeals has acknowledged that automatic recognition of “license” verbiage purporting to cut off purchasers’ first sale rights would deprive consumers of these rights to an extent most consumers would count as ridiculous, and many product and service providers would see as threatening to innovation.<sup>15</sup>

Preserving a strong default rule that the purchaser of a lawfully made product owns it and can dispose of it as she wishes will strengthen the Internet economy. Consumers are confident about the value proposition of books, CDs, and DVDs because they know what they are buying. The understanding of first sale rights in the context of Internet and other digital transfers is evolving. The ease of making digital copies, and the *necessity* of making ephemeral or buffer copies as a digital file travels across the Internet and within a device’s memory, make it more difficult to identify lawful copies to which first sale will apply. Official education and messaging in legal areas where disputes cloud the margins should not detract from the value that U.S. law attaches to consumer sovereignty.

## **c. Fair Use**

The well-established doctrine of fair use should be a part of any balanced program of public education about U.S. copyright law.<sup>16</sup> One reason that the Internet was nurtured and grew commercially in the United States rather than elsewhere is our reservation of the right of fair use, which is lacking in most other legal systems. Fair use supports personal and creative use without notice to, or authorization of, the copyright owner.<sup>17</sup> It supports software reverse-engineering in aid of interoperability.<sup>18</sup> It recognizes that consumers may make personal copies of creative works,<sup>19</sup> and protects technologies that enable such uses. It supports uses by other creators, for purposes that include criticism and creative or informative transformation.

Unlike most foreign legislatures, Congress did not prescribe static categories of only those specific uses that are exempt from authorization. Nor did it attempt to establish the amount or

---

<sup>13</sup> 17 U.S.C. § 109.

<sup>14</sup> *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

<sup>15</sup> See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010). The Court of Appeals, nevertheless, approved such a “license” interpretation in the case that was before it.

<sup>16</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164-65 (9th Cir. 2007).

<sup>17</sup> 17 U.S.C. § 107.

<sup>18</sup> *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527-28 (9th Cir. 1993).

<sup>19</sup> *Sony*, 464 U.S. 417, at 454-55.

percentage of a work that may be copied. Recognizing that fair use, like first sale, derives from judicial practice, and that it is rooted in our First Amendment,<sup>20</sup> the Copyright Act sets out general and non-exclusive factors for consideration by our courts. With the overhang of ruinous statutory damages<sup>21</sup> for secondary liability, however, consumers and innovators must weigh the risk that a court will not agree that their product, service, or business is entitled to this doctrine's protection. Without a means of establishing more certainty for copyright users, the fair use bulwark could erode to "the right to hire a lawyer,"<sup>22</sup> for technologists as well as users.

One solution developed by groups of copyright users (including authors and artists) to reduce the uncertainty inherent in fair use is voluntary codes of best practices. Documentary filmmakers,<sup>23</sup> English teachers,<sup>24</sup> music teachers,<sup>25</sup> and research libraries<sup>26</sup> have created or are creating "best practices" for what they believe should be fair use in particular contexts. As part of seeking a balance between increasing copyright owners' income from Internet distribution and preserving the rights and freedoms of users and consumers, the Department should encourage the creation of best practices statements and promote their use, where appropriate, by courts, insurers, and other stakeholders.

#### **IV. DRM Should Preserve Users' Rights**

The Department has asked for comment on the techniques used to deter illegal copying of works distributed on the Internet. Many but not all copyrighted works are distributed with some form of digital rights management (DRM) technology, often using encryption to restrict access to paying users, and to implement rentals and limited-use purchases. DRM technologies are simply marketplace tools for technological self-protection. They obtain legal protection against circumvention if they are effective *without* imposing or implying some legal mandate on device manufacturers or component suppliers to design their products so as to *make* the technology effective. The Digital Millennium Copyright Act (DMCA) recognizes that imposing a design mandate in order to *make* an otherwise ineffective technology (such as a signal distortion or a passive marking) effective in all devices would chill both innovation and commerce. Thus, it includes Section 1201(c)(3) – the "no mandate clause." To the extent measures are effective in their ordinary operation they are protected by the DMCA, but only as to their circumvention. The DMCA does not mandate implementation or compliance in devices or services, or in the selection of components for devices.<sup>27</sup>

Any official pronouncements or education undertakings with respect to DRM technologies should recognize that these technologies are marketplace tools that may impose technological constraints on downstream devices and users, so as to require licensed use. Specifically, CEA recommends that the Department, in policy positions and public education, acknowledge that U.S. law does not impose or infer any legal or technical mandate on product

---

<sup>20</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (calling fair use a "traditional First Amendment safeguard[]").

<sup>21</sup> 17 U.S.C § 504(c).

<sup>22</sup> Often attributed to Professor Lawrence Lessig.

<sup>23</sup> [http://www.centerforsocialmedia.org/sites/default/files/fair\\_use\\_final.pdf](http://www.centerforsocialmedia.org/sites/default/files/fair_use_final.pdf)

<sup>24</sup> <http://www.ncte.org/positions/statements/fairusemedialiteracy>

<sup>25</sup> [http://www.ams-net.org/AMS\\_Fair\\_Use\\_Statement.pdf](http://www.ams-net.org/AMS_Fair_Use_Statement.pdf)

<sup>26</sup> [http://chaucer.umuc.edu/blogcip/collectanea/2010/04/best\\_practices\\_in\\_fair\\_use\\_com.html](http://chaucer.umuc.edu/blogcip/collectanea/2010/04/best_practices_in_fair_use_com.html)

<sup>27</sup> See Schwartz and Turner, When Is A "Technological Measure" "Effective" And When Is Compliance Mandated?, <http://www.hrrc.org/index.php?id=133&subid=2>.

and software innovators that would make DRM technology effective where otherwise it would not be. Irrespective of the DMCA, the proprietor of a DRM technology may assert rights in a patent or copyright, if infringed. The proprietor of a protected work has rights under the DMCA as to its circumvention. Neither the proprietor of the DRM technology nor the owner of the work is granted by the DMCA any additional right as to products or components of products, so as to require the design or adaptation of those products to be responsive to a technical protection measure.

## **V. Educational Materials for Consumers and Universities Should Give Equal Weight To Users' Rights**

The Notice of Inquiry asks about existing initiatives to “improve the general awareness” of Internet users and university communities about “online copyright infringement.”<sup>28</sup> Most of the educational materials currently being offered for students and the public focus on achieving the first of the goals that the Department identified in this NOI – to “[i]ncrease benefits for rights holders of creative works accessible online but not for those who infringe on such rights.”<sup>29</sup> However, many of these materials omit any information about equally vital user rights and freedoms. Indeed, in many cases these educational materials contain serious inaccuracies that lead to public ignorance and misconception about users' rights. This undermines the Department's other goals of “maintain[ing] robust information flows” and “safeguard[ing] end-user interests in freedom of expression, due process, and privacy.”<sup>30</sup>

Many of the “educational” materials available on the Internet suggest that consumers, users, and audiences of creative works have no rights at all beyond those explicitly granted by the copyright owner, or assert that every use requires permission. For example, the Copyright Alliance Education Foundation's “Educator's Guide to Copyright” states flatly and erroneously that “‘fair use’ does not permit making unauthorized copies of copyrighted material for professional use,” and that “[s]ome students believe that copyright law makes an exception for ‘personal use’ of copyrighted material. It does not.”<sup>31</sup> These statements ignore the reality that many uses of copyrighted works (such as private performances) are completely unregulated, and others (including some “professional” and “personal” uses) are fair use.

Another set of curriculum materials, from the “B4UCopy” website, also ignores vital parts of our Copyright Act. It urges teachers to teach that “the copyright symbol identifies the owner of a piece of intellectual property and serves as a reminder that it is illegal for anyone to copy that property without the owner's permission.”<sup>32</sup> This is especially problematic, because the sort of creative experimentation that leads to innovation (both by artists and by technologists) is stifled when it requires permission from copyright owners, and it is partly for this reason that fair use may apply in those circumstances. Teaching students and the public that *any* use requires permission can lead to self-censorship and lost opportunities for innovation.

---

<sup>28</sup> NOI at 61423.

<sup>29</sup> NOI at 61420.

<sup>30</sup> *Id.*

<sup>31</sup> <http://www.copyrightfoundation.org/files/userfiles/file/EducatorsGuide.pdf>, at 3.

<sup>32</sup> <http://www.b4ucopy.com/teens/B4UCopy-HighSchool-Teachers-Guide.pdf>

