

Testimony on
“The Digital Media Consumers’ Rights Act of 2003”
(H.R. 107),
before the Subcommittee on
Commerce, Trade, and Consumer Protection,
U.S. House of Representatives,
May 12, 2004.

Lawrence Lessig

Professor, Stanford Law School.

Mr. Chairman, and Members of the Committee:

I am the John A. Wilson Distinguished Scholar, and a Professor of Law at Stanford Law School. I have written extensively about new technologies and legal policy. As a lawyer, I have been involved in a wide range of litigation involving copyright and the Internet. I am Chairman of the Board of Creative Commons, and a member of the boards of Public Knowledge, the Public Library of Science, EFF and the Free Software Foundation. I direct the Stanford Center for Internet and Society.

I am grateful for the opportunity to testify before you today, and offer the following to help your deliberations.

Copyright law is an essential protection for authors and creators. It is a necessary protection for creative industries and commerce. Innovation and creativity depend upon adequate and reliable copyright protection. Commercial piracy is therefore an important threat that the government rightly should address.

Yet in its eagerness to staunch commercial piracy, the law must not lose sight of the crucial balance in copyright that has also been at the core of our tradition. These limits in the United States have

historically guaranteed that the benefits of copyright regulation do not outweigh its costs. A poorly crafted copyright law — a law that either creates too much uncertainty, or a law that extends its reach beyond its legitimate purpose — can stifle progress rather than promote it.

“Fair use” is one important limitation upon the regulation of copyright. Historically, it has neither been the most important or most familiar. The efforts of this Committee to consider whether fair use is adequately protected in the digital age is an important first step in striking the right balance in the regulation of copyright.

But it is only a first step. In my view, Congress’s zealous efforts to attack “piracy” have had the unintended collateral effect of destroying a crucial balance in copyright law. Never in the history of our nation has the law of copyright regulated as broadly; never has it regulated as extensively. And in light of the creative and commercial potential of digital technologies, never has the law burdened creative work as directly or pervasively. If copyright litigation promises to become the “asbestos litigation for the Internet Age,”

as Stewart Baker recently wrote in the Wall Street Journal,¹ then the actual law of copyright promises to become the IRS code of the creative class. The direct beneficiaries of this massive change in legal regulation are existing, highly concentrated, copyright industries, and lawyers. Those burdened by this regulation are increasingly creators and innovators, both commercial and noncommercial.

In my view, Congress should systematically reconsider the scope of federal regulation governing the creative process. It should reevaluate, in light of the massive changes that digital technology produces, the best way to protect the legitimate interests of creators. Rules that made sense even just 30 years ago are highly questionable today. Congress's objective must be to guarantee that the regulation of creative work continues to serve the single constitutional purpose of that regulation: to "promote the Progress of Science."

I know from personal experience that the position I mean to advance before this Committee is apparently difficult for many to understand. No doubt that failure is in part due to the rhetoric of some of us on this side of the debate. So let me state as simply and

¹ Stewart Baker, Review, Wall Street Journal, W6, March 26, 2004.

clearly as I can: My argument is for balance in copyright regulation. Yet many hear such an argument as an argument against copyright. A kind of “IP McCarthyism” seems to govern this debate. The rhetoric from both extremes makes it sound as if the only choices were between two extremes.

This view is a profoundly costly mistake for both commerce and innovation generally. Congress must begin to recognize the radical change in the scope and reach of copyright regulation in just the past twenty years. In part that change is the product of legislation; in part it is the unintended consequence of copyright law applied to vastly different technologies. As I have tried to demonstrate in my own work,² the consequences of these changes together are to burden creativity, and stifle commercial innovation. Neither effect is a necessary consequence of a well-crafted copyright law.

Just as one can criticize the tax code without criticizing the idea that in a civilized society, citizens must pay taxes, and just as one can criticize the regulations of OSHA without believing that business should be free from safety regulation, so too can one criticize the extremism that copyright law has become without criti-

cizing the idea that copyright is essential to creative work, and to creative industries. That it is essential is my view; that it has become too costly and inefficient is also my view.

It is for this reason too that it is extremely important that these issues be considered by this Committee. The history of regulation being used as a tool to stifle competition is long. And as this Committee knows well, only a careful and consistent monitoring of regulation can assure that the law not become a tool that industries use to protect themselves from new competition. Every generation will view the innovations of the next generation as troubling and threatening. But those same innovations keep competition vigorous. As Adam Smith famously remarked, competitors are always seeking ways to stifle competition. Federal monopolies, which copyrights are, are often the most effective tool. Copyrights are no doubt important. But the Constitution gives Congress the power not to grant copyrights, but to “promote the Progress of Science.”

In the testimony that follows, I briefly outline the historical balance that copyright law struck. I then consider the current position of “fair use,” in light of the changes that I describe. Against

² The Future of Ideas (2001); Free Culture (2004).

this background, I argue that H.R. 107 is an important step in restoring balance to copyright. And finally, I conclude with other efforts Congress might consider to further balance copyright law in light of new technologies.

THE HISTORICAL BALANCE OF COPYRIGHT

As the Supreme Court has repeated, and as the late Professor Lyman Ray Patterson made clear,³ copyright “has never accorded the copyright owner complete control over all possible uses of his work.”⁴ Its purpose instead is to secure a limited monopoly over certain ways in which creative work is exploited, so as to give authors an incentive to create, and thus, in turn, to “promote the Progress of Science.”

Originally, the trigger for that protection was the act of “publishing” a work. The first Copyright Act secured an exclusive right to the authors over the publication of “maps, charts, and books.”⁵ In 1909, the scope of that right was expanded to give authors an

³ See Lyman Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 46 (1987).

⁴ *Sony v. Universal City Studios*, 464 U.S. 417, 432 (1984).

⁵ Act of May 31, 1790, 1 Stat. 124.

exclusive right over “copies.”⁶ Against the background of the technology extant in 1909, that change was probably not intended as a substantive change in the reach of the law, and in any case, was not significant: For printed texts, the technologies of “copying” were essentially the same as the technologies of “publishing.”

Before digital technologies, this pattern of regulation meant that while some “uses” of copyrighted material were plainly regulated under the law — publishing a book, or reprinting a chapter — many uses were *unregulated* under the law. Reading a physical book, for example, is an unregulated use under the law, since reading a book does not produce a copy. Giving someone a book is an unregulated use, since giving someone a book does not produce a copy. These uses are thus independent of the regulation of copyright. And these unregulated uses support many important commercial activities, including used bookstores and libraries.

Unregulated uses are not the same as “fair use.” “Fair use” is a privileged use of a copyrighted work that otherwise would have infringed an exclusive right. It is, in other words, a copy that the user is privileged to make regardless of the desire of the copyright owner. Thus, reading a book is an unregulated act under copyright

⁶ Patterson, *supra*, at 12.

law. But quoting a book in a critical review is a presumptively regulated use (because a quote is a copy), yet privileged under the law of fair use.

The traditional contours of copyright law thus secured to authors exclusive rights over just some uses of their creative work. But it secured to consumers and the public *unregulated access* to that creative work for most ordinary uses. And it privileged the public for some uses that would otherwise have infringed the exclusive right to copy.

This traditional balance has been changed in the context of digital technologies. For it is in the nature of digital technologies that every *use* of a digital object produces a copy. Thus every *use* of a digital object is presumptively within the scope of copyright law's regulation. And that in turn means many ordinary uses must now either seek permission first, or rely upon the doctrine of "fair use" to excuse what otherwise would be an infringement.

For example, the ordinary use of reading a book — unregulated by copyright law for a physical book — is now regulated by copyright law on a digital network: as any act on a digital network, produces a copy, so too does merely reading a book. The same with "lending" a book, or selling a book — all these produce copies; all

these are regulated on a digital network; none of these would have been regulated outside of a digital network.

These changes are the unintended consequence of the interaction between digital networks and a form of copyright law that triggers liability upon the making of copies. Their consequence is that the law now reaches far more broadly than it ever did before. And when tied to the unconditional reach of copyright after the abandonment of copyright formalities, they mean that the burden of copyright applies in a vast range of contexts in which it does not also provide any copyright related benefits.

THE CURRENT INADEQUACY OF FAIR USE

There are many who believe that “fair use” is an adequate balance within copyright law. I believe that at present, this view is mistaken for three related reasons.

First, as the history just sketched suggests, the doctrine of “fair use” has not historically been relied upon to free ordinary uses of copyrighted material from the regulation of the law. Instead, ordinary uses were free of regulation because copyright law did not cover those uses. “Fair use” originally regulated uses by *competitors*

to the copyright owner.⁷ It didn't regulate uses by consumers. Yet given the fundamental shift of copyright's reach, it is now the rights of consumers to use content in ordinary ways that must be defended through the doctrine of "fair use."

Second, as any *practical* understanding of the law reveals, "fair use" is an extraordinarily uncertain freedom. The test is crafted as a balancing test, with no single factor as determinative. This means that *ex ante*, it is extremely hard for creators and publishers to know precisely what freedom the law allows. This either forces publishers to impose rules that are far more strict than fair use,⁸ or it forces creators to clear permissions upfront. And when that permission cannot be secured, it forces the creator into an extremely difficult choice: whether to risk substantial exposure for copyright liability, or to remove the speech from the creator's work.

A recent example involving NBC makes this hypothetical more salient. Cinema Libre intends to distribute an award-winning documentary about the Iraq War by film director and producer Robert Greenwald, titled "Uncovered." In preparing the extended version of the film, Greenwald wanted to include a one-

⁷ *Id.*

minute clip from NBC’s “Meet the Press” interview with the President. Greenwald was denied permission. The agent informing Greenwald’s agent of the decision stated, “unofficially, we don’t believe it makes the President look good.” And thus Greenwald and Cinema Libre are now confronted with a stark and odd choice for a democracy protected by the First Amendment: Should they risk substantial liability simply to repeat the words the President of the United States?

These costs of fair use are significant both to commercial and creative potential. Though some naively believe the costs of seeking permission are slight, in fact those costs are prohibitively high for all but a few commercial creators. Indeed, because the costs of giving permission are often higher than any possible revenue from that permission, many rights owners adopt a simple presumption against giving permission. Transaction costs thus bury creative work under a system of uncertain fair and free use.

Finally, and most directly related to the issues before this Committee today, “fair use” is effectively erased by technical measures that block ordinary or fair uses of creative material, and by legal rules that render illegal technologies that might help evade

⁸ See William F. Patry and Richard Posner, *Fair Use and Statutory Reform*

those restrictions. Thus, technologies that restrict the ability to capture a clip from a DVD for educational purposes, or that restrict the ability of consumers to backup digital media, interfere with uses that would, under the law of copyright, be deemed fair. And under the DMCA, efforts to evade those restrictions are prohibited.

These three reasons together suggest that “fair use” in its current state will not suffice to secure a balance between the control copyright regulation secures, and the access that copyright is meant to guarantee. It is therefore crucial that Congress consider a range of measures to update fair use in the digital age. H.R. 107 is an important beginning, as I describe below. But I would not let it be the last.

Fair use has been a central aspect of American copyright law. It is less familiar within other legal traditions. Indeed, this difference may well account for the relatively anemic understanding of fair use offered by trade associations, including the RIAA. As every major label in that trade organization is now owned by foreign corporations, it is not surprising that those labels find our tradition to be alien. “Fair use,” as a senior executive at one of the major la-

in the Wake of Eldred, California Law Review (forthcoming 2004).

bels recently put it, “is the last refuge of scoundrels.” I understand how that may be the view of some in the world. But within our tradition, fair use is a core freedom.

In its current state, however, fair use does not effectively protect consumers and creators in their transformative use of creative material. That in turn increasingly stifles commerce as well as creativity.

One useful example of this consequence is the litigation surrounding MP3.COM. MP3.COM designed a technology to enable consumers to verify to a computer that they owned or possessed a CD. Once that fact was verified, the company gave the consumer access to the content on that CD from any computer on the network. These password protected accounts served to validate and protect the selected music. And they were supported by MP3.COM’s purchasing and copying 50,000 CDs onto MP3.COM’s servers.

Because the company was simply giving customers access to music they had already presumptively purchased, and because the service in fact made the music that people had purchased more valuable, MP3.COM believed its business model was protected by “fair use.” Some recording labels and artists disagreed, and sued

MP3.COM. Months later, a court found the company liable, and fined the company over \$120,000,000, and effectively forced the company into bankruptcy. When one of the labels suing MP3.COM purchased the company, it then filed a lawsuit against MP3.COM's lawyers, charging them with malpractice in advising MP3.COM the company that its business model was legal.

That case has subsequently been criticized by Judge Richard Posner.⁹ But my point here is not to take sides in the matter (although I agree with Judge Posner). It is instead to make the obvious point that a committee on Commerce would well understand: if the doctrine of fair use is so uncertain that senior and respected judges would apply it differently in the same case, and yet exposes innovators to such severe liability, we can expect (as we have observed in Silicon Valley) that this legal uncertainty will chill business investment.

H.R. 107

H.R. 107 is an important first step in restriking a balance in copyright law. The bill would make two significant changes. It would first, and least controversially, require adequate labeling of

⁹ William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 120-21 (2003).

copy-protected CDs. And second, it would eliminate anti-circumvention regulation in contexts in which there is no underlying copyright interest at stake.

(1) *Labeling*

As this Committee is well aware, technologists have been working for many years to find a technological way to control how CDs are used by consumers. In particular, they have sought a technological way to assure that a CD could be played, but that its content could not be copied.

Such a technology, given the open implementation of CD protocols, is extraordinarily difficult to perfect. And hence the risk that any particular technology will not work on a particular machine is high.

“Not work” however can mean much more than simply not playing. In some reported cases, copy-protection technologies have actually destroyed data on the consumer’s computer. That loss can be extremely costly.

This risk is more significant on less-mainstream computers. Any copy-protection technology is likely to have been tested on the most popular systems. It is economically impossible for these

technologies to be tested on every system. Thus, it is certain that some users of these copy-protected technologies will use the technology on a machine for which it has not been tested. And no doubt, some will suffer significant costs from that use.

These costs from copy-protection technologies must be considered in light of an obvious fact: that the ordinary use restricted by these technologies is not, ordinarily, a copyright infringement. A consumer who purchases a CD, and then shifts the content of that CD to his computer so that he can listen to music, engages in a “fair use” of that content. No doubt some might not be protected by fair use — a user who systematically copies CDs borrowed from the library to build his own library of music, for example. But the vast majority of users would be using purchased content in a totally legal way.

In this context, a labeling requirement is an obvious and valuable regulation for both consumers and producers of content and computers. The benefit to consumers is obvious: they can avoid protected content if they have reason to be concerned that the technology used to protect the content might interfere with their machine.

But there is also a benefit to content producers and technologists: To the extent stories about harm caused by copy-protected technologies become more common, they will create an uncertainty among computer users. That will reduce the demand for CDs by those users. Eliminating that uncertainty will counteract that dampening of demand. And likewise, producers of competing, but not-yet mainstream, technologies will not face the barrier to entry created by consumer fear — namely, that their technology might interact badly with copy-protected CDs. If there's no way to know whether a CD will destroy data on a non-Windows based computer, that will, on the margin, make it less likely that one would purchase a non-Windows based computer.

Adding information into the market will thus improve competition within the market. And while in the short term, such labels may drive consumers away from copy-protected CDs, they will also create a strong incentive for CD manufacturers to support certifying organizations that can verify that the technologies cause no harm. The label would thus create an incentive for better cross-platform certification, which again would benefit consumers and competition generally.

(2) *Non-infringing use exception from anti-circumvention regulation*

The more controversial aspects of H.R. 107 are the portions aiming to exempt from DMCA liability technologies that circumvent copyright protection technologies for privileged uses. The bill both privileges circumvention if the underlying use of the copyrighted work would be privileged, and privileges technologies “capable of enabling significant non-infringing use of a copyrighted work.”

This correction to the DMCA is long overdue. It is necessitated first by the limited authority granted to Congress under the Copyright and Patent Clause. As the Supreme Court has repeatedly affirmed, Congress’s power under the Copyright & Patent Clause is limited. *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (clause “both a grant of power and a limitation”). As it has recently indicated in *Eldred v. Ashcroft*, among those limits is “fair use.” Slip Op. at 30. Yet the DMCA, as interpreted, plainly interferes with the effective exercise of “fair use.” And if Congress is restrained by the First Amendment to include “fair use” in the Copyright Act, it is constrained by the First Amendment not to exclude it through other copyright-related rules.

No doubt, content owners who rely upon copy-control technologies will worry that this exception will swallow the DMCA-rule: that by allowing technologies that, e.g., enable back-ups of DVDs, Congress will be allowing technologies that enable “piracy.” But there is absolutely no independent economic showing of harm caused by the ability to circumvent copy-protection technologies for non-infringing uses. It is possible, of course, that such an exception will create a problem in the future. But rather than destroying a tradition of consumer rights because of a fear, Congress should predicate additional legal regulation only upon an actual showing of harm from such technologies.

That showing, moreover, must be precisely focused upon the copyright related interest in controlling circumvention. The question of harm is whether the existence of a technology (a) cannibalized a market (by enabling some to get the content without paying for it) more than it (b) expanded the market (by making the underlying content more valuable). That harm must then be discounted by the constitutionally required “fair use” enabled by that technology.

OTHER NECESSARY STEPS

As I have indicated, this important legislation is just the first step in a series of actions that Congress should consider to assure that copyright law continues to function in the balanced way that is our tradition. In addition to this change, I would urge this Committee to recommend the establishment of a serious and balanced study, perhaps chaired by former Congressman Robert Kastenmeier, to consider fully how best to adjust the protections of copyright to the digital age. Kastenmeier's tenure chairing the Subcommittee on Courts was defined by a constant appreciation of the balance the law needs to strike in light of changes in technology. A commission focused on precisely this sort of balance could provide a map for Congress in a range of areas.

Such a map would reveal, I suspect, the great value that could be produced by rules designed to re-formalize much of copyright law. One unintended consequence of Congress's changes in the law in the 1976 Act was to eliminate many traditional copyright formalities. That in turn has massively increased the unproductive burden of copyright regulation — both making it more difficult to track down copyright owners, and extending copyright protection to works having no continuing copyright-related interest. Rules

for more clearly identifying owners and content requiring protection would improve the creative process generally.

No doubt some of this work can be done by the private sector. I am Chairman of Creative Commons, <<http://creativecommons.org>>, a non-profit corporation that builds and gives away technologies that enable authors and creators to more simply signal the freedoms they intend to run with their content. Thus a musician can use these tools to signal her desire that others share her music for non-commercial purposes. Or an author may use these tools to signal his desire that others use his work for any purpose so long as attribution is given. As a recent feature article in *Business 2.0* describes,¹⁰ this strategy is increasingly used by artists and authors to enable their own commercial success, by lowering the transaction costs imposed by the law on the ability of others to reuse and share content.

I am proud of the work that Creative Commons has done to enable creators to make their work more easily available. And following a recent grant, I am eager to expand that work into the domain of science. But this work signals the need for a more ex-

¹⁰ Andy Raskin, *Giving it Away (For Fun and For Profit)*, *Business 2.0* (May 2004).

tensive reconsideration about how copyright law currently functions. It is not a substitute.

CONCLUSION

As the Supreme Court has indicated repeatedly, it is primarily Congress's job to "defin[e] the scope of the limited monopoly that should be granted to authors or to inventors."¹¹ But in executing that task, it is crucial that Congress not be captured by any single set of interests. While I believe historically that Congress has done a good job in balancing technologies and protection, there is an important and valid criticism made by many that Congress has crafted copyright policy to conform to the interests of current creators, while ignoring the interests of future creativity, and businesses that build on their work.

My concern is that this dynamic precisely is happening just now. In the heat of the debate about "piracy," I believe that Congress is losing sight of other important values. And in particular, in the burdensome regulations that have been enacted to fight "piracy," my concern is that a great deal of the potential commerce and creativity that digital technologies might enable will be lost.

¹¹ Sony, *supra*, 464 U.S., at 429.