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Prepared Remarks of Professor Greg Lastowka

I first want to thank this committee and the National Academies for undertaking this valuable and important project and for giving me this opportunity to be heard.

This committee is staffed with a stellar set of experts on copyright law. Yet to some extent, that raises a concern. Specialists are heavily steeped in what the law is. The task of this committee, however, is to offer an opinion about whether the law is working. And that is a very different question.

It is a question that is commonly framed in the wrong terms. Everyone knows that the Internet has caused substantial problems for copyright law. We are repeatedly told that copyright law is in a moment of technological crisis.

Yet, in my opinion, our current crisis has very little to do with Internet-based piracy. Piracy is certainly occurring today. Yet the entertainment industry has always evolved and adapted to new technologies. The creative destruction of particular business models is a healthy process for the progress of our technology, our economy, and our culture. More importantly, there is no risk here that copyright law will fail its ultimate purpose. Art and culture will continue to be created and shared.

Today's true copyright crisis, as I see it, is a crisis of public legitimacy. As Professor Jane Ginsburg has pointed out, copyright law has gotten a very bad name for itself in recent years.[1] And public perceptions of copyright are very important because the general public is increasingly involved in copyright matters.

Today we have unprecedented lawsuits brought by content industries against ordinary consumers for making personal use copies of works. At the same time, the rhetoric of consumer piracy has fueled a series of recent expansions of copyright entitlements, including new criminal provisions and the unprecedented technological regulations found in the Digital Millennium Copyright Act.

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[1] Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM.-VLA J. L. & ARTS 61 (2002).

Although the piratical public is often cast as the villain in copyright circles, that public has only a vague sense of the actual mandates of copyright law.[2] Yet as they are increasingly sued, they are increasingly curious about the rules of copyright. Unfortunately, Title 17 reads (for good reason) like a complicated contractual compromise between specific industrial players concerning specific technologies. The general public, unfortunately, cannot understand the letter of copyright law.

More importantly, when threatened with lawsuits, the public wants to know not only what the law demands, but why we have copyright law. And this is where copyright law faces a true digital dilemma. Copyright law's approach to the Internet has been precisely backwards.

As the committee is well aware, copyright's primary purpose is to promote public access to knowledge, education, and learning. (Notably, it is not a law intended to sustain the profitability of certain late 20th century business models.) Today, this purpose is being fulfilled via digital technologies.

Today, the average citizen has new technological tools to create valuable creative works in a variety of digital formats. Amateurs, meaning those outside the economic system of the traditional content industries, are producing a long tail of new works in bewildering varieties.[3]

Carpenters and electricians offer primers on home improvement projects; online communities struggling with medical conditions pool their wisdom in guides and wikis; authors, artists, and musicians post original works for free public consumption; and even law professors post their thoughts about intellectual property and new technology.[4]

This wealth of networked contributions to our collective knowledge has revolutionized the information ecology. Today's citizen has an unprecedented ability to access whatever it is he or she needs to know in order to do whatever it is he or she needs to do. That knowledge can then be easily shared with others. The free access sphere of digital copyright has a tremendous economic and educational value.

My children think it is quite natural to go to Google or YouTube on a whim to learn how to build a catapult, to learn how to tie an Aikido belt, or to look for examples of hybrid fruit trees.

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[2] See Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 168 (2001) (noting the prevalence of copyright myths).

[3] My own writings about amateur content include: VIRTUAL JUSTICE 166-193 (Yale University Press 2010); *User-Generated Content & Virtual Worlds*, 10 VANDERBILT J. ENT. & TECH. LAW 893 (2008); *Digital Attribution*, 87 BOSTON UNIV. L. REV. 41 (2007); *Amateur-to-Amateur* (with Dan Hunter), 46 WILLIAM & MARY L. REV. 951 (2004); and *Free Access and the Future of Copyright*, 27 RUTGERS COMPUTER & TECH. L. J. 293-331 (2001). But as the committee is well aware, there are many other scholars inside and outside the legal academy who have examined the contributions of amateur authors (*e.g.*, Larry Lessig, Rebecca Tushnet, Yochai Benkler, Henry Jenkins).

[4] As just one example, three of today's best-selling books about new technology and intellectual property law are Larry Lessig's FREE CULTURE, Yochai Benkler's THE WEALTH OF NETWORKS, and Jon Zittrain's THE FUTURE OF THE INTERNET. All three books sell well on Amazon.com and are also available as free and legal Internet downloads.

Commercial content industries used to provide this information, yet they are being displaced by the free access content on the Web.

I should stress that the laws of copyright do protect these important new amateur works. Yet although falling within the purview of copyright, the amateur contributions made to this sphere are submitted on a presumption that others are free to access and enjoy the authorial work. This difference is extremely important because these new authors have significantly different hopes with regard to their works and respond to significantly different copyright incentives.[5]

I should also stress that there is a vibrant economy that is being built on this new form of copyright wealth. Aggregator companies like Google and Facebook are building profits primarily from harnessing the value of free access content. They index and organize amateur contributions in ways that the public finds useful and that the companies find profitable.

The free access information economy is not devoid of policy problems or concerns. Yet from the standpoint of the public's access to knowledge, this is a miraculous development that fulfills the essential goals of copyright. Accordingly, reforms to copyright law should seek to serve and shape this revolution. We should craft copyright reforms that promote these new digital technologies rather than constraining them. [6]

I hope this committee will not frame its inquiry as a matter of how best to control the technologies made available to a piratical public. The public is not composed of pirates. It is composed of authors.

The economic value provided to this country by the sphere of free and open access copyright is immense. I hope this committee might advise Congress to enact reformations that address the needs of our most important authors, the people of this country. We are currently in dire need of a copyright law that the general public can understand, endorse, and enjoy.

Sincerely yours,

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[5] *See generally* Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009) (exploring the question of authorship incentives); ROBERTA KWALL, THE SOUL OF CREATIVITY (2009) (arguing in favor of an expanded "moral rights" regime in United States copyright law).
[6] JESSICA LITMAN, DIGITAL COPYRIGHT 80 (2001).