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TO: FCC Commissioners

FROM:

Patricia Aufderheide, University Professor in the School of Communication and Director, Center for Social Media, American University

Peter Jaszi, Professor in the Washington College of Law, American University

IN RE: The Future of Media Inquiry

We commend the Federal Communication Commission for its broad focus in addressing the question of the future of media. As co-principal investigators in American University's Fair Use Project, which began in 2004 and continues, we are acutely aware of the intersection between cultural production and copyright policy. As media production and distribution increasingly become decentralized, we believe that underlying standards and practices rise in importance. We would like to signal some areas in which the FCC may want to provide recommendations for improvements in copyright policy, to encourage cultural production in general and media production in particular. We also suggest one area, fair use, in which copyright policy should not be tampered with.

Copyright and creativity are tightly linked. All cultural expression everywhere, including all media, draws upon existing culture; otherwise, it would be incomprehensible. Increasingly, people can and do draw digitally upon existing culture, to produce new works, and to use existing works in new ways that do not interfere with existing markets for the copyrighted material. This vast expansion in creative possibility occurs in a policy environment created by decades of governmental and corporate investment in "long and strong" copyright—copyright that heavily favors existing owners and that interprets copyright as a property right.

The economics of businesses directly affected by copyright policy are changing. As the most recent study by the Computer and Communications Industry Association (CCIA) notes (<http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000354/fair-use-study-final.pdf>), the businesses in sectors that depend upon unlicensed access to culture, especially through fair use, now account for at least 16 percent of the GDP, while at their own count, copyright holders claim that works depending on powerful owner monopoly rights are only 23 percent of the GDP. Internet publishing and broadcasting and web search portals showed the most rapid rate of growth among fair use industries, which overall grew by 36% between 2002

and 2007 (23% of all U.S. real economic growth). We are in the first two minutes of an emerging era of digital media, whose eventual shape is unknowable but can easily be deformed by the weight of incumbency.

Our research demonstrates that when people do not understand their rights to use copyrighted work without licensing, in situations where it is reasonable to do so, their creative production is hampered and the quality of work produced by communities of practice is diminished. We have documented this for documentary filmmakers,<sup>1</sup> media literacy teachers,<sup>2</sup> students who contemplate making online videos,<sup>3</sup> and communication scholars<sup>4</sup> as well as closely observing the problems faced by makers of open courseware in higher education and archivists in the dance community. All have, in the past, not only faced obstacles to executing work, but—a far more serious problem—shrunk their expectations for their own creative work to the shape of their fears and confusions about copyright law.

Both copyright law and public understanding of copyright law need to be more user-friendly, in order to encourage cultural production at all levels and permit innovation. This is entirely possible without undertaking a complete rewrite of copyright policy or impeding the health of an economy dependent on national and international trade in intellectual property.

We have, in our American University project, already seen an impressive growth and change in creative practice, as we have helped communities of practice to articulate and publicize among themselves their own consensus on best practices in fair use.<sup>5</sup> These codes are available at [centerforsocialmedia.org/fairuse](http://centerforsocialmedia.org/fairuse). Codes of best practices in fair use have helped filmmakers, teachers, professors, archivists and makers of open courseware do more and better work; they have helped executives at movie studios and television programming services expand the range of work undertaken; they have helped school board executives expand pedagogical opportunities throughout their systems. Fair use has proved to be a flexible, adaptable and highly useful balancing feature of copyright policy. It has proved valuable enough to defined communities of practice for them to argue, in some cases successfully, before the Copyright Office for exemptions to the Digital Millennium Copyright Act's anti-circumvention rules.

Unlike some, we believe that fair use is properly defined and does not need statutory clarification. It needs articulation by fields of practice. Any other solution risks at least one of several outcomes. We could experience the inflexibility and narrow interpretations seen in European national copyright policies, where limitations and exceptions can become baroquely complex, to the point of defeating their purpose. We could create zones for nonprofit experiment that become cages, limiting circulation of work to narrow circuits. We could see safe-harbor

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<sup>1</sup> [http://www.centerforsocialmedia.org/resources/publications/the\\_good\\_bad\\_and\\_confusing/](http://www.centerforsocialmedia.org/resources/publications/the_good_bad_and_confusing/)

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[http://www.centerforsocialmedia.org/resources/publications/the\\_cost\\_of\\_copyright\\_confusion\\_for\\_media\\_literacy/](http://www.centerforsocialmedia.org/resources/publications/the_cost_of_copyright_confusion_for_media_literacy/)

<sup>3</sup> [http://www.centerforsocialmedia.org/resources/publications/the\\_good\\_bad\\_and\\_confusing/](http://www.centerforsocialmedia.org/resources/publications/the_good_bad_and_confusing/)

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[http://www.centerforsocialmedia.org/resources/publications/clipping\\_our\\_own\\_wings\\_copyright\\_and\\_creativity\\_in\\_communication\\_research/](http://www.centerforsocialmedia.org/resources/publications/clipping_our_own_wings_copyright_and_creativity_in_communication_research/)

<sup>5</sup> <http://www.centerforsocialmedia.org/files/pdf/IPTodaySuccess.pdf>

definitions become the ceiling of expectation, as has been true in guidelines created with prominent input from copyright holders.

Still, some aspects of copyright law unduly complicate cultural creativity and innovation, and could benefit from adjustments. People are intimidated by potentially gigantic (if rarely invoked) statutory damages, a concern that some copyright holders then exploit with frivolous cease-and-desist letters. People face uncertainty when confronted with orphan works, or works whose owners are missing. Sometimes “shrinkwrap” licenses or “click-on” terms of service conflict, or appear to conflict, with new creators’ rights under copyright law.

Creators also find that distributors, especially in a turbulent time of shifting models for distribution, may effectively embargo their work, failing to distribute it in established or emerging platforms. Digital culture needs a version of “out of print,” with rights of reversion to authors.

Creators also sometimes have as their highest priority recognition, rather than monetary reward. In today’s environment, they turn to copyright to get that recognition. This nation’s intellectual property policy needs a limited general right of attribution, ensuring that in a remix culture there is a mutually understood obligation to recognize the origin of works imported into new creation. This will relieve pressure on copyright law.

Emerging practices are also constrained by confusions or lack of clarity in copyright law. In the digital environment, the equivalent of the “first sale” right is unclear. First sale is a longstanding, uncontroversial right in the analog environment, permitting owners of copyrighted works to do what they wish with them, including reselling them. In the digital environment, copyright holders have in practice acted as if this right did not exist, while many consumers disagree. The twists and turns of the Google book settlement show that mass digitization requires greater legal clarity.

For these reasons, we offer a checklist of potential actions to make copyright law more consistent with digital creative culture, organized into do’s and don’ts:

**DO:**

- Create a limited general right of attribution. This will ensure that creators can be recognized—often their primary concern—and separate that need from market considerations.
- Limit statutory damages to cases of commercial-scale piracy. This will locate statutory damages in the arena they were designed for, and release the ordinary creator from unnecessary fear and confusion.
- Hold the duration of copyright at current levels. Long copyright terms put off-limits most of the work any creator experiences in their lifetime, without invoking an exemption such as fair use or licensing. That is already a high price today’s makers and tomorrow’s culture are paying to yesterday’s creators and today’s owners. The shrunken public domain should not shrink further, especially at a time when the parts of the economy that depend upon unlicensed access to culture are growing rapidly.

- Codify the Copyright Office exceptions to the DMCA. These modest exceptions have improved the productivity and functionality of the communities of practice that have won them to date. They have not caused harm to copyright owners. They can be codified without risk.
- Recognize (and define) a privileged space of non-commercial use. Many people use commercial objects to make media that is strictly of a private and noncommercial nature. This entire zone should be beyond the reach of copyright.
- Pass orphan works legislation, creating a mechanism to permit licensing of orphan works. Viable language exists in the Shawn Bentley Orphan Works Act of 2008, which did not go forward.
- Enact a digital “first sale” doctrine. The digital environment needs clarity, and consumers need the ability to use the media they have purchased with enough flexibility to ensure that cultural communication—the fount of creativity-- is not disrupted.
- Make clear that copyright preempts conflicting terms in mass-market consumer (e.g. shrink-wrap or “click-on”) licenses. We should not let technical obstacles and corporate practice override copyright law.
- Implement the Supreme Court eBay decision (*eBay Inc v. MercExchange, L.L.C.*, 547 U.S. 388 [2006]) in copyright cases. The Court decided that even if a defendant loses a lawsuit regarding intellectual property, courts have discretion to decline to award an injunction, which would remove the work in question from the marketplace.
- Authorize collective administration of rights in file-sharing content, as has been discussed in Prof. William Fisher’s *Promises to Keep*. This procedure, somewhat like ASCAP or BMI, might require an anti-trust exemption.
- Establish a safe space for mass digitization of special collections and related content, by amending Sec. 108 or 110 of the Copyright Act. Libraries and archives routinely need to digitize analog material--which may include material under copyright, orphan works and works in the public domain-- in order to preserve it and/or make it useful to patrons. It is impossible for librarians and archivists to proceed if they need to verify the copyright status of each piece.
- Establish a safe space for nonprofit libraries and archives to archive online content, including work exposed on the World Wide Web, by amending Sec. 108 or 110 of the Copyright Act. Many institutions fear doing so today, although outliers are doing it anyway, because it is not explicitly authorized in the Copyright Act.
- Legislate an automatic right of reversion to creators in cases of “unworked” licenses—licenses that fail to exploit the copyrighted work. Creators need to be able to take back and put to work material of theirs that is languishing, especially in a rapidly changing marketplace.

**DON'T**

■ Change Sec. 107, which articulates the fair use doctrine. That doctrine is actually working well for emerging creators and emerging creative practices.

We are fully aware that the changes we recommend by and large are not within the purview of the Commission. However, copyright issues complicate the issues that are at the heart of the Future of Media Inquiry, and therefore we believe that it is relevant to show a range of reasonable short-term measures to facilitate the growth of a healthy digital culture.

Thank you very much for your interest. We are happy to discuss this further. Peter Jaszi is available at [pjaszi@wcl.american.edu](mailto:pjaszi@wcl.american.edu) and 202-274-4216. Patricia Aufderheide is available at [paufder@american.edu](mailto:paufder@american.edu) and 202-885-2069.