BEFORE THE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
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FAIR USE: ITS EFFECTS ON CONSUMERS AND INDUSTRY
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NetCoalition appreciates this opportunity to testify before the subcommittee on the importance of fair use to the Internet. NetCoalition represents some of the Internet's most innovative companies, including Bloomberg, CNET Networks, Google, Interactive Corp., and Yahoo!. NetCoalition members believe in strong intellectual property protection. They own copyrights, patents, and trademarks, and enforce them vigorously. Indeed, their most valuable assets are intellectual property.

At the same time, NetCoalition members agree with Judge Alex Kozinski that overprotection of intellectual property is as harmful as underprotection. *See White v. Samsung Electronics*, 989 F.2d 1512 (9th Cir.)(Kozinski, J., dissenting), *cert. denied*, 113 S.Ct. 2443 (1993). The Supreme Court explains that the intellectual property system requires a "balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other." *Sony Corp. v. Universal City Studio, Inc*., 464 U.S. 417, 429 (1984).

Congress and the courts have carefully structured the copyright law to maintain this balance. Thus, while "copyright protection subsists … in original works of authorship fixed in any tangible medium of expression," copyright does not "extend to

any idea, procedure, process, system, method of operation, concept, principle, or discovery…." 17 U.S.C. 102. Similarly, the Supreme Court in *Feist v. Rural Telephone*, 499 U.S. 340 (1991), stated that "the most fundamental axiom of copyright law" is "that no one may copyright facts…." *Id*. at 353. Accordingly, "raw facts may be copied at will." *Id*. at 349.

The fair use doctrine is another means by which the copyright law balances "the competing concerns of providing incentive to authors to create and of fostering competition in such creativity." *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F,2d 1458, 1463 (5th Cir.), *cert. denied*, 498 U.S. 952 (1990). The Supreme Court has described fair use as an "equitable rule of reason which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 237 (1990). Just two years ago, Justice Ginsburg termed fair use as one of copyright law's "built-in First Amendment accommodations…." *Eldred v. Ashcroft*, 123 S.Ct. 769, 788 (2003).

Fair use is particularly important in the digital environment, where even the most basic functions require computers to make copies. For example, for a user to view a website, the user's computer must make a temporary copy of the website in its random access memory. Almost every other activity on the Internet also involves the making of a copy: printing out an interesting article; responding to an email; including an image downloaded from a website in an elementary school book report.

The balance of my testimony will address three instances where fair use plays a critical role for Internet companies: search engines, software development, and online creativity. My testimony then will discuss some of the threats to fair use.

FAIR USE AND SEARCH ENGINES

Internet companies rely on fair use in their daily operations. This reliance is most apparent with search engines, the basic tool that allows users to find information on the Internet. A search engine firm sends out software "spiders" that crawl publicly accessible websites and copy vast quantities of data into the search engine's database. As a practical matter, each of the major search engine companies copies a large (and increasing) percentage of the entire World Wide Web every few weeks to keep the database current and comprehensive. When a user issues a query, the search engine searches the websites stored in its database for relevant information. The response provided to the user typically contains links both to the original site as well as to the "cache" copy of the website stored in the search engine's database.

Significantly, the search engines conduct this vast amount of copying without the authority of the website operators. Although the search engines will respect an exclusion header, a software "Do Not Enter Sign" posted by a website operator, the search engines does not ask for permission before they enter websites and copy their contents. Rather, the search engine firms believe that the fair use doctrine permits their activities. In other words, the billions of dollars of market capital represented by the search engine companies are based primarily on the fair use doctrine.

KELLY v. ARRIBA SOFT

The application of fair use to search engines has been considered in one case -- *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003). There, the Ninth Circuit concluded that the fair use doctrine permitted the copying performed by search engines.

Arriba Soft operated a search engine for Internet images. Arriba compiled a database of images by copying pictures from websites, without the express authorization of the website operators. Arriba reduced the full size images into thumbnails, which it stored in its database. In response to a user query, the Arriba search engine displayed responsive thumbnails. If a user clicked on one of the thumbnails, she was linked to the full size image on the original website from which the image had been copied. Kelly, a photographer, discovered that some of the photographs from his website were in the Arriba search database, and he sued for copyright infringement. The lower court found that Arriba's reproduction of the photographs was a fair use, and the Ninth Circuit affirmed.

With respect to the first of the four fair use factors, "the purpose and character of the use, including whether such use is of a commercial nature," 17 U.S.C. § 107(1), the Ninth Circuit acknowledged that Arriba operated its site for commercial purposes. However, Arriba's use of Kelly's images

> was more incidental and less exploitative in nature than more traditional types of commercial use. Arriba was neither using Kelly's images to directly promote its web site nor trying to profit by selling Kelly's images. Instead, Kelly's images were among thousands of images in Arriba's search engine database. Because the use of Kelly's images was not highly exploitative, the commercial nature of the use weighs only slightly against a finding of fair use.

Kelly at 818.

The court then considered the transformative nature of the use – whether Arriba's use merely superseded the object of the originals or instead added a further purpose or different character. The court concluded that "the thumbnails were much smaller, lower resolution images that served an entirely different function than Kelly's original images."

Id. While Kelly's "images are artistic works intended to inform and engage the viewer in an aesthetic experience," Arriba's search engine "functions as a tool to help index and improve access to images on the internet …." *Id*. Further, users were unlikely to enlarge the thumbnails to use them for aesthetic purposes because they were of lower resolution and thus could not be enlarged without significant loss of clarity. In distinguishing other judicial decisions, the Ninth Circuit stressed that "[t]his case involves more than merely a transmission of Kelly's images in a different medium. Arriba's use of the images serves a different function than Kelly's use – improving access to information on the internet versus artistic expression." *Id*. at 819. The court closed its discussion of the first fair use factor by concluding that Arriba's "use of Kelly's images promotes the goals of the Copyright Act and the fair use exception" because the thumbnails "do not supplant the need for the originals" and they "benefit the public by enhancing information gathering techniques on the internet." *Id*. at 820.

With respect to the second fair use factor, the nature of the copyrighted work, the Ninth Circuit observed that "[w]orks that are creative in nature are closer to the core of intended copyright protection than are more fact-based works." *Kelly* at 820. Moreover, "[p]ublished works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred." *Id*. Kelly's works were creative, but published. Accordingly, the Ninth Circuit concluded that the second factor weighed only slightly in favor of Kelly.

The third fair use factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). The Ninth Circuit recognized that "copying an entire work militates against a finding of fair use." *Kelly* at

820. Nonetheless, the court states that "the extent of permissible copying varies with the purpose and character of the use." *Id*. Thus, "if the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her." *Id*. at 820-21. In *Kelly*, this factor weighed in favor of neither party:

> although Arriba did copy each of Kelly's images as a whole, it was reasonable to do so in light of Arriba's use of the images. It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site. If Arriba copied only part of the image, it would be more difficult to identify it, thereby reducing the usefulness and effectiveness of the visual search engine.

Kelly at 821.

The Ninth Circuit decided that the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. §107(4), weighed in favor of Arriba. The court found that the Arriba "search engine would guide users to Kelly's web site rather than away from it." *Kelly* at 821. Additionally, the thumbnail images would not harm Kelly's ability to sell or license full size images because the low resolution of the thumbnails effectively prevented their enlargement.

Are other circuits likely to reach the same conclusion as the Ninth Circuit when reviewing the copying performed by search engines? They are, because the Ninth Circuit's fair use analysis relied heavily on the Supreme Court's most recent fair use decision, *Campbell v. Acuff-Rose, Music, Inc*., 510 U.S. 569 (1994). Thus, *Kelly* correctly noted that *Campbell* held that "[t]he more transformative the new work, the less important the other factors, including commercialism, become." *Kelly* at 818, *citing Campbell* at 579. Likewise, *Kelly* cited *Campbell* for the proposition that "the extent of permissible copying varies with the purpose and character of the use." *Kelly* at 820, *citing*

Campbell at 586-87. And *Kelly* followed *Campbell*'s conclusion that "[a] transformative work is less likely to have an adverse impact on the market for the original than a work that merely supersedes the copyrighted work." *Kelly* at 821, *citing Campbell* at 591. Perhaps most importantly, *Kelly* repeated the Supreme Court's articulation in *Campbell* and *Stewart v. Abend*, 495 U.S. 207, 236 (1990), of the objective of the fair use doctrine: "This exception 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" *Kelly* at 817.

FAIR USE AND SOFTWARE DEVELOPMENT

Fair use is also critical to the inner workings of the Internet. A user's computer can access information stored on a distant server only because the software on the user's computer, on the server, and on all the computers in between, can communicate with one another. This interoperability often can be achieved only if the software developer can reverse engineer the products with which it seek to communicate. And because of the nature of software, this reverse engineering, this studying of the operation of an existing product, can require the making of temporary copies or translations of the existing program. Several courts have concluded that fair use permits the copying that occurs during the course of software reverse engineering. *See Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992); *Atari v. Nintendo*, 975 F.2d 832 (Fed. Cir. 1992); *Sony v. Connectix*, 203 F.3d 596 (9th Cir. 2000).

FAIR USE AND CREATIVITY ON THE INTERNET

The Supreme Court has observed that the Internet is "a unique and wholly new medium of worldwide communication." *Reno v. ACLU*, 521 U.S. 844 (1997). It

"constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers and buyers." *Id*. at 853. The Court marveled at the "vast democratic fora of the Internet," *id*. at 868, including thousands of newsgroups, "each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls." *Id*. at 851. Much of the commentary on newgroups and blogs involves quotations from articles or other commentators. Or it may consist of parodies of speeches or songs. Fair use makes this vital form of political and artistic speech lawful. And hyperlinking technology allows the commentator to link back to the original work. In this manner, the transformative fair use provides wider distribution to the original work. NetCoalition members encourage – and benefit from – this robust creative activity.

THREATS TO FAIR USE

Entertainment companies understandably seek to prevent infringement of their works through the use of digital rights management systems. But such DRMs typically preclude fair uses as well as unlawful ones. As DRMs become more pervasive, Congress may need to consider mechanisms for preserving fair use. Additionally, Congress should exercise great care before mandating DRMs. Such technological mandates will not only limit fair use; they will also impede innovation. These activities permitted by the fair use doctrine must be distinguished from the unauthorized widespread distribution of entertainment content such as sound recordings and motion pictures.

In sum, as Congress fashions policies to protect the entertainment industry from large-scale infringement over digital networks, it must take care not to prevent lawful

uses that enrich our lives. The Supreme Court in a related context cautioned that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." Id.