



# American Free Trade Association™

[www.aftaus.com](http://www.aftaus.com)

[afta@aftaus.com](mailto:afta@aftaus.com)

1-888-600-4179

November 13, 2013

Via email:

[CopyrightComments2013@uspto.gov](mailto:CopyrightComments2013@uspto.gov)

Office of Policy and External Affairs,  
United States Patent and Trademark Office,  
Mail Stop External Affairs, P.O. Box 1450,  
Alexandria, VA 22313-1450  
ATTN: Mr. Ben Golant

Federal Register /Vol. 78, No. 192 /Thursday, October 3, 2013

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

Dear Mr. Golant:

The American Free Trade Association (["AFTA"](http://www.aftaus.com)) welcomes the opportunity to provide comments to the inquiries posed by the Department of Commerce in the *Federal Register* dated October 3, 2013 about U.S. copyright reform. AFTA is a not-for-profit trade association of independent American importers, distributors, retailers and wholesalers, dedicated to preservation of the parallel market to assure competitive pricing and distribution of genuine and legitimate brand-name goods for American consumers.

### **Summary Comments**

AFTA believes that copyright reform particularly in the context of new electronic technologies must carefully balance the rights of all stakeholders copyright holders, American consumers and small businesses. To that end, AFTA specifically suggests the following:

1. Copyright reform must focus on providing consumers continued if not greater access to genuine, copyrighted works and must **not** substitute monopolistic control over distribution and supply chains in substitution for the existing limited distribution rights.
2. Copyright law must distinguish between intrinsically copyrightable finished goods and products that are under its governance only by virtue of ancillary collateral, labels and/or functional components.
3. Nothing in U.S. law prohibits the implementation of lawful business strategies affording corporate stakeholders the greatest potential for profitability. However, it is inappropriate to consider commercial profitability strategies, which knowingly hinder the ability of U.S. consumers to freely access



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lawfully manufactured and acquired copyrighted products, as a part of congressional or administrative copyright reform efforts.

4. The first sale protections afforded to lawful owners of copyrighted goods as affirmed earlier this year by the U.S. Supreme Court in the *Kirtsaeng* decision must not be mitigated by unregulated, non-transparent, and anti-competitive licensing regimes or policies.

5. The “take down” notice provisions available to rights holders under 17 USC §512 that serve as a liability shield to On-line Service Providers (OSP’s) should be amended to provide incentives to OSPs to maintain third party websites which sell or resell genuine merchandise equivalent to the “take down” procedures for immediate “take down” upon the OSP’s receipt of a letter by a competing rights owner.

### **Background Information**

AFTA has been an active advocate of parallel market interests for over thirty years. It has appeared as *amicus curiae* in the three leading Supreme Court cases affirming the legality of parallel market trade under the federal trademark, customs and copyright acts (the 1985 *Kmart* case, the 1998 *Quality King* case, and the 2012 *Kirtsaeng* case) and in numerous lower court decisions. In addition, for several decades, AFTA has led the charge against counterfeiters and has actively participated in crafting legislation and rulemaking focused on eradicating all forms of this illicit trade. AFTA’s involvement in emerging legislation and agency rule making has been critical to ensuring the continued availability of genuine, competitive, brand name merchandise, even in the midst of aggressive activity meant to punish and deter counterfeiters and/or to further expand the exclusive rights and remedies available through existing U.S. intellectual property rights, laws and regulations.

### **Comments and General Discussion**

Copyright reform provides a unique opportunity not only to amend U.S. copyright law to better reflect current technologies, but also to offer all stakeholders the opportunity to better balance the legitimate concerns of rights holders with those of small businesses and individual traders selling and reselling safe, genuine and competitively-priced branded goods.

Manufacturers of finished goods such as shampoo, perfumes, watches and sneakers, in connection with which copyright protection is unavailable, should not be able to rely upon U.S. copyright law to thwart downstream distribution of genuine goods, whether via the DMCA’s take down provisions or by diminishing or eliminating the first sale protections where electronic transactions are involved.

Despite the request for distinguishing electronic sales of copyrighted goods from those of other articles in the *Federal Register* notice, it is actually very difficult to clearly make such a distinction. Nearly every single consumer product, whether or not intrinsically “copyrightable”, has some original part, component or accessory that may, in fact, be at least minimally unique and distinctive. For example, product labels may be copyrighted even if the product cannot be; instruction booklets included within a product kit may be copyrighted even if the individual components of the finished product cannot be; clothing cannot be copyrighted but the patterns ingrained within the fabric may be; small designs can



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be copyrighted even if the means of display cannot be; and computer hardware is not copyrightable even if the software enabling functionality may be. By extending federal copyright protection to products due to the presence of ancillary copyrightable materials, manufacturers (i.e., the copyright owners) of otherwise uncopyrightable finished goods would be able to rely upon U.S. Copyright law to manipulate and control product distribution and pricing to the detriment of the American consumer.

Moreover, in order to genuinely attempt a balance between consumers and copyright owners, U.S. copyright law reform must examine not only the differences between products claiming copyrighted status, but it also must be blind to manufacturers' claims of potential revenue losses should market segmentation not be a viable business strategy enforceable under US copyright law. Nothing in the Supreme Court's decision in *Kirtsaeng v. Wiley* limits the ability of any product seller to offer any product at any price. *Kirtsaeng* does not prohibit market segmentation nor does it suggest that copyright law is intended to increase the profits of big business. If a company is unable to realize a profit through global distribution of its goods, this is not a reason to push for copyright reform; this is a reason to re-examine corporate priorities and strategies, neither of which should be determined by the government, congress or, with all due respect, the Administration's Internet Task Force.

*Kirtsaeng* has already presented the opportunity for some to argue that efforts to empower and educate residents in lesser developed countries will be compromised if manufacturers are not incentivized to geographically segment market sales. While it may be a reasonable business strategy, and perhaps a laudable goal, for a manufacturer to make its copyrighted works available to consumers overseas at a lower price than that charged in the U.S for the identical product to purportedly increase literacy throughout the world, that manufacturer loses all credibility when it asks Congress or looks to the Administration's Task Force to overturn *Kirtsaeng* to ensure that it may charge American consumers more money than it does anyone else for identical goods it sells overseas.

Turning briefly, then, specifically toward electronic commerce, the Court in *Kirtsaeng* did indicate that the first sale doctrine would not apply to digital goods because those are licensed to consumers and not outrightly purchased. But it is important that any copyright reform protect and benefit consumers even before benefitting multinational businesses by providing a sweeping new exception to the historic limitation on downstream pricing and distribution fostered by the copyright laws. Without any type of licensing regulation, electronic transactions of any kind or genre, involving any product or service, can be licensed and not sold merely via a receipt confirming such terms. If product distribution can be stopped outright by a manufacturer deciding only to license its goods to avoid applicability of the first sale doctrine, consumers purchasing clothes or jewelry, auto parts or perfumes may be unable to subsequently resell or even donate those items without first seeking permission of the original product manufacturer. AFTA hopes that the Task Force recognizes the dangers of fostering an economy premised on licensing in lieu of purchasing whereby American consumers can only own what the manufacturer determines is appropriate for them to own.

Further it is not possible to ensure compliance with any restrictions on resale so long as manufacturers are neither required nor voluntarily willing to make their terms of license and/or a list of



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authorized licensees publicly available, or if manufacturers are unwilling to publicly disclose which of its products are federally protected via trademark or copyright registration. The lack of transparency would serve only to generate litigation against buyers and sellers acting without knowledge of any copyright restriction. More fundamentally, manufacturers should not be permitted to adopt licensing regimes to avoid applicability of the first sale doctrine and manufacturers should be required to make public licensing conditions and detailed images of copyrighted inventory.

Currently many genuine, branded, consumer goods are sold by parties other than the original product manufacturers via both traditional means of sale (such as brick and mortar stores) as well as via online marketplaces, stores or auction sites. Amazon.com, in fact, offers customers genuine goods sold directly by Amazon itself as well as those very same products being sold by third parties perhaps at different price points or with different terms of sale or warranty. Similarly, eBay offers consumers a variety of buying options for identical or similar items, including stores selling and shipping from countries outside of the United States, sellers offering unlimited returns, and sellers offering used, refurbished or second hand products. These electronic commercial venues empower American consumers to buy what they want, at the price they want to spend and with those product attributes/seller services of particular value and interest to that specific customer. This incentivizes a broad range of competitive strategies and advantages for manufacturers, sellers and consumers while maintaining the tenets of supply and demand that are the foundations of our global economy.

We believe that the DMCA should be revised to better protect third party sellers of genuine, brand name merchandise and to better balance the rights of brand owners with those of legitimate small businesses so that American consumers are able to continue realizing the opportunities created solely as a result of electronic commerce. Despite the advantages of an unfettered electronic marketplace which transparently relies upon the consumer to determine what it really wants to purchase and from whom, many in government and private industry seem convinced that American consumers are unable to sufficiently and accurately determine which sellers offer genuine products versus those only dealing in fakes. For example, the "Take Down" notice provisions of the Digital Millennium Copyright Act provide a means for rights holders to immediately stop the sales of "unauthorized" copyrighted articles because they *appear* to infringe proprietary domestic intellectual property rights *without first providing an opportunity* for the seller or website owner to refute such charges.

Third party sellers suffer a tremendous competitive disadvantage from any allegation of infringement especially since auction houses and similar intermediaries are much more likely to immediately cede to an allegation of infringement and take down a website, no matter its prior stellar history and reputation among customers, in lieu of committing the resources to insist on evidence first and/or jeopardizing their very valuable "safe haven" status. Given the number of businesses electronically selling or offering to sell the same or identical products, a substantial and measurable loss of money, reputation and good will necessarily results from a brand owner insisting that a site be locked down for infringing activity, even if a seller with the means to defend its reputation against false allegations is ultimately able to prove its innocence and relaunch its electronic store.




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### **Summary and Conclusion**

There is little doubt that the Internet has created new forms of product distribution and sale unimagined at the time the U.S. Copyright law was last substantively amended in 1976. In light of ever-changing technologies and the unique challenges posed by the Internet, it is critical that the Task Force focus its policy reforms on those most likely to protect consumers and businesses committed to job creation, economic growth and expanded innovation. As a critical stakeholder in the copyright reform process, AFTA encourages the Task Force to unequivocally maintain the secondary marketplace, uphold the Supreme Court's decision in *Kirtsaeng* and provide American consumers all of the opportunities available as a result of a freely accessible and rewarding global, electronic marketplace.

Sincerely,  
**AMERICAN FREE TRADE ASSOCIATION**

By:   
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Gilbert Lee Sandler  
Counsel