

THE NATIONAL ACADEMIES OF SCIENCE

**THE COMMITTEE ON THE IMPACT OF COPYRIGHT POLICY ON
INNOVATION IN THE DIGITAL ERA**

STATEMENT OF PUBLIC KNOWLEDGE

Thank you for providing me with the opportunity to present our views regarding the impact of copyright policy on innovation. Public Knowledge is a non-profit public interest advocacy and research organization dedicated to promoting a balanced copyright and an open communications regime.

Introduction

While we as a country accept that granting exclusive rights can spur progress in knowledge and creativity, there is no linear correlation between the extent of protection and the amount of creativity. In fact, a too-rigid network of pervasive rights can prevent the flow of knowledge and information.

I'd like to address a few topics that are ripe for further investigation and study.

First, the length of copyright terms and the associated problem of orphan works;

Second, the social costs of anticircumvention provisions; Third, the erosion of the

first sale doctrine, through technology and through overextended licenses; Fourth,

the increasing scale of statutory damages; And Finally the costs and benefits of Internet intermediary liability.

1. The Optimal term of copyright protection

Copyright terms have been expanding since the Copyright Statute of 1790. Most of these term extensions have been justified on the assertion that the longer term would provide greater incentives to authors to create more works. In addition, Congress has also expressed the belief that longer terms would also provide an incentive to copyright owners to restore older works. Yet there seems to be little empirical evidence supporting these propositions.

On the other hand, experts point out that the actual commercial life of works is much shorter than their term of protection. For example, a 2005 Library of Congress study that focused on sound recordings created before 1965 found that the commercial life of many of these recordings was much shorter than their term of protection. Furthermore, contrary to the belief expressed by Congress, rights owners did not re-issue a majority of these recordings. In addition, the long copyright duration also results in the problem of orphan works.

As a result of the short commercial life of many copyrighted works and the resulting orphan works problem, many works of historical, social, and cultural significance become unavailable to scholars, historians, educators, and the general public. In view of these problems, a re-examination of the appropriate term of copyright protection is warranted.

2. The social costs of using technological protection measures to prevent infringement

The DMCA imposes a ban on circumvention of technological protection measures (TPMs), arguably even when that circumvention is in service of a completely legal use of a work.

However, public interest advocates including Public Knowledge, believe that the experience with use of TPMs backed by the DMCA demonstrates several shortcomings. First, such measures inadvertently prevent not only infringing uses, but also lawful uses. For instance, not only will an infringer be prevented from copying a protected DVD, but also an elementary school teacher will be prevented

from making excerpts from the DVD to illustrate a point in the classroom. Second the triennial rulemaking process, meant to provide relief from the prohibitions of the DMCA, is burdensome on users. Third, the prohibition on circumvention lets publishers restrict, under penalty of statutory damages, behaviors completely legal under the Copyright Act. This grants them the power to extend their control over post-sale distribution in ways contrary to congressional intent and the purposes of copyright law itself.

After a decade under this regime, a number of questions about the effectiveness, values, and costs of anticircumvention and the exemption process need to be answered.

3. The state of the first sale doctrine

The first sale doctrine allows owners to dispose of their particular copies of copyrighted works. The purpose of the doctrine has been to preserve users' rights to alienate their own property. It has allowed libraries to lend works and for secondary markets to exist.

However, in recent years this right has been challenged on various grounds. Through the use of overly restrictive End User License Agreements, copyright owners claim that they have licensed physical copies of works rather than sold them. This claim is also made with respect to sales of digital downloads of works. By creating the presumption that users do not own the works they have paid for, drafters of these EULAs can sidestep the first sale doctrine and control post-sale distribution.

The gradual erosion of the first sale doctrine has several consequences. It prevents existence of secondary markets where copyrighted goods are sold at lower prices to those who cannot afford the price of the original. It can be used to prevent secondary markets in goods that are not themselves the object of copyright protection, but may have copyrighted signage or packaging affixed to them. Furthermore, it threatens to penalize through copyright law parties who have never entered into any agreement with the distributor or copyright owner,

The Committee could consider these and other questions as they relate to the first sale doctrine. Also, the committee could consider the costs conveyed onto consumers by requiring them to read and understand EULAs.

4. Statutory damages

The current copyright statutory damages regime has resulted in extremely large damages awards in many cases. Often, these awards bear no relationship to the actual damage suffered by the copyright owner. Statutory damages were created in an environment when commercial infringement was the norm—where the infringement of one work thousands of times over would create a large presumptive loss for the copyright holder. However, in the instance of file-sharing cases today, we're commonly seeing many files being infringed just once, with much smaller actual damages. Yet the statutory damages scheme, which attaches massive dollar amounts per work infringed, is ill-suited to create effective and proportional penalties in these cases.

These huge awards have a tendency to chill innovation by discouraging introduction of products/services that facilitate new uses of copyrighted works. Also, they chill use of orphan works.

In view of these concerns, we must examine the current statutory damages regime and its effectiveness in curbing infringement. Also currently unknown is the

number of instances where works were not used for fear of exposure to statutory damages.

5. The costs and benefits of third party liability

The Internet Service Provider (ISP) safe harbor provisions codified in section 512 of the DMCA have facilitated the growth of the Internet by relieving ISPs from liability for infringing actions of their customers, if they abide by certain conditions. The safe harbor for Internet access providers is premised on the notion that they are mere conduits of information and cannot interfere with its contents.

However, changes in technology now allow ISPs to be more than mere conduits. As a result, some have called on ISPs to actively prevent infringement on their networks by using filtering technologies such as Deep Packet Inspection, or other monitoring systems. Such filtering raises a number of concerns from the consumer perspective and the committee could address these concerns. For instance, what effect would content filtering have on consumers' free speech interests and privacy? From the copyright perspective, what is the possibility that automatic filters would be able to detect and prevent throttling of fair use? What are the due process implications of looking at communications without a court order? What

effect would filtering requirements have on innovative services that are not able to accommodate proposed technology mandates and its associated expenses?

Conclusion

I would like to thank the Committee once again for giving Public Knowledge an opportunity to present its views. We remain at your disposal to answer any questions you may have.

Thank you.