Center for Democracy & Technology Transition Memo
Theme: Keeping the Internet Open
Issue: Digital Copyright

✶**Issue/Problem.** The Internet and digital technologies offer new and powerful tools for locating, disseminating, and interacting with information and media. These capabilities can make possible infringement of copyright on an extremely large scale – but they also facilitate innovation, free expression, civic discourse, economic opportunity, and a more participatory and interactive culture.

Copyright policy therefore must seek a careful balance. Concern over copyright infringement is entirely legitimate, but must not be allowed to lead to responses – legislative, legal, or technological – that jeopardize the open architecture of computers and the Internet. For example, we should avoid technology mandates (requiring or prohibiting specific features in the design of technology), which could hobble the ability of computers and the Internet to serve as engines of free expression and innovation.

Digital copyright is a polarized area of debate. Some observers say efforts to protect the interests of copyright holders have already gone too far, and that the legal framework is growing increasingly skewed in ways that threaten to discourage, rather than promote, creativity and innovation. Copyright holders argue strongly, meanwhile, that new protections are needed to meet evolving challenges.

✶**Policy History.** The 1998 Digital Millennium Copyright Act (DMCA) prohibited the circumvention of technical protection measures (essentially, digital "locks" used by copyright holders to prevent unauthorized copying). It also provided "safe harbor" protection from copyright liability for an online service that hosts or transmits user-supplied information or media, so long as the service takes down infringing material when notified. Critics have argued that both the anti-circumvention and notice-and-takedown provisions of the DMCA have been subject to abuse and can stifle free expression and fair use. Congressman Boucher has repeatedly introduced legislation to permit circumvention when the purpose is fair use.

The emergence of peer-to-peer filing sharing technology, starting with the original Napster program around 2000, raised major concerns on the part of the music and movie industries and generated a wave of controversial legislative proposals. A draft bill by then-Senator Hollings would have dictated government-imposed design requirements for digital devices of all kinds; a bill by Congressman Berman would have given companies license to "hack" into citizens' computers in pursuit of pirated content; and another bill would have opened the door to holding technology makers broadly responsible when users engage in copyright infringement.

Meanwhile, the FCC required the use of "broadcast flag" technology in devices capable of displaying or handling digital television programs, only to have those rules invalidated by an appeals court in 2005. Since then, the movie industry has pushed Congress to reinstate the broadcast flag regime, while the music industry has sought to authorize some form of

FCC-mandated protection for digital radio. To date, none of these controversial proposals has been enacted.

Additional legislation has been adopted, however, in the area of enforcement. In 2005 and again in 2008, Congress enacted laws to boost penalties for certain copyright violations. The 2008 law also creates a new "Intellectual Property Enforcement Coordinator" in the White House. In addition, the Bush Administration launched an interagency initiative it dubbed "STOP" (Strategy for Targeting Organized Piracy), which has been credited with energizing and improving federal law enforcement in this area.

In the courts, cases continue to raise the important question of when and whether providers of digital products and services should be liable for copyright infringement. In 2005, the Supreme Court's *Grokster* case held that peer-to-peer services could be liable if they actively encouraged users to engage in infringement. Viacom's pending billion dollar suit against YouTube is a major test of the DMCA safe harbor provisions. Lawsuits are frequently filed against new services or technologies, from Google's "Book Search" tool to the offerings of small startups.

Issues surrounding the important legal principle of "fair use" have received increased attention in recent years, though still far less attention than the problem of large-scale piracy. A bill to facilitate the use of "orphan works" – works whose owners cannot be found – passed the Senate in 2008 but failed to clear the House.

Copyright has also been a subject of international trade and treaty negotiations. International cooperation on enforcement can help combat foreign and cross-border infringement. At the same time, negotiations have sometimes failed to reflect a balanced view of copyright. Negotiations towards an Anti-Counterfeiting Trade Agreement (ACTA) and the currently stalled WIPO broadcast treaty have sparked particular concerns.

✶**What the Obama Administration Should Do.** 1) President Obama should choose top appointees, and especially a new I.P. Enforcement Coordinator, who are sensitive to the full range of interests that copyright policy must balance.

2) On the international negotiations front, President Obama should pledge that ACTA will not move forward until a draft text is made available for comment, and should state that the United States will oppose further work on a WIPO broadcast treaty absent a real showing of need.

3) President Obama should support sensible reforms in areas like orphan works and music licensing.

4) President Obama should make clear that he will not support government technology mandates or other policies that would undermine innovation and free expression.

✶**Campaign Platform.** President Obama's campaign platform called for copyright policy to balance important competing interests: "We need to update and reform our copyright

and patent systems to promote civic discourse, innovation and investment while ensuring that intellectual property owners are fairly treated."

✶ **Other Voices.** Technology companies, library associations, and many public interests groups support these positions. The entertainment industries generally would argue that fighting infringement and protecting rights holders should take precedence.

✶ **For More Information.**

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Resources:

- CDT policy post on balanced framework for online copyright: http://www.cdt.org/publications/policyposts/2005/14
- CDT policy post on broadcast treaty: http://www.cdt.org/publications/policyposts/2006/16
- CDT policy post on *Grokster* case: http://www.cdt.org/publications/policyposts/2005/17
- CDT policy post on ACTA: http://cdt.org/publications/policyposts/2008/14

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