

*Before the*  
U.S. Patent & Trademark Office  
National Telecommunications & Information Administration  
Department of Commerce  
Washington, DC

*In re*

Request for Comments on Department  
of Commerce Green Paper, Copyright  
Policy, Creativity, and Innovation in the  
Digital Economy

Dkt. No. 130927852–3852–01

**COMMENTS OF  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the U.S. Patent & Trademark Office (PTO) and the National Telecommunications & Information Administration (NTIA) and published in the Federal Register at 78 Fed. Reg. 61,337 (Oct. 3, 2013), the Computer & Communications Industry Association (CCIA) submits the following comments.<sup>1</sup> These comments focus principally on discussing issues pertaining to statutory damages (questions 13-15) and DMCA compliance (questions 22-25).

**Introduction**

It is no accident that the U.S. Internet industry dominates audience metrics throughout industrialized nations.<sup>2</sup> Congress’s calculated efforts to encourage rapid innovation and an entrepreneurial spirit online permitted Internet businesses to flourish more readily in the U.S. than elsewhere. U.S. intellectual property policy has long balanced protection for authors with protection for users, recognizing that proper exceptions and enforcement are “part and parcel of a balanced system of intellectual property.”<sup>3</sup> These balancing provisions, including the safe

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<sup>1</sup> CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. CCIA members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A list of CCIA members is available at <http://www.ccianet.org/members>.

<sup>2</sup> See Nielsen, [http://www.nielsen-netratings.com/resources.jsp?section=pr\\_netv&nav=1](http://www.nielsen-netratings.com/resources.jsp?section=pr_netv&nav=1).

<sup>3</sup> See Statement of Delegation of United States of America, on Copyright Exceptions and Limitation for

harbors of the Digital Millennium Copyright Act (DMCA),<sup>4</sup> and limitations and exceptions such as the fair use doctrine and the first sale doctrine, which allows goods to move freely in commerce, have provided the legal foundation for today's highly successful Internet services and applications. The success of Internet and e-commerce businesses in the U.S. must be at least partially attributed to the fact that Congress ensured copyright flexibility for innovators, and certainty with respect to liability matters.

While there has been considerable discussion of copyright reform, it is far from clear that attempting a re-write of the Copyright Act would represent a step forward. This may be a risky undertaking for key sectors of the American economy that rely on the carefully balanced (if exceptionally complex) provisions of the law. Nevertheless, developing an understanding of different stakeholders' perspectives on the system is valuable, and may assist parties in better utilizing the existing framework. These comments represent one such industry perspective.

## **I. Legal Framework for Remixes** (*Questions 1-6*)

Internet-based service providers enable extraordinary new creativity and communication by millions online, including remixes and mashups. This new form of creativity has increased demand for and supply of new content, as modern consumers spend more on entertainment and also create commercial content themselves.<sup>5</sup> Of course, the propriety of any given use of copyright-protected content is determined by the scope of the right and exceptions like the fair use doctrine, a principle that is of considerable importance to the economy.<sup>6</sup> Although CCIA's comments here focus principally on remedies-related issues, the items discussed below in relation to both statutory damages and the DMCA are relevant to remixes and mashups. Copyright damages that are neither rationally nor proportionally related to injury may significantly deter lawful creation and communication. Similarly, much of the remixed content

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Persons with Print Disabilities, World Intellectual Property Organization (WIPO), Standing Committee on Copyright and Related Rights, 19<sup>th</sup> Session (Dec. 15, 2009) at 5.

<sup>4</sup> Outside of copyright issues, Section 230 of the Communications Decency Act of 1996, passed in order to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services," has been equally important. See 47 U.S.C. § 230(b)(2).

<sup>5</sup> Michael Masnick & Michael Ho, *The Sky is Rising* (Floor64 2012), available at <http://www.ccia.net/org/CCIA/files/ccLibraryFiles/Filename/000000000586/TheSkyIsRising7-130.pdf>.

<sup>6</sup> Research indicates that industries benefiting from fair use and related limitations to copyright contributed \$2.4 trillion in value-add to the US economy (roughly one-sixth of total US current dollar GDP). See Thomas Rogers & Andrew Szamosszegi, *Fair Use in the U.S. Economy* at 26-27 (2011), available at <http://www.ccia.net/org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>.

contemplated in the notice is hosted online using DMCA-compliant services. Over-aggressive or improper use of the DMCA will result in a situation where content is removed regardless of what rights users have. Thus, rationalizing statutory damages and deterring DMCA abuse may help mitigate uncertainty around remixes and mashups.

## **II. First Sale in the Digital Environment** (*Questions 7-12*)

The first sale doctrine represents a crucial component of copyright law, which has long ensured that physical goods in which some copyrighted work has been embodied function like other conventional chattel. This enables commerce, as well as rental, gifts, and charitable donations, and various other conventional actions that consumers do not expect to be regulated by intellectual property constraints. In short, the first sale doctrine promotes free and open commerce by moving products from those who value them less to those who value them more. When combined with the global marketplace that the Internet has created, which increases potential demand and removes infrastructure costs traditionally associated with global trade, the first sale doctrine offers significant opportunities for international commerce.

Today, thousands of online businesses engage in the sale, lending, leasing, or giving away of products. Amazon and eBay are prominent examples of global marketplaces for many of these small businesses to sell physical copyrighted products. RedBox's app represents an innovative platform that enables the lending of physical movies at low cost. LeaderTrader.com and Swapalease facilitate the legal transfer of car leases on vehicles that contain embedded software. Goodwill's website helps users to locate Goodwill retail stores for donations, and provides Goodwill stores with a platform for selling their products.

The recent decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), brought welcome certainty to these markets. Rightsholders continue to be able to utilize contracts to set different prices in different markets prior to the first sale. Stated otherwise, just as firms selling non-IP-based goods can price discriminate in different markets because of transaction costs associated with resale of products, so too can IP-based firms price discriminate prior to the first sale.

Although *Kirtsaeng* finally resolved persistent questions about the first sale doctrine in the physical context, "digital first sale" issues remain uncertain. It appears that the time has come for a comprehensive discussion of how the first sale doctrine intersects with digital

technology, without prejudging its outcome. Future technologies and business models are likely to enable the transfer of digital goods, and copyright law should consider the unique aspects of these new models. CCIA looks forward to participating in a conversation about how to best promote new business models, while respecting rights, contracts, and consumer expectations.

### **III. Statutory Damages** (*Questions 13-15*)

The legislative history and Copyright Office recommendations on statutory damages leading up to the 1976 Act sought to remedy dissatisfaction with aspects of the 1909 Act that produced arbitrary results and contributed to uncertainty. The modern trend of greater application of statutory damages and increased use of a broadened concept of secondary liability has injected these problems back into copyright litigation. Policymakers could take certain steps to prevent the chilling effect of copyright damages on technological innovation by lawful products and services while still ensuring that rightsholders may obtain meaningful remedies.

Statutory damages have historically been viewed not solely as a compensatory mechanism where injury is difficult to measure, but in fact a punitive tool, “designed to discourage wrongful conduct.”<sup>7</sup> This goal of deterring misconduct, however, is not being served in cases where the individual engaged in misconduct is not before the court. When cases are brought against an intermediary for third party conduct, particularly where the intermediary was endeavoring to comply with the DMCA, a punitive mechanism is generally inappropriate.

Even in cases where a punitive mechanism is appropriate, it is doubtful that any additional marginal deterrence is achieved by multiplying judgments tenfold. The difference between \$100 million and \$10 million in damages has little effect on a corporate defendant with only \$1 million in assets, or an individual with only a few thousand dollars.

To whatever extent statutory damages deter misbehavior in this case, they also deter investment by creating substantial uncertainty and risk. Scholarly studies of statutory damages show punitive and inconsistent outcomes, *see, e.g.*, Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV.

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<sup>7</sup> *See N.A.S. Import, Corp. v. Chenson Enterprises, Inc.*, 968 F.2d 250, 252 (2d Cir. 1992) (citing *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952)); *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 354 (1998).

439 (2009),<sup>8</sup> and threats of personal liability for statutory damages are a severe deterrent to exploring new business models.<sup>9</sup> Surveys confirm that uncertainty around liability risks deter investment in this field.<sup>10</sup> (By contrast, the legal certainty resulting from the *Cablevision* decision – *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) – was estimated to have inspired up to \$1.3 billion in investment in U.S. cloud computing firms in the 30 months following the decision.<sup>11</sup>) Federal judges have also questioned disproportionate awards of copyright statutory damages.<sup>12</sup> CCIA has previously proposed reassessing Section 504(c), as summarized below, in a manner that would make statutory damages more reasonable and predictable.

Congressional action would be required to correct uncertainties associated with Section 504. While the Administration might recommend certain interpretations of the statute to courts, this would provide little certain to businesses, who will receive counsel based upon their exposure under the current statute. Adjustments to Section 504 may include:

*Providing guidance to courts.* Currently, 17 U.S.C. § 504(c) imposes a minimum statutory award of \$750 per work infringed, which may be reduced to \$200 if the infringer was

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<sup>8</sup> See also J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004).

<sup>9</sup> Michael Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 944 (2012). See also *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (litigation by UMG against Shelter Capital and two other investors in online service Veoh).

<sup>10</sup> Matthew Le Merle *et al.*, Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (2011), available at <http://www.booz.com/media/file/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

<sup>11</sup> Josh Lerner *et al.*, Analysis Group, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (2011), available at [http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner\\_Fall2011\\_Copyright\\_Policy\\_V\\_C\\_Investments.pdf](http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_V_C_Investments.pdf).

<sup>12</sup> See, e.g., *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (Mass. Dist. Ct. 2010) (referring to the jury's award of \$675,000 for infringement of thirty copyrighted works as "unconstitutionally excessive," "arbitrary and grossly excessive," "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," and "wholly out of proportion"); see also *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (concluding that the statutory damages award was "unprecedented and oppressive"); *In re Napster Copyright Litig.*, 7 U.S.P.Q. 2d 1833 (N.D. Cal. 2005) (noting that "under certain circumstances, large awards of statutory damages can raise due process concerns."); *UMG Recordings v. Lindor*, No. 05-Civ-1095, slip. op. at 6 (E.D.N.Y. Nov. 9, 2006) (permitting motion to add affirmative defense of unconstitutionality where plaintiffs sought statutory damages, noting that "plaintiffs' actual damages are 70 cents per recording and that plaintiffs seek statutory damages under the Copyright Act that are 1,071 times the actual damages suffered.").

not aware and had no reason to believe the act constituted infringement. The maximum increases from \$30,000 per work up to \$150,000 in cases of willful infringement. Courts could benefit from more guidance for calculating damage awards than merely stating, as 17 U.S.C. § 504(c)(1) does, “as the court considers just.” This language suggests that the court’s award should be designed to ‘do justice.’ However, when the case is not an exceptional one involving ‘willful infringement,’ or where an intermediary is being penalized for the misconduct of another party, there is no economic basis for attempting deterrence.

To provide such guidance in cases not involving willful infringement, Section 504(c)(2) could direct courts to “attempt to compensate the copyright owner” for the injury resulting from infringement.<sup>13</sup> To ensure that intermediaries attempting to comply with the DMCA are not conflated with willful pirates, Section 504(c)(2)’s provision on reducing damages might be explicitly extended to encompass all defendants with a good faith belief that the use at issue was lawful.

*Reconsidering statutory minimum damages.* Reconsidering the statutory minimum per-work-infringed award in § 504(c)(1) is also in order. The credibility of copyright remedies<sup>14</sup> is impeded by a system that subjects an individual to a penalty of \$750 for infringement of a single work that may be available in a digital marketplace for under \$1. Even if a court finds the infringement is innocent, the minimum is still \$200. Moreover, courts have held that the “innocent infringer” provision is not available with respect to works that were published in “hard copy” with a copyright notice—a limitation that makes little sense in the online world and even less sense with respect to an intermediary. *See Maverick Recording Co. v. Harper*, 598 F.3d 193 (5th Cir. 2010) (citing 17 U.S.C. § 402(d)); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005) (same). This result is difficult to reconcile with the increased preference for statutory damages and the Supreme Court’s “concerns over the imprecise manner in which punitive damages systems are administered,” *see State Farm Mutual Automobile Insurance Co. v.*

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<sup>13</sup> Samuelson & Wheatland, *supra*, suggest separating § 504(c) into separate sections on statutory damages as compensation when damages are difficult to prove. *Id.* at 509-10. Courts could be guided to limit this remedy where claim aggregation would result in grossly excessive remedies, such as in class actions and cases of secondary liability. *Id.*

<sup>14</sup> *See generally* Peter S. Menell, *This American Copyright Life: Reflections on Re-equilibrating Copyright for the Internet Age* (draft), Oct. 30, 2013, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2347674](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347674).

*Campbell*, 538 U.S. 408 (2003). The statutory minimum appears to enable trolling business models, some of which have led to judicial calls for criminal investigation.<sup>15</sup>

The minimum also presents problems for businesses, however. Conventionally, the large value range of statutory damages (up to \$150,000) is identified as the cause of copyright uncertainty. However, the floor presents a greater problem for online services. The \$750 floor means that – in a market where most new digital products and online services (such as cloud storage) contemplate many thousands of users manipulating hundreds or thousands of lawfully-acquired works – potential damages quickly reach uninsurable levels that deter investment. Even halving the minimum would still provide damages 100 times the going rate for many works. Of course, if statutory awards are insufficient, plaintiffs may always opt for actual damages.

*Harmonizing copyright willfulness with patent willfulness.* If an infringement is committed willfully, the statutory maximum increases by a factor of five, from \$30,000 to \$150,000. However, the Copyright Act does not define ‘willfulness,’ and there is a lack of uniformity in the courts concerning this important concept. The Federal Circuit’s decision, *In re Seagate Technologies, LLC*, 497 F.3d 1360 (Fed. Cir. 2007), defined willful *patent* infringement, however, and that definition may provide a helpful guide for a definition of willful copyright infringement, by requiring that a plaintiff “show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement.” *Id.* at 1371.

*Requiring the timely election of statutory damages.* Current practice has permitted plaintiffs to delay the election between actual and statutory damages until after the jury (or court) awards both actual and statutory damages. This allows the plaintiff to ‘game the system’ and extract higher settlements by threatening draconian damages throughout the litigation. So as not to unfairly prejudice defendants, plaintiffs should make this election in a timely manner, before the trial or the filing of a motion for summary judgment.

#### **IV. Government Role in Improving Online Licensing** (*Questions 16-21*)

CCIA encourages the Commerce Department’s efforts to promote increased licensing of online content. Research suggests that a substantial component of online infringement is

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<sup>15</sup> See Joe Mullin, *Prenda’s massive trolling take revealed: \$1.9 million in 2012*, ARS TECHNICA, Oct. 18, 2013, at <http://arstechnica.com/tech-policy/2013/10/prenda-massive-trolling-take-revealed-at-least-1-9-million-in-2012>.

attributable to market failure, and increasing consumers' lawful access to content would mitigate infringement, increase sales, and satisfy customers.<sup>16</sup> As CCIA has also noted in the context of orphan works, one of the unfortunate consequences of the choice to abolish formalities is that identifying and licensing works becomes more challenging. Even if Berne Convention restrictions are viewed as impeding government-driven initiatives, the Department can nevertheless encourage rightsholders to participate in broader licensing efforts, and to pursue private sector initiatives that would replicate the benefits of formalities and thereby facilitate more lawful commerce.

The ASCAP case pending in New York may be instructive on the difficulties of licensing. *See In re Petition of Pandora Media, Inc.*, No. 12-08035 (S.D.N.Y. Sept. 17, 2013). Pandora has been compelled to litigate against ASCAP and several major record labels for refusing to license works as mandated by a 1941 consent decree. The fact that a lawful service must litigate simply to ensure that copyrighted works are licensed in compliance with federal antitrust law illustrates the challenges of digital licensing, and the importance of the government encouraging competition for the benefit of the public.

As CCIA explained in comments to the PTO regarding voluntary best practices, the availability of services offering licensed digital content has been linked with a reduction in piracy. The introduction of Spotify into the Netherlands and Sweden substantially decreased unlawful music downloads in those countries, whereas it still remains quite prevalent in Italy, where Spotify only just launched.<sup>17</sup> Similarly, the introduction of both Netflix and Spotify into Norway was followed by a 50% reduction in video piracy and an 80% reduction in music piracy.<sup>18</sup> By contrast, reducing consumers' options for lawfully accessing content (presumably, with the aim of securing greater licensing revenues from various 'windows' or content outlets) appears to exacerbate piracy. For example, in 2011 commentators observed a marked increase in downloading of Fox television programming when that network began delaying shows' release

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<sup>16</sup> Timothy B. Lee, *Many of the most pirated movies aren't available for legitimate online purchase*, WASH. POST, Oct. 15, 2013, available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/15/people-pirate-movies-because-they-cant-get-legitimate-copies>.

<sup>17</sup> Will Page, *Adventures in the Netherlands*, Spotify, July 17, 2013, available at <http://press.spotify.com/uk/2013/07/17/adventures-in-netherlands>.

<sup>18</sup> Sophie Curtis, *Spotify and Netflix Curb Music and Film Piracy*, THE TELEGRAPH, July 18, 2013, at <http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>.

on the Hulu platform,<sup>19</sup> and more recently, the Time Warner/CBS retransmission fee dispute appears to have resulted in users turning to BitTorrent to watch CBS's "Under the Dome."<sup>20</sup> The market impact of window-driven infringement appears to vary. A 2012 study found that piracy had a limited effect on U.S. box office revenues, in contrast to international releases.<sup>21</sup> Because there is often a release window between U.S. and international releases, many consumers do not have a legal avenue with which to view films during their initial release period, and instead, turn to piracy. Findings of this nature suggest that increasing access to content, through new services and platforms, is a necessary strategy for mitigating infringement.

## **V. Operation of the DMCA Notice and Takedown System** (*Questions 22-25*)

It should not be surprising that the volume of DMCA takedowns has increased over time. The increased volume of DMCA takedowns indicates that rightsholders see utility in submitting them, and also generally illustrates the overarching importance of the Internet in the modern economy. The Internet has grown in significance over the intervening 15 years, and now enables almost \$8 trillion in commerce each year.<sup>22</sup> DMCA-reliant Internet services represent a substantial portion of the U.S. economy.

The DMCA is an essential system to the Internet economy, and the Internet sector depends upon a robust and unambiguous safe harbor. Because of this, online service providers generally acknowledge that DMCA compliance is an important responsibility for the industry, and work to comply expeditiously with takedown notices. The U.S. Copyright Office's online directory indicates that more than 66,000 service providers have complied with the formalities to receive the protections of the DMCA,<sup>23</sup> and an even greater number of businesses rely upon those service providers to reach new customers, and compete in the global marketplace at lower

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<sup>19</sup> Ernesto, *Fox's 8-Day Delay on Hulu Triggers Piracy Surge*, TORRENTFREAK, Aug. 22, 2011, at <http://torrentfreak.com/foxs-8-day-delay-on-hulu-triggers-piracy-surge-110822>.

<sup>20</sup> Brian Fung, *How CBS Sparked More Online Piracy – of its Own Show*, WASH. POST, Aug. 8, 2013, at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/08/how-cbs-sparked-more-online-piracy-of-its-own-show>.

<sup>21</sup> Brett Danaher & Joel Waldfoegel, *Reel Piracy: The Effect of Online Film Piracy on International Box Office Sales* (2012), available at <http://ssrn.com/abstract=1986299>.

<sup>22</sup> Matthieu Pélissié du Rausas *et al.*, *Internet Matters: The Net's sweeping impact on growth, jobs and prosperity* (McKinsey Global Institute 2011), available at [http://www.mckinsey.com/insights/high\\_tech\\_telecoms\\_internet/internet\\_matters](http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters).

<sup>23</sup> See U.S. Copyright Office, *Directory of OSP Designated Agents*, at [http://www.copyright.gov/onlinesp/list/a\\_agents.html](http://www.copyright.gov/onlinesp/list/a_agents.html).

costs.

Nevertheless, the Veoh litigation shows that the DMCA does not provide sufficiently extensive protection to prevent lawful services from being litigated into bankruptcy. In *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013), the “promising start-up” Veoh was ultimately exonerated after extended litigation, but not before the DMCA-compliant online video site had been ground into Chapter 7 bankruptcy. The plaintiffs then pursued Veoh’s investors.<sup>24</sup> Significantly, Veoh’s problem wasn’t the DMCA itself. Rather, the problem was that the rightsholders sued Veoh notwithstanding the DMCA, contending incorrectly that Veoh did not qualify for its protections. Viacom has arguably subjected YouTube to a similar strategy; the difference between the two cases is that YouTube has had the resources to survive marathon litigation. See *Viacom Int’l Inc. v. YouTube, Inc.*, No. 13-1720 (2d Cir. 2013) (pending).

The volume of takedown notices is best minimized by (a) reducing misuse of the DMCA system, (b) ensuring that consumers have more options for lawful access to content, given that a significant portion of online infringement results from the lack of lawful options in the marketplace, and (c) embracing new business models for content distribution.

While many rightsholders use the DMCA in good faith, misuse of the takedown process for non-copyright purposes is well-documented, and occurs with unfortunate frequency. See, e.g., *Tuteur v. Crosley-Corcoran*, No. 13-10159 (D. Mass. Sept. 10, 2013); see also *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (regarding whether misrepresentation for purposes of 17 U.S.C. § 512(f) includes failure to consider fair use). Even sophisticated enterprises appear willing to use the DMCA for inappropriate purposes.<sup>25</sup> It is reasonable to assume that reported and litigated cases are only the tip of the iceberg, and that a substantial number of similar incidents go unreported. The fact that the majority of takedowns may be legitimate does nothing to mitigate the speech-restricting effect of the minority. Moreover, even well-intentioned copyright owners appear to make mistakes; for the users who

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<sup>24</sup> Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, WIRED, Feb. 12, 2010, at <http://www.wired.com/business/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/> (“History will add online video site Veoh to the long list of promising start-ups driven into bankruptcy by copyright lawsuits — despite the fact that unlike the others, it actually prevailed in court.”).

<sup>25</sup> See, e.g., Michael Masnick, *Office Depot Sends World’s Worst DMCA Notice to Reddit*, TECHDIRT, Nov. 6, 2013, at <http://www.techdirt.com/articles/20131106/11130125151/office-depot-sends-worlds-worst-dmca-notice-to-reddit.shtml>.

are affected, the good intentions of these rightsholders may be of little comfort.<sup>26</sup> It is unclear, however, whether this could be improved by statutory revision.

As is the case with most complex regulatory systems, smaller enterprises and individuals will find compliance with the DMCA process more difficult than larger ones. Larger rightsholders may outsource the task of issuing takedowns to more specialized entities, and larger online services can deploy expensive systems like YouTube's ContentID. Individuals and small and medium-size enterprises (SMEs), on the other hand, generally must send and respond to notices manually.

The statute responds to this matter in three ways. First, the term "substantially" appears in several places, ensuring that formalistic objections cannot invalidate takedown requests under 512(c)(3), or counter-notices under 512(g)(3). This ensures that individuals and SMEs who make trivial errors in notices are not penalized regarding notices that are nevertheless sufficient to enable the service provider to locate the allegedly infringing material. (Similarly, agent designations under 512(c)(2) are governed by a substantial compliance standard.) Second, the statute uses the term "expeditious" to characterize the speed with which notices must be processed. What constitutes "expeditious" will naturally vary, such that small service providers or individuals are not held to the same standard as large service providers. Finally, as is being currently litigated in the *Lenz v. Universal* case, the statute only penalizes knowing misrepresentations, such that individuals and SMEs who make honest mistakes in issuing notices are not penalized.

Fifteen years ago, Congress acknowledged that Internet investment would not occur if service providers faced copyright infringement liability for content they handled "in the ordinary course of their operations". See S. Rep. 105-190, at 8 (1998). The compromise at the heart of the DMCA imposes upon service providers the costs of responding to millions of complaints in exchange for liability limitations, while guaranteeing rightsholders a rapid response to claims in exchange for the responsibility to affirmatively report infringement. Congress enacted this regulatory regime that mutually burdens and benefits rightsholders and service providers to provide certainty and encourage "the necessary investment in the expansion" of the Internet. *Id.* Policymakers should take care not to disturb the balance that Congress carefully contemplated,

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<sup>26</sup> See, e.g., *Disney Enters. v. Hotfile Corp.*, No. 11-20427 (S.D. Fla. Sept. 20, 2013) (describing hundreds of erroneous takedown notices sent by Warner Bros.), available at <http://www.scribd.com/doc/169783483/Disney-v-Hotfile-SJ-Order-M-D-Fla-2013>.

which continues to enable First Amendment-protected speech, including political speech, as well as online and traditional commerce. Increasing the DMCA compliance requirements would harm the public, service providers, and rightsholders.

Respectfully submitted,

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