

In the Matter of:

MULTISTAKEHOLDER FORUM

September 10, 2014



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UNITED STATES PATENT AND TRADEMARK OFFICE

DEPARTMENT OF COMMERCE MULTISTAKEHOLDER FORUM
ON IMPROVING THE OPERATION OF THE DMCA NOTICE
AND TAKEDOWN SYSTEM

FOURTH PUBLIC MEETING

Alexandria, Virginia

Wednesday, September 10, 2014

A G E N D A

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Present on the Podium:

SHIRA PERLMUTTER, Chief Policy Officer and
Director for International Affairs, USPTO

JOHN MORRIS, Associate Administrator and
Director of Internet Policy, NTIA

DARREN POGODA, Attorney-Advisor,
Office of Policy and International
Affairs, USPTO

JENNIFER BLANK, Attorney-Advisor,
Office of Policy and International
Affairs, USPTO

1 Opening Remarks:

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3 SHIRA PERLMUTTER, Chief Policy Officer and
4 Director for International Affairs, USPTO

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6 JOHN MORRIS, Associate Administrator and
7 Director of Internet Policy, NTIA

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10 Report of Working Group:

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12 SANDRA AISTARS, Copyright Alliance

13 JIM HALPERT, Internet Commerce Coalition

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1 Panel Discussion:

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3 SARAH FEINGOLD, Etsy

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5 EDWARD MCCOYD, Association of American

6 Publishers

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8 VICKY SHECKLER, Recording Industry Association

9 of America

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11 SHERWIN SIY, Public Knowledge

12

13 FRED VON LOHMANN, Google

14

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16 Discussion of Working Group Report and Future Work and

17 Closing Remarks:

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19 SHIRA PERLMUTTER

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 MS. PERLMUTTER: All right. I think
4 we've given a decent few minutes to let everyone
5 get into the room and we're ready to get
6 started.

7 Are we live on the webcast?

8 OPERATOR: Yes.

9 MS. PERLMUTTER: Wonderful. So good
10 morning everyone. I'm Shira Perlmutter. I'm
11 the Chief Policy Officer here at the PTO, and I
12 wanted to begin by welcoming everyone to what is
13 now the fourth meeting of our Multistakeholder
14 Forum on Improving the Operation of the DMCA
15 Notice and Takedown System.

16 We are very pleased to see everyone
17 who's made it here today at the Patent and
18 Trademark Office, and we also, of course,
19 welcome everyone who's participating by webcast
20 or telephone.

21 For those of you who are joining for
22 the first time, this process is an outgrowth of

1 the Copyright Green Paper that was issued last
2 year by the Department of Commerce's Internet
3 Policy Task Force, and the work on this issue
4 has been led by the PTO along with our sister
5 agency in the Department of Commerce, the NTIA.

6 Now, the goal of the process is to find
7 ways to improve the operation of the DMCA Notice
8 and Takedown System by addressing various
9 concerns that have been raised by all types of
10 users of the system and to do so without the
11 need for legislation. So we've been holding
12 regular meetings, periodic meetings, since March
13 of this year, alternating by popular request
14 between the East and West Coasts.

15 The first meeting of the
16 Multistakeholder Forum took place here in this
17 room on March 20th, and it brought together a
18 wide variety of stakeholders representing
19 constituencies on all sides of the issues and of
20 all sizes, both entities and individuals. And
21 we were very gratified that despite the
22 divergent viewpoints and perhaps some initial

1 concerns about the ability to work well
2 together, the forum from the outset established
3 a very positive and constructive tone, and that
4 has continued ever since. I think it's been one
5 of the best atmospheres for an Internet
6 copyright discussion I've seen in Washington in
7 some time. And a decision was made early on to
8 begin by focusing on the topic of
9 standardization in the notice and takedown
10 process.

11 So the next meeting, on May 8th,
12 addressed the issue of standardization of DMCA
13 notice forms and also standardization of the
14 overall aspects of the overall takedown process,
15 and we had a series of presentations of
16 practices and views from different entities and
17 organizations and individuals. And a number of
18 stakeholders volunteered to participate in a
19 smaller working group which was intended to
20 discuss the operational and technical aspects in
21 greater depth and then to make a report and
22 hopefully recommendations to this full forum.

1 Now, it was interesting. We expected a
2 small group of people who would be willing to
3 commit the extra time and energy that would be
4 required. But in the end, we were actually both
5 surprised and gratified by the high level of
6 interest. So it's turned out to be quite a
7 large working group, in fact, but nevertheless
8 one that hasn't gotten bogged down by its size,
9 and I understand the working group does include
10 most of the people who are physically here in
11 this room today.

12 Now, since the May meeting, the working
13 group has met a number of times and worked very
14 extensively together. We understand that
15 everyone has dedicated considerable resources,
16 and we very much appreciate it. So today's
17 meeting really provides the opportunity to share
18 the working group's thinking and its current
19 directions with the full Multistakeholder Forum
20 and with the public through the webcast.

21 So even if not everyone who will be
22 hearing about the working group's process and

1 developments for the first time is in the room,
2 many of them are listening now or can listen to
3 the recorded webcast in the future, and this
4 will give us the opportunity to have
5 transparency into the process and bring everyone
6 into the discussion at this intermediate stage
7 so that whatever additional input is received
8 can be considered by the working group as they
9 move forward. And just from our side here on
10 the podium, I know that we at PTO and NTIA are
11 very interested to hear what's been happening in
12 all of these discussions.

13 So at our last meeting, which was on
14 June 20th, we heard an initial report from the
15 hardworking working group chairs, Sandra Aistars
16 and Jim Halpert, and they're going to provide us
17 with a more detailed description of what's been
18 going on today.

19 We've also invited five members of the
20 working group to take part in a panel
21 discussion, and the purpose is to give everyone
22 some insight -- to give the bigger group and the

1 public some insight into how the different
2 stakeholders view the process in the working
3 group, what the challenges are in distilling
4 their positions and views into a group approach,
5 and what options there may be for producing a
6 final product. And, again, I keep stressing
7 this is predicated on finding a voluntary
8 approach that doesn't require legislation.

9 So in the interest of time, I will stop
10 here and hand the podium over to my colleague,
11 John Morris, Associate Administrator and
12 Director of Internet Policy for NTIA.

13 MR. MORRIS: Let me see if I can just
14 do it from right here. My remarks are going to
15 be very brief, just to add my welcome.

16 I am very, very aware, from the work
17 that my office does on privacy issues, how hard
18 these multistakeholder efforts are. And I'm
19 also aware that for them to be successful, it
20 really requires not actually any major
21 contribution from the folks up here on the
22 podium, but it requires hard work from the

1 participants. And from what I've been hearing,
2 both that hard work has been happening and that
3 has been productive.

4 So I really am, as Shira just said, I
5 think, very, very interested to kind of hear
6 where we are, and we'll also be listening to see
7 if there's anything we can do to kind of help
8 facilitate more progress. So thanks to the co-
9 chairs and thanks to all the participants in the
10 effort. So thanks.

11 MR. POGODA: So not much left for me to
12 do here other than to introduce the first item in
13 our agenda, and that is going to be a report from
14 the co-chairs of the working group, Jim Halpert
15 and Sandra Aistars. Are both of you coming up?

16 MS. AISTARS: Yes.

17 MR. POGODA: Okay. I will let them
18 come up and take it from here. Thank you.

19 MS. AISTARS: Well, thank you very much
20 for inviting us to give a briefing. We are also
21 very grateful to all of the members of the
22 working group who have worked diligently with us

1 and given their input on all of the issues that
2 we've been tackling together.

3 Shira has started out by already giving
4 us a little bit of an overview of how the work
5 has progressed so far in terms of the process.
6 But just so that folks who maybe haven't been as
7 closely tied into our work as the working group
8 itself has been, we've outlined both the process
9 and the substance that we've gone through in the
10 working group meetings, and so maybe we can go
11 through just very quickly some of the process
12 points to give folks a sense of the amount of
13 effort that everybody in the working group has
14 invested and kind of the back and forth that
15 it's entailed.

16 I think that this is probably a unique
17 effort in that it's not one that has occurred
18 all amongst D.C.-based participants. It really
19 has involved people on the West Coast and on the
20 East Coast. It has involved people from the
21 creative community, individual artists,
22 musicians, filmmakers, and so forth, as well as

1 policy experts within the Internet service
2 provider community, engineers in that community,
3 and then the policy experts and lawyers here in
4 D.C. as well. So it's a big group of people to
5 bring together, and I think folks have worked
6 really effectively together.

7 Do you want to add anything or just
8 walk through some of our --

9 MR. HALPERT: Sure. This sort of
10 effort requires pretty intense engagement from a
11 smaller group of folks, as Shira described, with
12 a lot of time commitment, and you'll hear from
13 five of the people who stepped forward to do
14 this.

15 If you feel as though you have a
16 perspective that is -- and this is also for
17 folks on the phone -- that's not reflected in
18 this effort and the discussions, let us know and
19 there are ways to include you in the process.
20 We definitely want to have as broad a group and
21 set of input as possible.

22 So if you're sitting on the phone and

1 you're wondering what this is and you want to be
2 part of it, read the materials, see what you
3 think, and let us know if there are concerns or
4 there's additional information that the drafting
5 group at the core of this preparation and the
6 working group need to have, and it's very easy
7 to get involved, particularly in the working
8 group.

9 MS. AISTARS: Yes. So just to quickly
10 run through some of the process, as Shira said,
11 we hold our meetings in person roughly every six
12 to eight weeks or so, alternating between D.C.
13 and the West Coast, primarily Berkeley, and
14 they've mostly occurred concurrent with USPTO
15 meetings of other types, whether plenary
16 sessions like this or some of the roundtable
17 meetings that USPTO was hosting there for other
18 Green Paper topics over the course of the
19 summer. We also held an extra in-person meeting
20 at the end of July in Berkeley in conjunction
21 with the USPTO roundtable sessions.

22 Then in between those meetings, to move

1 work along, we have phone meetings to facilitate
2 additional progress on issues that we're
3 tackling. And over the course of August, we
4 concluded that we really needed to double down
5 our efforts even further, so we recruited a
6 smaller drafting committee after the July 31st
7 meeting that was composed of creative community
8 representatives, rights owners, OSPs, and
9 Internet user community representatives who all
10 volunteered to participate to turn drafts of
11 documents on a pretty rapid-fire basis so that
12 we could produce something for discussion with
13 the larger group today. We've had several
14 exchanges of drafts going up until 1:30 this
15 morning so that we'd have something to share
16 with the group today.

17 So the approach in everything we've
18 done is to have collaborative drafting, always
19 involving representatives, not just of one
20 interested party or another, but truly bringing
21 together rights owners, online service
22 providers, Internet user community, and

1 independent artists and creators and small
2 businesses.

3 And then when we meet in person, the
4 effort has been to really try to explore and
5 deepen our mutual understanding of operational
6 issues that each of these communities face, and
7 those, to my mind, have been some of our most
8 effective tools in getting progress. Because
9 often, if you are viewing an issue in terms of
10 what's effective and what's not effective in
11 notice sending, you understand what's effective
12 from your perspective as the notice sender or as
13 the notice recipient, but it's not necessarily
14 as clear to you how the opposite side of the
15 process plays out on a day-to-day basis. So
16 that's been very helpful, I think, in sharing
17 perspective and understanding challenges we need
18 to overcome.

19 MR. HALPERT: And I would add that I
20 think many of the service providers and Internet
21 user participants in the process have learned a
22 lot about bad practices that are frustrating the

1 sending of notices, and drawing the line between
2 what's efficient from one perspective and very
3 inefficient from another perspective is one of
4 the real challenges in intellectually
5 interesting things to capture in this process.

6 The discussion that Sandra highlighted
7 is, I think, pushing us toward some conclusions
8 where there is really consensus, particularly on
9 some of the bad practices that each side is
10 concerned about, both troll behaviors and
11 websites that are deliberately frustrating the
12 submission of notices, and that's been an
13 interesting process.

14 For those of you who want to hear more
15 about it, just get involved in the working group
16 and you'll hear more. I think you'll hear a
17 little bit today as well.

18 MS. AISTARS: So all of the work that
19 we've done that you'll see in the documents that
20 have been distributed today has been done on a
21 fairly rapid-fire basis without a lot of time to
22 consult even internally with colleagues within a

1 company or within a trade association or within
2 a group of members, so the drafters who have
3 participated have all reserved the rights to ask
4 for additional input. And, of course, this
5 whole process is intended to seek input from the
6 public and from others who haven't been
7 participating in our work to date.

8 And we've benefited also from people
9 within the working group who have not been
10 participating in the day-to-day drafting
11 exercises coming in at various points and
12 saying, you know, here's a challenge I'm facing,
13 here's a suggestion of how you could address a
14 particular challenge, and we've taken that up in
15 the drafting discussions and found that useful.

16 So that's something we'd encourage
17 folks on the phone and listening to the webcast,
18 even on an archive basis, to do, and you can
19 contact Jim or myself directly and we'll put you
20 on the distribution list if you want to
21 participate in email conversations with us as
22 well.

1 And then Jim and I maintain
2 conversations sort of with the respective
3 stakeholder communities separately to try and
4 more deeply understand their particular
5 concerns, and then we maintain an open dialogue
6 with each other so that we can kind of share
7 those concerns and try and find ways to bridge
8 gaps if there seems to be a place where it's
9 more of a question of misunderstanding how a
10 practice works or a drafting issue that needs
11 addressing.

12 One of the things that I think has been --
13 it's both a good and an unfortunate side effect of
14 good collaboration is the fact that I think no one
15 in the group is identifying practices that anyone in
16 the group is actually doing for negative reasons.
17 There's always a very positive, reasonable reason for
18 undertaking a practice.

19 And so the challenge is how do you
20 explain the situation in which something that,
21 for instance, an online service provider is
22 doing for a legitimate security reason or to

1 frustrate whatever, a DDoS attack or whatever,
2 how do you appropriately cabin that so that it
3 doesn't become a frustration for people who are
4 sending notices. That's really what I think the
5 most challenging aspect of this conversation has
6 been.

7 MR. HALPERT: And then I think, from
8 the perspective of the service providers, when
9 there are ideas about, hey, wouldn't it be great
10 if we didn't have to do X, Y, and Z, or if a
11 notice and takedown process were configured in
12 this particular way, there often are operational
13 considerations on the flip side of that, reasons
14 why, yes, it would be ideal from the perspective
15 of a particular notice sender or maybe all
16 notice senders but can create significant
17 inefficiencies operationally for the service
18 providers.

19 And it's really having a dialogue and
20 beginning to have a rich understanding of where
21 there's a net inefficiency that I think is the
22 sweet spot of this, and obviously many people

1 have different perspectives on that, but that's
2 what we're striving for when we're working to
3 get consensus here.

4 So the process so far, you know, a lot
5 of this is trial and error. There's no right
6 way to do this. And as John mentioned, in the
7 multistakeholder processes there are lots of
8 fruitless rabbit holes one can go down, and
9 we're trying to make this work as productive as
10 possible. So sometimes we'll work on something
11 and run into an obstacle but then save it and
12 figure out other ways to put it in.

13 But we started off, thanks to really
14 work that RIAA put together, and Vicky and your
15 intern -- I believe was it Marina? --

16 MS. SHECKLER: Marina.

17 MR. HALPERT: -- yes -- deserved a lot
18 of credit for going and cataloging a lot of
19 existing approaches for service providers in
20 receiving DMCA notices. There was then a
21 discussion of existing web forms, in particular,
22 to look at both operational challenges and

1 reasons for particular approaches for service
2 providers on the web form side.

3 The first effort that Vicky and Thomas
4 from Gandi.net worked on was a strawman draft of
5 a model XML-based API in a standardized email
6 form for submissions that would be used by
7 rights owners to contact service providers or to
8 submit information to service providers. That
9 raised some questions from the service providers
10 that these approaches had never been tested, so
11 would need to be beta tested and would not be
12 the best thing to do first without a clear
13 record of whether this practice actually
14 promoted efficiency and actually worked well
15 from many perspectives.

16 So the thought was to shift to
17 developing, first, a descriptive document based
18 on existing practices to look at that. And
19 Sarah from Etsy, Fred from Google, and Jordan
20 from Yahoo put pen to paper on that -- I think
21 Patricia from Etsy probably did a lot of work
22 there, too, and I don't mean to exclude you --

1 and that was discussed. You know, as inevitably
2 happens, there are features of those practices
3 that are highlighted that raised some questions
4 from rights owners saying, you know, this for me
5 produces an inefficiency. So we then moved on
6 in a way to find consensus.

7 And, understandably, the service
8 providers who offered up their examples didn't
9 want to have a document that specifically
10 criticized them, so we thought, okay, then we'll
11 move to a document that highlights best
12 practices but in a way that is not highly
13 prescriptive so that the service providers who
14 are not in the room and aren't even aware of
15 this process don't wind up seeing some best
16 practices document that, just operationally,
17 they have no clue about and doesn't work for
18 them operationally.

19 We're going to work on something that
20 goes out for comment and building greater
21 support. Some of the recommendations can get
22 stronger and we can highlight particular things

1 as being really, really good, but overall we're
2 working on a descriptive report that explains
3 model practices, in terms of the functions
4 rather than the particular implementation, that
5 promote efficiency in different circumstances,
6 including where you have a smaller rights owner
7 who's sending only a few notices or infrequently
8 sending notices to a site, and then the other
9 sort of side of the spectrum where you have a
10 very large entity, for example an enforcement
11 entity on behalf of its members, that's sending
12 repeated notices.

13 One example was in the hundreds of
14 thousands that we discussed yesterday in the
15 working group. And that's a different sort of
16 situation where, first of all, the sender is
17 much more sophisticated, but also the service
18 provider can do an authentication of that sender
19 and give them sort of faster service. If you
20 look in the world of, say, the eBay VeRo program
21 is a good example of that where somebody signs
22 up, provides a bunch of information, and there

1 isn't the same need to go and authenticate that
2 person each time provided that they've got a
3 log-in and they provide that authenticator.
4 There isn't additional information that needs to
5 be supplied. Some forms could even be pre-
6 populated. There are a whole bunch of different
7 ways to make that process more efficient -- it
8 wouldn't necessarily just be for a large
9 provider, it could be for a small notifier --
10 but that is in the habit of sending lots of
11 notices to a particular entity.

12 And so there are efficiency gains there
13 that are based on current industry practices but
14 that can be distilled here in a way that will
15 be, we hope, used by other entities to achieve
16 similar or greater efficiencies.

17 Sandra, do you want to speak to that?

18 MS. AISTARS: Yes. And we've sort of
19 left it open for discussion kind of where we go
20 once we work through this kind of good
21 practices, bad practices, and situational
22 practices document that we've been working on.

1 You know, ideally, I think we would
2 want to come up with a document at the end of
3 the day that gives an illustration or a model
4 for someone who is not a sophisticated designer
5 of web forums, or websites for that matter, that
6 they could follow and come up with a process
7 that is something that we would all agree is a
8 good, appropriate practice to follow for
9 accepting notices and acting on notices in an
10 efficient fashion.

11 But as we worked through the first
12 phase of attempting to create this document, we
13 did face challenges in finding kind of perfect
14 examples to point to. Because while there are
15 very good things about many of the examples that
16 are currently existing in the marketplace, many
17 of them also have certain challenges. And so
18 the tradeoff is how do you actually illustrate
19 the good things that you want people to do
20 without kind of inadvertently leading someone
21 who may not be paying close attention to the
22 document to fully implement other aspects of an

1 approach that may not be appropriate in their
2 given circumstance. And so that's, I think, a
3 challenge that the group still needs to work
4 through.

5 And I would say from a creative
6 community perspective, a rights holder
7 perspective, for the effort to be useful at the
8 end of the day, there's going, I think, to be an
9 interest in having something that you can really
10 point either an unsophisticated designer to or
11 use as a model to really guide appropriate
12 action. Because I think the people who are
13 participating in this working group effort are
14 all already sophisticated actors and doing their
15 best to contribute to a best practices effort.
16 So part of the goal here is to provide guidance
17 and help to people who are not part of this
18 group and who will be looking to what this group
19 comes up with to guide their own development
20 work once we're done here.

21 MR. HALPERT: And then the challenge
22 while doing that is not to privilege particular

1 business models or particular ways of doing
2 things that exist now. Some of the larger
3 service providers who are involved in this
4 process are nervous about coming up and
5 negotiating something that then puts actually
6 their smaller competitors at some sort of
7 competitive disadvantage and will be viewed as
8 sort of backdoor -- you know, misunderstood as a
9 backdoor negotiation of some process that is
10 rigged against other parties. So it's very
11 important to have public input on this. And I
12 think before we'd move to anything that was more
13 prescriptive highlighting particular solutions,
14 it's really important to get public input on it
15 and public validation of that approach and to
16 consider comments.

17 So we're very focused on not limiting
18 input to the people who have been following this
19 process and attending all the meetings because
20 there are a whole lot of small entities that
21 have to run their businesses. And unless they
22 get this and can really look at it and it's easy

1 to understand, it will be hard, I think, to have
2 any confidence that we've addressed their
3 potential concerns. So that's one of the
4 operational challenges that a process like this
5 has, even if it's very open and there are lots
6 of opportunities for folks who are aware of it
7 and have the time to provide input.

8 So we'd welcome ideas on how best to
9 obtain that sort of feedback in addition to the
10 ordinary PTO notice and comment process so that
11 there isn't inadvertent skewing of the
12 legitimate market through a solution that's
13 negotiated by a bunch of more sophisticated or
14 plugged-into-Washington-policy-discussions
15 players.

16 MS. AISTARS: Right.

17 MR. HALPERT: And creative thinking on
18 that is much appreciated.

19 MS. AISTARS: And I think the challenge
20 is equally significant and perhaps even more so
21 for artists and creators who don't belong to
22 trade associations and don't have representation

1 in conversations like this. Whereas a website
2 operator has a level of sophistication in
3 dealing with notice sending because they're
4 designing a website and that's part of their
5 business, somebody who is an author or a
6 songwriter or a musician may very well not be
7 paying attention to this process at all and not
8 know that it's going on at all.

9 And so while we're trying to provide
10 some input through the Copyright Alliance and
11 through other rights holders who are
12 participating in the effort, those perspectives
13 and those challenges are also difficult to plug
14 into the discussion.

15 MR. HALPERT: Absolutely. And there
16 are a series of challenges in coming up with
17 these consensus points on good, bad, and
18 situational practices, and that is probably the
19 biggest procedural challenge that we face. For
20 what the points are so far, we actually made
21 pretty good progress over the past couple of
22 weeks on the good practices. The bad practices

1 may be more challenging.

2 But you'll see a strawman draft that
3 Sandra and I were working on up until late last
4 night, and Sandra, in particular, had the
5 pleasure of sending it out at one in the
6 morning. But this reflects the discussions,
7 including three and a half hours of discussions
8 yesterday, to try to focus in on what are good
9 practices, particularly with regard to service
10 providers that are receiving notices.

11 And you can look through the discussion
12 draft. I think the next panel will walk folks
13 through and we can just speak at a somewhat
14 higher level about this. But the points that
15 need more discussion are flagged in comments or
16 bracketed text in this document.

17 There are some challenges, in
18 particular procedurally, in coming up with a set
19 of good and bad practices here. Particularly
20 for the reasons we described earlier, and Sandra
21 gave great examples of them, you can have a
22 practice that operationally has very legitimate

1 purposes both on the sender and on the recipient
2 side. And there are reasons why, for example,
3 on the sender's side, you wouldn't want to
4 provide -- it may be burdensome to provide
5 really specific information about if you've got
6 a bunch of photographs on a particular site. To
7 do that, you know, the exact location, the
8 additional identification information may be
9 relevant in particular for photographs. It may
10 not be relevant for other types of copyrighted
11 work. So we need to wrestle with that.

12 But, also, the process of requesting
13 additional information which can help actually
14 promote efficiency in the photograph context in
15 order for the service provider to find the
16 material without a lot of back and forth can
17 also be abused by a rogue site that also asks
18 for all sorts of additional information that is
19 really not relevant.

20 And so the balance of how we address
21 this -- It's actually easier to address these
22 sorts of things in bad practices where there's a

1 sort of intent to confuse or an intent to
2 mislead in providing a notice. Building them
3 into good practices has proven to be somewhat
4 challenging. And so I think we're sort of
5 moving toward including some mentions of these
6 efficiency practices as potentially good
7 practices, but then cross-referencing them
8 immediately in the same text back to bad
9 practices because this is almost contextual.

10 There are some times when a CAPTCHA code,
11 for example, is used by an entity that doesn't
12 have a lot of resources for a particular service
13 to authenticate people on, say, a one-time
14 basis. Multiple CAPTCHA codes, particularly
15 after one has input other information that is
16 lost as a prerequisite to sending notices, may
17 not serve and does not serve, typically, the
18 security interest that the one-time CAPTCHA does
19 to evade, for example, denial of service attacks
20 or void them.

21 So how we help to reach consensus on
22 those sorts of balancing issues without moving

1 everything to a very specific bad practices --
2 you know, highly contextual bad practices
3 discussion is probably one of the things in the
4 discussions we are finding most challenging.
5 The default is just to push it into a bad
6 practice without having, say, the opposite of
7 the bad practice be a good practice, and that's
8 been a lot of what we've been doing over the
9 past couple of weeks on the good practices
10 document.

11 And then other issues that can be
12 challenging are also things that make sending
13 the notice more burdensome. You'll hear from
14 Sherwin on the next panel and what Internet
15 users would like on education or on fair use,
16 and some of that -- operationally, we have yet
17 to fully tackle that -- can be quite costly and
18 may be inefficient or may be efficient.

19 Those are the kinds of things that we
20 have to balance in coming up with a document in
21 a multistakeholder process. It's not what one
22 side would want. Ideally, we want to find sweet

1 spots that are sufficiently appetizing to all
2 the participants that they feel that the
3 document reflects what they would like. And
4 that's, I think, our hard work ahead,
5 particularly as we get into some of the bad
6 practices.

7 Again, it's easy to take the list of
8 practices like requiring people to see
9 advertising and go through multiple
10 authentication gateways in order to submit a
11 takedown notice or hiding how to submit the
12 takedown notice. Those are things that
13 everybody agrees are bad practices. The same
14 thing to send a takedown notice that is
15 deceptive and inaccurate for the purpose of
16 knocking a competitor's business off the
17 Internet. No dispute on either side. Those are
18 the easy cases, though. And the hard cases tend
19 to be ones where there are significant interests
20 on each side, and we just have to work very hard
21 with the group to see if it's possible to find
22 consensus on those.

1 MS. AISTARS: And as you'll see from
2 some of the headings in the document, our intent
3 is not to have a document that simply has good
4 and bad practices, but also has situational
5 practices identified and contextualized and also
6 has practices identified both from the sender
7 side and from the recipient side so that there's
8 some level of balance struck on all sides.

9 You'll also see references not just to
10 takedown notices but to counter-notices in the
11 document where that's appropriate so that we're
12 dealing with all DMCA notice sending in the
13 document. So if there are particular areas for
14 counter-notice senders that need further
15 flushing out, that's another area that we'll be
16 looking at a little bit more closely.

17 There have been various conversations
18 that have come up through this process which
19 don't fit neatly into a conversation about
20 sending notices, but are quite relevant to the
21 sending of notices and may serve the overall
22 goal of efficiency in acting on notices and in

1 educating the user public on when it's
2 appropriate both to post content and not post
3 content and send notices and not send notices.

4 And so we're also having further
5 discussions kind of around the margins about how
6 to deal with things like educational information
7 and expanding some of the transparency research
8 that various entities are doing, which is sort
9 of out of scope but still relevant to the
10 overall process here, and whether that is
11 something that gets reflected in a document like
12 this or in some parallel effort that we might
13 suggest as to be determined.

14 MR. HALPERT: We also had a discussion
15 yesterday about difficulty finding out where to
16 send a notice. And in that discussion, it was
17 pointed out that the Copyright Office has a
18 proceeding that's been open for more than two
19 years to make it easier to find information
20 about designated agents and how to contact a
21 designated agent. So we had a discussion that
22 was rightly brought up that it's sometimes hard

1 to find that information in a standardized way.
2 The document has a recommendation on that with
3 regard to good practices. But a big solution,
4 the whole point of designating with the
5 Copyright Office is to make that information
6 accessible to rights owners so they can provide
7 notices, and the Copyright Office currently
8 doesn't provide a good solution for that. And
9 so there may be a recommendation on that front
10 as well.

11 Even if the overall proceeding may not
12 be completed and there are other issues to
13 address, fixing that one issue would solve one
14 of the problems on this list and it rests with
15 an agency of government in addition to the
16 stakeholders to help find solutions to that
17 problem.

18 So the discussion sometimes goes in
19 interesting ways, and I think we'll need to think
20 about the recommendations and what's most appropriate
21 given relations between different parts of the
22 federal government as well in this process.

1 But we're trying to think holistically
2 about solutions to the problems here, and an
3 education document may well be, if stakeholders
4 want to do that, a partial solution as well by
5 reducing the incidence of infringement frankly.
6 And if that can be part of the process and it's
7 done in a way that is sensitive to all
8 perspectives and not written in a way that
9 people won't pay attention to, that could be
10 very helpful. There is a certain amount of
11 infringement that, as the CCI process has shown
12 in terms of ISP notices, that users can be
13 educated so that they understand what's an
14 infringement and what not to do. And to the
15 extent that we're able to add that as a
16 deliverable in this process, or some element of
17 it, that may well be worthwhile. It's really up
18 to the group.

19 But that's one of the things that we've
20 been kicking around as well as a potential
21 further deliverable from the group or something
22 that could be alluded to in the document. I

1 just wanted to flush that out a little more for
2 you guys so you see where that's headed. There
3 have been requests both from users and from
4 rights owners on this question, and it may be a
5 fruitful thing to do.

6 MS. AISTARS: So I think that is it in
7 terms of our presentation, and the panel
8 participants, I think, will be probably willing
9 to dig into some of the conversations we're
10 having a little bit more deeply. And, of
11 course, we're willing to answer questions if
12 anybody has questions for us.

13 MR. HALPERT: Any questions?

14 MS. PERLMUTTER: We can take a few
15 minutes before we move to the panel if there are
16 questions in the room or on the phone that are
17 specific to process at this point for Jim and
18 Sandra. And then we'll have, in addition after
19 the break, a chunk of time for discussion in any
20 event. So if there are people who have
21 questions specifically about what you have just
22 heard, in particular about the process and how

1 we arrived at this point, please feel free to
2 voice them now.

3 OPERATOR: If you would like to ask a
4 question on the phone, please press *1 and
5 record your name at this time.

6 MS. PERLMUTTER: Okay. So what we'll
7 do is move to the panel discussion and then,
8 again, we will have time later for more
9 interaction if people would like to participate.
10 Thank you.

11 MS. BLANK: I want to thank our
12 panelists right off the top and I will introduce
13 them briefly, and we'll talk a little bit about
14 the overall process and then hear from them
15 individually.

16 Let me start right here to my right.
17 We have Vicky Sheckler from RIAA, then we have
18 Ed McCoyd from AAP, Sarah Feingold from Etsy,
19 Fred von Lohmann from Google, and Sherwin Siy
20 from Public Knowledge. I'm going to ask them
21 each, in a moment, to introduce themselves in a
22 somewhat deeper fashion and talk a little bit

1 about what they do for each of their companies
2 so we can have that context.

3 I want to make sure everybody
4 understands, this is part of that smaller
5 working group that we've been talking about
6 today. We started with the plenary session. We
7 broke it down to a volunteer working group.
8 And, of course, within the working group, you
9 have to have smaller groups of people working on
10 a day-to-day product, and these folks are all
11 from that working group. And, of course, they
12 will be putting pen to paper further than has
13 already been done to bring this particular part
14 of the program to conclusion, the
15 standardization.

16 I think what I'd like to do is ask
17 everyone to take a few minutes, as I said,
18 introduce yourselves so we have context of where you
19 fit in your own organization's structure and then
20 your interests in this process, and then talk a
21 little bit about what you've been working on.

22 As Jim and Sandra said, dig a little

1 deeper, to the extent you can, into the issues.
2 There will be plenty of time to ask the panel
3 questions, and I might have a few questions
4 also.

5 So, Vicky, do you want to start?

6 MS. SHECKLER: Sure. I'll start with
7 an introduction. My name is Vicky Sheckler.
8 I'm the deputy general counsel for the Recording
9 Industry Association of America. We represent
10 the major record labels in the United States.

11 In my role as the deputy general
12 counsel at RIAA, I work very closely with our
13 anti-piracy or content protection group in
14 sending notices under the DMCA and other types
15 of notices to alert people of the fact that we
16 see infringement occurring on their site or via
17 their activities online, one way or the other.

18 In addition, in my role as deputy
19 general counsel at RIAA, I work on various
20 voluntary initiatives in this space, which is
21 why we're so interested in working in this
22 process.

1 MR. MCCOYD: Hi. I'm Ed McCoyd. I'm
2 an attorney at the Association of American
3 Publishers. We're the national trade
4 association of the U.S. books and journals
5 publishing industry, and I work with a variety
6 of committees and organizations on different
7 subjects.

8 One of them is our online piracy
9 working group, which focuses specifically on the
10 issue of infringement via file-sharing sites,
11 and the group has been around since 2001. We
12 were very enthusiastic about this process, and
13 in response to it, formed a sub-committee of
14 members of the online piracy working group to
15 help me provide input into the process.

16 MS. FEINGOLD: Hello. I'm Sarah
17 Feingold. I represent Etsy. If you're
18 unfamiliar with Etsy, Etsy's a marketplace where
19 people around the world connect to buy and sell
20 unique goods. Our mission is to re-imagine
21 commerce to build a more fulfilling and lasting
22 world. We were founded in 2005, and right now

1 more than three-quarters of Etsy sellers are
2 women, most with home-based businesses, and half
3 the sellers have never sold their goods before
4 opening an Etsy shop.

5 I joined Etsy in 2007 as their first
6 attorney, and I'm currently counsel of Etsy. As
7 its first attorney, I was handling all the DMCA
8 notices, and I now have a team of three people
9 who help with DMCA notices, so I'm coming at
10 this with a small ISP viewpoint. Thank you.

11 MR. VON LOHMANN: I'm Fred von Lohmann,
12 and I'm legal director for copyright at Google.
13 In my role at Google over the last four years,
14 I've worked closely with our teams to make the
15 DMCA notice process as efficient as possible.
16 And, in fact, we, just a few weeks ago, broke
17 the number, that we now are processing a million
18 takedown notices a day for search. And I'm very
19 proud to say our average response time on those
20 notices is less than six hours, and that has
21 been due to work not just at Google but also on
22 the part of rights holders.

1 Our process to improve the efficiency
2 has been a collaborative one that I've been
3 happy to be part of. So I look forward to
4 bringing some of the lessons of Google's
5 experience to the question of how do we achieve
6 efficiency in this process, which I think all
7 stakeholders would like to see.

8 MR. SIY: Hi. My name is Sherwin Siy.
9 I'm vice president of legal affairs at Public
10 Knowledge. Public Knowledge is a non-profit
11 public interest organization focusing on
12 communications and intellectual property issues,
13 so including telecommunications law, but also
14 obviously subjects like this one.

15 In terms of participating in this
16 process, I think our role at least is to try to
17 represent the diverse and widespread and
18 disparate interests of Internet users as they
19 approach this process, as they might face their
20 content being taken down, and their interface
21 with both the ISP and the rights holder.

22 MS. BLANK: Okay. Very helpful. Does

1 somebody want to dive in, Sarah, and talk a
2 little bit about what's been going on with the
3 working group? You know, we've heard from Jim
4 and Sandra how things have gotten to this point.
5 Would you be willing to sort of provide us a
6 little more detail on how this process has been
7 going?

8 MS. FEINGOLD: Sure. So the process
9 has been going where some of us from the ISP
10 standpoint have been meeting to discuss some
11 good and bad practices, and we drafted a
12 document. And then the IP rights holders have
13 also commented on our working group draft. And
14 then we've really had a really open dialogue to
15 discuss the rationale behind each one of our
16 practices and what we can do to move forward to
17 create some best practices and worst practices
18 guidelines.

19 MS. BLANK: Well, your answer actually
20 makes me want to go to Vicky here, because early
21 on in the process, Jim and Sandra mentioned it
22 and I remember seeing a document involving an

1 enormous chart of features that different
2 websites offered for good and bad practices.

3 MS. SHECKLER: Uh-huh.

4 MS. BLANK: You're looking at me like
5 you don't know what I'm talking about.

6 MS. SHECKLER: No. I know exactly what
7 you're talking about.

8 MS. BLANK: How has that informed
9 what's going forward, and do you recall which
10 websites or which practices proved the most
11 useful in moving the discussion forward?

12 MS. SHECKLER: As some of you may
13 recall, we had an intern this summer that took
14 on the task of cataloging, I think, 30 websites
15 and their notice and counter-notice practices
16 for the group. And I think the utility that we
17 got out of that exercise was to identify the
18 different styles of practices that we see, both
19 good and bad, to help us hone down on what are
20 the items that are of interest both to service
21 providers as well as to the content owners and
22 to the folks that Public Knowledge represents in

1 terms of whittling down to where are the tension
2 points, if you will, and, also, as you heard
3 from Sandra and Jim earlier, being able to say,
4 oh, my gosh, we didn't know that there are some
5 people that purport to use the DMCA that do
6 these type of practices that everyone found a
7 bit shocking.

8 And by the same token, it was useful to
9 hear from some of the service providers who were
10 in the working group why they do certain
11 practices and what the utility is that they see
12 from that. So I think that was -- The main
13 purpose of it was just to help us hone down into
14 what the practices might be.

15 MS. BLANK: And do you recall, were
16 there any examples that were particularly
17 useful? Unless you don't want to name names.

18 MS. SHECKLER: I'd rather not name names.

19 MS. BLANK: Okay. That's why I asked.

20 MS. SHECKLER: Well, actually, you
21 know, I would like to name a couple of names.

22 MS. BLANK: Okay.

1 MS. SHECKLER: I'd like to name Sandra
2 and Jim and thank them because we haven't
3 thanked them yet for all the work that they've
4 done on this process, especially in the last
5 couple of weeks. We really appreciate it.
6 Thank you so much.

7 (Applause.)

8 MS. BLANK: Sherwin, you look eager to speak.

9 MR. SIY: Oh, no. I think that sort of
10 highlights -- I think Vicky's hesitation to sort
11 of specifically call out particular instances
12 brings up one of the issues of the process which
13 is there's a question of how we want to proceed.
14 Do we want to do something -- and I think this
15 was mentioned in the last discussion -- goal-
16 oriented or technique-oriented? Because you can
17 call out certain things as good examples given
18 the current context. You can call out things as
19 bad examples given the current context. But the
20 minute you say something is an ideal practice,
21 then the landscape changes over the course of
22 time, and you're left with a document that says

1 you should all do this thing referencing
2 technology that has changed or is obsolete.

3 And so to create something that is
4 future-proofed, there's always that idea of
5 maybe you can use examples, certainly, but you
6 want the basis of it not to be so technically
7 detailed.

8 MS. BLANK: So perhaps I shouldn't be
9 looking for a book of forms to look at in the
10 future?

11 MR. SIY: Probably -- That would be --
12 I think that would probably be yeah, that would
13 be a problem.

14 MS. BLANK: Fred.

15 MR. VON LOHMANN: I'd actually like to
16 sound a slightly dissenting note on that point.
17 You know, I think we've all benefitted from the
18 guidance that Shira set for us at the outset,
19 that this process is aiming for a consensus
20 approach that is not intended to be
21 prescriptive, that's not intended to be
22 legislative in orientation. And I think there's

1 a lot of lessons to be gleaned from things that
2 have succeeded in the real world.

3 So while I agree with Sherwin that we
4 don't want to end up in a position where we're
5 prescribing a specific technology solution that
6 proves to be obsolete in a year or two which, in
7 Internet time, is equivalent to decades as we
8 all know, but I do think there is a lot of value
9 to looking at forms that have proven successful
10 in the real world to highlight the features that
11 have worked in the real world that everyone
12 agrees on.

13 And here I did not think that the group
14 was interested in finding a perfect form, so I
15 am sympathetic to Sandra's concerns that she
16 mentioned on her slide. But I think that was
17 never the goal of the working group, to try to
18 find one form to rule them all. But, rather,
19 the idea was to highlight -- You know, a book of
20 forms may be too much, I would agree. But I
21 thought there was actually real possibilities
22 for highlighting the positive features of eight

1 to ten forms or email processes that everyone
2 could agree have positive features.

3 Not to say that any of them are
4 perfect. Not to say that any of them are
5 something that everyone would agree in every
6 aspect. But, frankly, I think you can do a lot
7 of work by, you know, as perhaps our parents
8 told us, if you can't say something nice, don't
9 say anything at all, it turns out you can
10 actually say a lot by saying things that are
11 nice. If you look at numerous forms and you say
12 these are features we like, then when you look
13 at another form and they lack those features,
14 you've implicitly said what you need to say
15 without getting into a whole bunch of finger-
16 pointing and name-calling.

17 So I think there is value, and I thank
18 Vicky for the work that her intern did during
19 the summer. And some of those efforts have not
20 been the ones that have succeeded, or at least
21 the ones that we're drafting now, but some of
22 the earlier efforts within the working group to

1 look at real world practices, what's worked,
2 what we like, I think that's been useful for us
3 even if we didn't ultimately choose the kind of
4 menu-of-options approach that some in the group,
5 including myself, preferred.

6 MS. BLANK: Ed.

7 MR. MCCOYD: So you will notice that
8 the document that was circulated today does not
9 include specific sample forms. Fred and others
10 had produced a document, Sarah as well, at a
11 certain stage that had some example forms and
12 highlighted the good practices. But some of us
13 from the rights holder side felt that it would
14 be better to implement this different approach
15 which you see reflected in the document that you
16 have today where we didn't provide these
17 examples because invariably there were certain
18 elements of any given form that the rights
19 holders saw some problems with, and we didn't
20 want to say bad things about specific companies'
21 forms. But, granted, there were many positive
22 elements in the forms that were included. So

1 what we did was take positive characteristics of
2 those and include them in a list which comprises
3 a portion of the document that you're seeing.

4 MS. SHECKLER: I'd also like to
5 challenge Fred a little bit, and it is great to
6 look at what's going on today and to point out
7 what are good qualities and perhaps challenging
8 qualities of the processes today, but it would
9 be even better if we can find paths forward to
10 deal with notices in a more efficient and more
11 efficacious manner.

12 And so while we may not come out with
13 an output document from this process that
14 directly impacts those issues, one of the great
15 things about this is that we can continue that
16 dialogue.

17 MR. MCCOYD: Yes. I think that it's
18 been a really helpful exercise in terms of
19 walking into the process, what I knew were a
20 range of things that AAP's members had
21 identified as inefficiencies. And so we simply
22 thought that they should be removed from notice

1 and takedown mechanisms, or I maybe thought
2 that. But then I learned a whole host of
3 reasons why certain elements are included. So
4 at least we can have some mutual understanding
5 and perhaps a way forward through that
6 understanding.

7 So to speak from -- If I can accurately
8 state the service provider perspective on a
9 number of issues. Something I didn't know
10 before getting involved in this working group
11 was that there are actual competitors in the
12 piracy space. So I want people to go to my
13 infringement of that particular title and not
14 acquire other people's infringement, so I'll
15 send false takedown notices. I'll misrepresent
16 that I'm the copyright owner on some other
17 infringing file of the same work. And, of
18 course, service providers only want to receive
19 takedown notices from authorized parties.

20 Then the fact that CAPTCHAs are seen as
21 an affordable security mechanism by service
22 providers that can't develop their entire

1 security apparatus in-house to prevent bot
2 attacks and things of that nature and that
3 volume limits in forms are similarly sometimes
4 instituted for that reason.

5 And then there are a number of other
6 things on that list. All of these reflect
7 issues from the rights holders' side in terms of
8 the efficiency of sending the notice, so at
9 least if we understand one another, then we can
10 figure out how to move forward and gain
11 improvements.

12 MS. BLANK: That's great. One thing
13 we've been hearing from the beginning and
14 continue to hear until today is this level of
15 cooperation, mutual learning, and attempts to
16 move forward for the mutual good. And that
17 hasn't always been the case in this community,
18 and it's really been gratifying to see that and
19 seeing what's developing from it.

20 You know, Sarah, I had another question
21 for you. Something you said when you were
22 introducing yourself and Etsy caught my ear, and

1 it was sort of a mission statement about what
2 the company's trying to accomplish. Can you
3 remind me what that is?

4 MS. FEINGOLD: I have it written down
5 because sometimes the lawyer and the marketing
6 people, we have to make sure we're all on the
7 same page.

8 Etsy is a marketplace where people
9 around the world connect to buy and sell unique
10 goods. Our mission is to re-imagine commerce to
11 build a more fulfilling and lasting world.

12 MS. BLANK: Okay. And that was what
13 caught my attention. It's very interesting, and
14 I'm wondering -- You know, it doesn't sound very
15 corporate to me. So I wonder, has Etsy's sort
16 of unique profile affected its view of this
17 process?

18 MS. FEINGOLD: Well, I mean, if anyone
19 has seen Etsy or some of the things that we do,
20 we try not to be too corporate. But I think we
21 take intellectual property rights, we take the
22 DMCA extremely seriously, and so I don't think

1 that our creative nature that's in our DNA has
2 impacted our views in that point of view -- in
3 that circumstance.

4 MS. BLANK: Has anyone else, although
5 you're not specific to the Etsy question, has
6 your corporate view affected how you've
7 approached this project?

8 MS. FEINGOLD: Do you mean my --

9 MS. BLANK: No. I'm talking to the
10 panel now.

11 MS. FEINGOLD: Oh.

12 MS. BLANK: Yes, Sherwin?

13 MR. SIY: Well, I mean, I think there's
14 an interesting issue that comes up when you have
15 a small provider like Etsy and you have those
16 interactions between the user and the provider
17 where, I think, as we talk about mechanisms that
18 are being used, the DMCA has a process as it's
19 being used can be fulfilled completely -- you
20 know, its process can be followed and fulfilled
21 completely by a series of casual email exchanges
22 between two people. That's not how I think the

1 vast number by volume are done, but that is the
2 idea behind it. It's that you have this
3 communication. And the idea behind -- And
4 ideally, you have a system that can accommodate
5 that sort of interpersonal communication from
6 somebody who is not a sophisticated legal actor
7 as well as high-volume exchanges between
8 sophisticated entities.

9 MR. VON LOHMANN: And I just wanted to
10 say that I agree with Sherwin that we do have
11 this challenge of figuring out -- There is no
12 one-size-fits-all solution. So we have to be
13 sensitive, as Jim mentioned, to the different
14 capacities and resources that large service
15 providers and small service providers bring.
16 And, of course, the same is true for rights
17 holders as well.

18 And so certainly from our perspective
19 at Google, we have systems in place to do things
20 at very high volume at scale. We also have
21 systems in place to try to make it easier for
22 smaller rights holders, web forms in many

1 languages, all of these -- we have hundreds of
2 people who work on copyright at Google. We're
3 able to do a lot of things that smaller service
4 providers like Etsy really couldn't do.

5 And I want to thank Sarah, in
6 particular, as a small service provider, the
7 commitment that she represents to attending and
8 participating in this forum is substantially
9 greater in many ways than Google's because I'm
10 one of 40,000, and Sarah is a much scarcer and
11 more valuable resource than I am to her company.

12 But I think we all have to be cautious
13 because there are over 66,000 service providers
14 who have registered copyright agents with the
15 Copyright Office, and the vast majority of them
16 are not with us in this process.

17 And so part of what I and Sarah and
18 Jordan Gimbel at Yahoo, I think all of us have
19 felt the need to not only represent our own
20 companies but to think more broadly about what
21 service providers can and can't do across the
22 spectrum of resources. Because in the end, of

1 course, we need to bring a document forward that
2 the service provider community as a whole can
3 feel confident about. It's not good enough if
4 just the three of us who have participated in
5 the drafting committee or the dozen or so that
6 have participated in the working group are
7 happy. We need to strive for a document that
8 will fairly represent the views of a broad
9 cross-section here.

10 So from my perspective, and I think I
11 don't speak just for myself, but all of us in
12 the service provider community have tried to
13 think about what do different kinds of service
14 providers face, what kinds of challenges can we
15 foresee, how can we make this document work for
16 all of them, not just the ones that we're here
17 representing.

18 MR. MCCOYD: Something that's been made
19 pretty clear in this process is that there are
20 at least three ways which, depending on the
21 frequency of the notice sending and the scale of
22 it, a service provider might ingest a takedown

1 notice in a given instance, email, an online
2 form, or a trusted submitter program. And email
3 might be preferred by a particular service
4 provider that doesn't have the resources perhaps
5 to develop a trusted submitter program. Another
6 service provider might want to encourage use of
7 forms for low volume, infrequent notice sending.

8 And from the perspective of AAP, we
9 just want to ensure that whatever size publisher
10 is submitting a notice, they can do so in a
11 manner that's efficient for the volume and
12 frequency of notices that they're sending.

13 So both on the service provider's side
14 and the rights holder's side there are questions
15 of the nature of the particular notice, the
16 frequency, and the resources involved in either
17 preparing the notice for submission or ingesting
18 the notice and acting on it.

19 MS. BLANK: Before I go on, because I
20 will go on, are there any questions for the
21 panel either on the phone, webcast, or in the
22 room? Allan.

1 MR. ADLER: Yes. A question for --

2 MS. BLANK: Oh, Allan, we're going to
3 need you to come up here, sorry, so you'll be
4 picked up by the webcast.

5 MR. ADLER: My name is Allan Adler.
6 I'm with the Association of American Publishers.
7 My question is directed to the panel, basically
8 excluding Ed since we've been discussing the
9 progress of this effort from the outset.

10 My question is basically that my
11 understanding is that you attempted to keep your
12 focus, and a consensus focus, by using the concept
13 of efficiency to define scope and basically the
14 barriers of scope. And in discussions with Ed, I
15 know there's been times where that's not been terribly
16 easy to do and there is some strain with that concept
17 in terms of what falls within its boundaries, what falls
18 without.

19 So I just wanted to ask the other
20 members of the panel their view as to whether
21 you think you've largely been able to operate
22 with a consensus view of scope in terms of the

1 issue of efficiency, have you received any kind
2 of useful guidance or do you think you need any
3 additional guidance from PTO and NTIA on that
4 issue, and what issues do you see to the extent
5 that, as you move forward, you do want to
6 address issues that, as you've said, are
7 relevant to the process but may not, in the view
8 of some members, be directly within scope?

9 MS. BLANK: Who would like to take that
10 first?

11 MS. FEINGOLD: I'll take it. So I
12 think that efficiency is in the background of
13 all of our conversations and all the decisions
14 that we're making. I'm coming at this from
15 efficiency from a smaller ISP standpoint, and
16 Fred's talking about efficiency from a larger
17 ISP standpoint, and then we're also discussing
18 efficiency from the rights holders. And so I
19 think it's all about coming to an understanding
20 about the rationale behind the perceived burdens
21 and how that can affect efficiency on both ends.

22 MR. VON LOHMANN: I think from the

1 outset in our very first plenary, I believe it
2 was Emery Simon from BSA who actually suggested
3 that we focus on efficiency first. And I think
4 that's proven to be quite a prescient suggestion
5 and a valuable one because I think, as I
6 mentioned earlier, efficiency is something which
7 all stakeholders are in favor of, improving
8 efficiency. It's good for all of us. There's
9 something to be gained on all sides there.

10 So as a starting point for the
11 discussion, I think it's been very fruitful
12 because it has allowed us to focus rather on the
13 areas where we have an alignment of interests
14 rather than focusing on areas of disagreement
15 where, quite frankly, there's plenty of areas of
16 disagreement. What's difficult is figuring out
17 how to make progress in a consensus-oriented
18 process if we spend all our time airing
19 grievances in essence. So I think the focus on
20 efficiency has been very helpful.

21 I'd like to echo what Ed said earlier,
22 that it has been helpful in particular for an

1 information exchange so that questions that were
2 maybe not so clear -- why do you use a CAPTCHA,
3 why are rate limits important, what are the
4 kinds of features that are most troublesome from
5 the submitter rights holder side? -- those kinds
6 of discussions I think were helped and made
7 possible by our initial focus in a particular
8 question, the question of efficiency. So I
9 think that's proven to be a worthy suggestion.
10 It's not to say that should be the only thing,
11 but it, I think, has been a great place to
12 start.

13 MS. BLANK: Vicky.

14 OPERATOR: Excuse me. This is the
15 operator. I do not have any calls in queue at
16 this time. Would you like me to put out a
17 reminder on how to access the questions?

18 MS. BLANK: Why don't we take this
19 current question, and then we'll take whatever's
20 online.

21 OPERATOR: Very good. Thank you.

22 MS. BLANK: Thank you.

1 MS. SHECKLER: I would agree with Fred
2 that starting with efficiency is a good place
3 for us to start. We do have some alignment of
4 interests with that concept.

5 But with respect to your question,
6 Allan, directly, there's lots of different ways
7 of thinking about efficiency. We can think
8 about efficiency from the service provider
9 perspective in terms of how can I ingest
10 notices, how can I make sure that the notices I
11 receive are good, accurate, and I can move on
12 them and trust them. From the notice sender
13 perspective, there's the question of why do I
14 have all of these hoops that I have to go
15 through to send the notice, why can't I send
16 them to the scale of -- that I identify on a
17 particular site. So there's some of those
18 direct questions.

19 And then there's some more indirect
20 things that tie into efficiency -- which may or
21 may not be appropriate as part of this
22 discussion, maybe it would be more appropriate

1 in a later discussion -- in terms of where is
2 the line between promoting efficiency and
3 talking about what is an abusive notice and
4 where is the line between promoting efficiency
5 and getting to a system that is efficacious or
6 that we have enough education out there so that
7 we don't need to be sending so many notices in
8 the first place.

9 MR. SIY: So, yes, I think the
10 efficiency focus is a useful one. And, again,
11 from the user perspective as well, there is
12 questions of efficiency because most people
13 encountering this process aren't familiar with
14 it.

15 And the more information they have
16 about the process itself and about the factors
17 that are leading into their involvement in the
18 process can actually help them acknowledge and
19 figure out how to proceed -- do I file a
20 counter-notice, what are the consequences of
21 that, do I have a license, was I doing something
22 wrong or not -- and getting all of that clear

1 can actually make a big difference in resolving
2 things quickly.

3 MS. BLANK: Some other questions? How
4 about on the phone?

5 OPERATOR: I show no questions in the
6 queue at this time. But just as a reminder, if
7 you would like to ask a question, please press
8 *1, un-mute your phone, and record your name
9 clearly. And then if you would like to withdraw
10 your question, please press *2. Again, to ask a
11 question, please press *1. It will take a few
12 moments for a question to come through. Please
13 stand by.

14 MS. BLANK: Okay. Thank you.

15 I have a question that we've talked
16 about a little bit just internally and it's one
17 that really intrigues me.

18 Let's fast forward to a product that
19 the working group comes up with and the plenary
20 is satisfied with. How do you sell it to the
21 people who aren't at the table? This was
22 referenced earlier that there's only a few

1 people compared to, what did you say, 66,000
2 ISPs? How are we going to encourage rights
3 holders and ISPs and get adoption from, you
4 know, Sherwin's constituency? Has there been
5 any discussion -- and it may be premature for
6 that -- or your own thoughts? Okay, Ed.

7 MR. MCCOYD: Well, early on in the
8 process when we were determining, you know, the
9 order of focus did change. But there was an
10 effort early on to start working on sort of a
11 strawman -- an open source schema, so developing
12 computer code and schema upon which open-sourced
13 tools could be built to help service providers,
14 particularly those which otherwise might not
15 have the resources to develop optimal takedown
16 notification mechanisms.

17 Now, it's beyond my technical expertise
18 how helpful such a work product might be to the
19 service provider community, but I did find it
20 intriguing because the issue of service provider
21 resources has been raised repeatedly. And so I
22 have wondered if at some stage, once we're

1 finished with the current exercise, whether we
2 could revisit that.

3 MS. BLANK: Fred.

4 MR. VON LOHMANN: I think yours is a
5 very good question, Jenny. I think we need the
6 document to be useful for all the stakeholders
7 in question because I think that will be what
8 encourages its widespread use.

9 I believe Sandra said during her
10 comments that part of the goal here is to
11 provide guidance for people who weren't
12 participants. If you are a smaller service
13 provider, for example, or maybe a service
14 provider who hasn't even been founded yet --
15 because the truth of the matter is the biggest
16 service provider five years from now will be a
17 company none of us have heard of yet -- it would
18 be great to have a document that really gives
19 them some guidance of how to do this.

20 Because the truth of the matter is
21 service providers are in another business. The
22 DMCA compliance is not their business. And as a

1 result, it's often something where somebody
2 thinks, hey, we need a DMCA process, let me go
3 find one. And so I think that's valuable.

4 But I think for this product, as you
5 describe it, to really work, it also needs to
6 include a robust set of guidelines for
7 submitters as well. And that is what I think
8 would be very important for the service provider
9 community and I think also, to some extent, for
10 the user community to make this product
11 something that they would want to also put a
12 shoulder behind selling, to use your phrase.

13 So, for example, a lot of the service
14 providers face efficiency challenges that are
15 not brought by the submitters who have
16 participated here. In fact, quite the contrary.
17 Our experience, as I said at the beginning, at
18 Google has been that the larger sophisticated
19 submitters have actually been very
20 collaborative, very positive to work with. But
21 that's not everyone. And it would be very
22 valuable for us to have a document that we can

1 also use to go out and say to submitters, here
2 are bad practices, what you are doing is on the
3 list of bad practices as agreed by a
4 multistakeholder group.

5 And that's something that the document,
6 to be successful, to be something that is sold
7 by all parties, needs to have those kinds of
8 principles in place to provide guidance, not
9 just for service providers, but also for
10 submitters who are not as sophisticated or not
11 as well-versed as the participants in the group.

12 MS. BLANK: Ed.

13 MR. MCCOYD: So I think, along the
14 lines of what Fred is talking about, there's a
15 current item that I believe is bracketed
16 because, as of the end of the day yesterday, we
17 weren't in total agreement as to how to approach
18 this.

19 But I think the rights holders are open
20 to the idea of where certain additional
21 information from the rights holder that's not
22 specifically required by DMCA 512 in terms of

1 things you have to check off to make sure your
2 notice is compliant with 512, that it makes
3 sense for the rights holder communities to be
4 advised that in particular instances it is
5 helpful to provide more information about the
6 copyrighted work to facilitate location of the
7 infringing content or activity by the service
8 provider.

9 But on the opposite side of that there
10 will be many rights holders where there's no
11 need for them to provide those additional pieces
12 of information. So from a piece perspective,
13 for example, we would want any document to be
14 very clear that items that are only optional in
15 terms of what the DMCA says should be flagged as
16 such, but it should be very clearly pointed out
17 that, as a notice sender, you might be
18 facilitating the process significantly in your
19 own interests by providing some additional
20 pieces of information.

21 But, typically, for a publisher, the
22 title of the work and the URL of the

1 infringement is enough for the service provider
2 to locate the infringement. And publishers have
3 complained that sometimes they're asked for a
4 further description of the work and a link to an
5 authorized version, and my understanding,
6 through the last few meetings we've had, is that
7 this is photography, a specific issue a lot of
8 the time, so it wouldn't affect a textbook or a
9 trade book that a notice was being sent on.
10 Just an example of one of the issues under
11 discussion in the area that Fred was talking
12 about.

13 MS. BLANK: Okay. Thank you. I'm
14 going to ask -- Oh, I'm sorry. There's a
15 question right there. Please come up and
16 identify yourself and your organization.

17 MS. DEUTSCH: Hi. I'm Sarah Deutsch
18 from Verizon, and I had a question on Fred's
19 comment on bad faith practices. This goes
20 really beyond the fact that the notifiers may
21 not be sophisticated, but we've been having a
22 huge amount of issue as an ISP with getting bad

1 faith notices from groups I would call
2 "copyright trolls" who are acting in bad faith.
3 They're spamming us with millions of notices, so
4 they're hurting the ability of large and small
5 ISPs to process good faith valid notices.

6 So I want to hear from the group about
7 what we can do to send a strong message to these
8 kind of extreme bad faith players that these
9 notices won't be tolerated in the system.

10 MS. BLANK: Okay. Thank you. Vicky,
11 you're right on that.

12 MS. SHECKLER: Yes. And I was going to
13 comment earlier on Fred's point that it would be
14 nice to have a document that only talked about
15 best practices or favored practices or something
16 of that nature. But the unfortunate reality is
17 that we do see gaming of the system both by bad
18 faith notice senders as well as by some service
19 providers that use it more as a sword to stop
20 themselves from getting the information or don't
21 process the information properly or what have
22 you.

1 And so I think that realistically for
2 this product to be useful and practical for all
3 of us, we have to include the favored practices
4 as well as something on the disfavored
5 practices.

6 In the document that was sent out
7 today, I think we have just a little bit on bad
8 faith because the drafting committee and the
9 working group hasn't gotten into the meat of
10 that quite yet. We've exchanged some drafts.
11 We have some ideas of where we are, at least
12 right now. But I have seen that when we do have
13 our discussions and get better understanding of
14 where each one is coming from, we can find some
15 consensus, which has been really helpful and I
16 appreciate that from the group.

17 MR. VON LOHMANN: I think part of what
18 Sarah's question goes to is the practice of
19 sending DMCA takedown notices to 512(a) online
20 service providers for whom such notices are not
21 appropriate and for which they don't have the
22 ability to remove the content in question. And

1 I think there shouldn't be any disagreement that
2 the sending of notices that are not valid within
3 the terms of the statute that don't actually --
4 they're not appropriate, that are not directed
5 at service providers who can actually do
6 anything about removing the material in
7 question, I don't imagine that will be a
8 problem. That's certainly something we've
9 discussed in the draft. But I do think it goes
10 to a continued challenge.

11 Certainly, some of the problem is the
12 result of intentional bad behavior. We
13 certainly have seen actions, for example, by
14 people who fabricate evidence. We've received
15 court documents that, when we check on it, are
16 forged. We have had politicians who have hired
17 operatives to remove material of their political
18 competitors. You know, they have no copyright
19 interest whatsoever in the materials. In fact,
20 we have caught people actually fabricating --
21 making copies of things on different websites
22 solely to claim that that was the original and

1 that their electoral competitor had copied from
2 that original source, which was, in fact, a
3 forgery.

4 So those are real challenges. And
5 those people aren't here, right? So whether
6 we're talking about copyright trolls or bad
7 faith users, they're not part of this process,
8 and I hope we can have some influence over that
9 community by setting forth some clear guidance
10 of what's definitely out of bounds. But I think
11 it will be a challenge. We'll never be able to
12 solve that whole problem because there will
13 always be some people in that group.

14 From my perspective, one very important
15 place where we can bring some additional
16 efficiency is to make sure we are accommodating
17 the unsophisticated submitters. That's an area
18 that -- For example, in this era of selfies and
19 photographs, we receive a lot of takedown
20 notices from individuals over photographs. And
21 while that's a tiny, trivial, infinitesimal
22 amount of the notices as a whole, they consume a

1 very large amount of resources because often the
2 submitters don't understand copyright law, they
3 don't understand that they may not in fact own
4 the copyright just because they appear in the
5 photograph, they may not provide us with
6 information that allows us to identify the
7 photograph because often they'll say the work --
8 I agree with Ed completely that for a book
9 publisher, you give us a title, and I can
10 understand what you're asking me to remove. But
11 if you are an individual and you tell me the
12 work in question is "photograph," quote,
13 unquote, that is much harder when you go to
14 visit a website and you find dozens or more or
15 hundreds of photographs to know what exactly is
16 supposedly infringing there.

17 So we need to make sure, as we put
18 these guidelines together, that we leave the
19 room that service providers need to address and
20 make the process for unsophisticated users
21 efficient as well.

22 As I say, Google has done an enormous

1 amount to make the process efficient for large-
2 scale submitters and in collaboration with those
3 submitters, and that's fantastic. We need to
4 make sure we don't soak up valuable resources in
5 places where, if we asked for a little more
6 information or if we had had some other
7 mechanisms in place, we could have made things
8 much more efficient for the unsophisticated
9 submitters as well.

10 MS. BLANK: Thank you. Hollis, do we
11 have any phone questions?

12 OPERATOR: No. I'm sorry, I show no
13 questions at this time.

14 MS. BLANK: No? Okay. Anybody here?
15 Okay. I'm going to actually -- We've got just a
16 few minutes left. I'm going to let you all have
17 sort of a last word if you want it, don't feel
18 obligated to take it, and then we're going to
19 wrap up with a break and move on to our next
20 session.

21 Vicky? I'm just going to run down the
22 line. Do you have anything you want to say?

1 MS. SHECKLER: I just want to thank the
2 group again and thank you and Shira and John and
3 the rest of the team for pushing us in this
4 direction. We have always believed that
5 voluntary initiatives are a better approach over
6 legislation if we can get there, and we look
7 forward to seeing this process through.

8 MR. MCCOYD: Yes. I would just echo
9 what Vicky said. We continue to be enthusiastic
10 about the process and we're glad to be a part of
11 it.

12 MS. FEINGOLD: Thank you so much for
13 including a small ISP like Etsy in this
14 conversation, and we're looking forward to
15 seeing what happens next.

16 MR. VON LOHMANN: Plus one to what
17 Vicky said.

18 MR. SIY: All of that. And just to
19 reiterate the fact that the process should be an
20 open one and that those who are here, on the
21 phone, who come across the webcasts later or
22 transcripts or find tweets of it later, if

1 they're interested in the process, you know,
2 should get involved.

3 MS. BLANK: Thank you very much
4 everybody, and we will be taking a 15-minute
5 break. There's coffee, tea, and water in the
6 back of the room. Thank you.

7 (Break 11:36 a.m. to 12:07 p.m.)

8 MS. PERLMUTTER: Okay. Thanks
9 everyone, and I hope you enjoyed the decent,
10 although not fantastic, coffee that we provided
11 in the back of the room.

12 What we propose to do is to have a bit
13 of a discussion of next steps, so let me tell
14 you where we see things from where we stand as
15 to how we can move forward.

16 We've had a number of questions, first
17 of all, about making the informal discussion
18 draft that was distributed in the room available
19 to those who are not here today. So our
20 suggestion would be that we make it available on
21 our website with a cover document that makes
22 quite clear that this is a work in process, that

1 it will be substituted at a subsequent date by
2 something that represents more of a formal
3 document coming from the working group, and that
4 it is not a consensus document, it is just
5 simply a snapshot of where the discussions have
6 been going. So I put that out on the table for
7 comment.

8 Let me tell you the other points we're
9 thinking of in terms of the process moving
10 forward, and then we can open the floor for
11 discussion which may be a three-minute
12 discussion or it could be up to a half-hour
13 discussion. And, again, for those of you who
14 are not in the room, you're also more than
15 welcome to call in with comments.

16 So I think it has been a very helpful
17 and interesting discussion so far today. We
18 very much appreciate the contributions of the
19 panelists, as well as Jim and Sandra as chairs
20 of the working group.

21 It has become quite clear, listening to
22 the conversation, that there has in fact been

1 considerable progress over the past few months
2 as the working group has met and discussed.
3 And, also, we were struck by the fact that even
4 apart from progress that's been made toward an
5 outcome or toward a document, there's clearly
6 been significant benefit just from the dialogue
7 itself in terms of achieving a better mutual
8 understanding of interests and concerns on all
9 sides. I think there was also tremendous value
10 both for us in the government sitting up here
11 and also for the general public in hearing the
12 presentations today and getting that kind of
13 insight into what has been going on as the
14 working group meets.

15 What I'd like to do is put all this in
16 a bit of context in terms of where we are and
17 how this fits into other things that are
18 happening.

19 First of all, of course, this is part
20 of our Green Paper process. The original paper
21 came out a year ago, and we are now looking
22 within the Department of Commerce to have some

1 outcome here on the various work streams, and
2 this is one of the most important.

3 We are also, of course, looking at a
4 Congressional review process that's going on
5 across the river, and we expect that those
6 hearings will pick up again this fall. And
7 there may be some activity and some
8 recommendations coming out early next year, and
9 we very much want to make sure that what we do
10 here is relevant and helpful as Congress is
11 looking at the Copyright Act. And, of course,
12 they've already had a hearing on Section 512, so
13 it's definitely on the radar screen there as
14 well.

15 So we do need to produce something by
16 the end of the year, but just bear in mind we
17 neither want to cut off productive conversations
18 that can continue, nor are we being prescriptive
19 about exactly what should be produced and what
20 format or how, so there's a lot of flexibility
21 here. But we do need to start thinking about
22 timing and how we can transform something that

1 so far is a very informal discussion draft into
2 something that can be adopted in a more
3 permanent form.

4 So we will next meet on October 28th at
5 Berkeley Law School. The exact timing of the
6 meeting we still need to determine, partly
7 because we also assume there might be a working
8 group meeting before it, and so we need to
9 figure out what makes the most sense for
10 everyone. But we will publish that on our
11 website as soon as possible.

12 We are also aware, of course, that
13 there are other issues to be addressed beyond
14 standardization specifically -- these are all
15 the topics that were raised in the course of the
16 Green Paper process through public comments --
17 and we do believe that there are a number of
18 areas where some consensus can in fact be
19 achieved. And, of course, as members of the
20 panel pointed out earlier, there's considerable
21 overlap with some of the efficiency discussions
22 that have already been taking place.

1 So we will be looking to expanding the
2 working group discussion at some point, and we
3 would propose that that be one of the topics we
4 discuss at the October meeting as well, where
5 are we now, in what form do we produce what by
6 the end of the year, and then where do we go
7 from there.

8 So I think that about covers it. Is
9 there anything, Jenny, John, Darren? No. So
10 I'll open the floor for reactions, comments.
11 And, again, we are happy to close it here with
12 that conclusion or to listen to any input or
13 reactions anyone may have either in the room or
14 on the phone. Thank you.

15 OPERATOR: And just as a reminder, if
16 you'd like to ask a question, please press *1,
17 un-mute your phone, and record your name
18 clearly. Thank you. It will take a few moments
19 for questions to come through.

20 MS. PERLMUTTER: So this is one of the
21 efficiency benefits of having most of the people
22 in the room on the working group is you've all

1 already given input, so it saves a lot of time.
2 Okay. Well, I'm not seeing any hands up in the
3 room or anyone making their way to the mic. We
4 don't have anyone calling in on the phone. So
5 as my former boss used to say, we'll give
6 everyone some time back.

7 We will be making the document
8 available, again with all the caveats I
9 mentioned. We will be posting the specific
10 times on October 28th for both the working group
11 and the plenary session meetings, and we look
12 forward to continuing this conversation.

13 Thank you all very much for all your
14 hard work and how much you've accomplished over
15 the last few months. Thank you.

16 MR. POGODA: Just in case it wasn't
17 clear, we're done. Thank you everyone, and
18 thanks to all of our staff here, technical and
19 administrative, that helped pull this event
20 together. Thank you.

21 (12:14 p.m.)

22