



United States Patent & Trademark Office

RE: Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy (78 Fed. Reg. 61,337) — Docket # 130927852–3852–01

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Introduction

The Association of American Publishers (AAP) represents nearly 300 publishers, ranging from major commercial book and journal publishers to small non-profit, university, and scholarly presses.¹ AAP appreciates this opportunity to build upon our previous comments² to the Internet Policy Task Force (Task Force) by now providing our views³ on the following issues that were discussed in the Task Force’s “Green Paper” on *Copyright Policy, Creativity, and Innovation in the Digital Economy*,⁴ and on which the Task Force now seeks public comment: (1) the legal framework for remixes; (2) the first sale doctrine in the digital environment; (3) statutory damages; (4) the government role in improving the online licensing environment; and (5) the operation of the DMCA notice and takedown system. We also look forward to discussing these and other issues at the planned December 12 public meeting on the “Green Paper.”

¹ AAP’s membership is comprised of three main sectors: trade (e.g., popular fiction/non-fiction); academic (e.g., textbooks); and professional and scholarly publishing (e.g., journals and books), which leads publishers to have a variety of interests and concerns.

² Comments from AAP in response to USPTO & NTIA, Notice of Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 72790 (Nov. 26, 2010), submitted Dec. 10, 2010, [http://ssl.ntia.doc.gov/comments/100910448-0448-01/attachments/AAP%20Response%20to%20NOI%20\(12-10-2010\).pdf](http://ssl.ntia.doc.gov/comments/100910448-0448-01/attachments/AAP%20Response%20to%20NOI%20(12-10-2010).pdf) (hereinafter referred to as “AAP Dec. 2010 PTO Comments”).

³The information provided in this Comment reflects only the views of the members that provided comments to AAP.

⁴ Department of Commerce, Internet Policy Task Force, “Copyright Policy, Creativity, and Innovation in the Digital Economy” July 31, 2013 <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (hereinafter referred to as “Green Paper”).

1. Legal framework for the creation of remixes.

a. General Statement

Publishers agree that, in appropriate circumstances, “remixes” and “mashups” may qualify as fair use of the original expression that is taken from other copyrighted works and combined to create such new works. Publishers also note that there are an increasing number of licensing mechanisms available to facilitate the legal creation of such combination works that would not qualify as fair use. This is an important practical and creative consideration in light of the Task Force’s observation that the applicability of fair use to any particular such combination of original expression from preexisting works is subject to “legal uncertainty...given the fact-specific balancing required by fair use.”⁵ Publishers believe it is neither necessary nor appropriate to attempt to eliminate such legal uncertainty by creating a statutory compulsory license or specific statutory exception authorizing such combination works when there is clear evidence that content and technology companies are working together on this issue to create market solutions, such as YouTube’s Content ID system, “which allows users to post remixes that may be monetized by the relevant right holder.”⁶ There is no need to undermine well-functioning, innovative business models, or any other market-based solutions, or the rights of copyright owners by creating such additional bases of statutory authorization for remixes and mashups.

The Task Force has primarily focused on remixes and mashups involving video and music content, but has defined such combinations more broadly—and without reference to specific classes of works—as “creative new works produced through changing and combining portions of existing works.”⁷ This broad definition, however, overlaps to varying degrees with the Copyright Act’s Section 101 definitions of compilations, collective works, and derivative works:

“Compilation” is defined as: “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.”

“Collective work,” which is a specific type of compilation, is defined as: “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”

“Derivative work” is defined as: “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” The statutory definition goes on to say that “[a] work consisting of editorial

⁵ Department of Commerce, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Internet Economy, 78 Fed. Reg. 61,337 (Oct. 3, 2013) <http://www.gpo.gov/fdsys/pkg/FR-2013-10-03/pdf/2013-24309.pdf>.

⁶ Green Paper at 29.

revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a ‘derivative work.’”

A copyright owner has an exclusive right under Section 106(2) “to prepare derivative works based upon [its] copyrighted work,” or to authorize others to do so. Additionally, to the extent that preexisting works are used to create a compilation or collective work, such use generally requires the permission of the copyright owner. While publishers frequently rely on fair use to incorporate third-party works or portions thereof into their publications and readily acknowledge that fair use can apply to the creation of any of these types of works, it must also be recognized that such applicability is, in fact and as a matter of law, an exception to the general rule that such use of preexisting works requires permission from the copyright owner. For this reason, the Copyright Clearance Center has, for decades, been providing different types of licensing arrangements to the education and business communities to authorize teachers, researchers, and corporate employees to use portions of preexisting copyrighted works pursuant to appropriate permissions from publishers.

AAP believes that a more precise understanding of the nature of “remixes” and “mashups” which clarifies the relationship and distinctions between those types of “combination” works and the above-referenced terms defined in the Copyright Act would benefit rights holders, prospective remixers and mashup-makers, and the courts in determining the applicability of fair use to them. Therefore AAP encourages the Task Force to work with stakeholders to clarify how such works fit within the Copyright Act’s taxonomy of compilation works, the creation of which generally require the permission of copyright owners for the inclusion of their preexisting works or portions thereof. Perhaps the Copyright Office might be directed to issue a circular or other statement of guidance on these issues.

b. Question 5: Should alternatives such as micro-licensing to individual consumers, a compulsory license, or a specific exception be considered? Why or why not?

With the continued growth of new digital content and the evolving capabilities of technology, publishers believe, as discussed above, that it is unnecessary and inappropriate to consider enactment of a statutory compulsory license or specific limitation or exception to broadly authorize the creation of “remixes” or “mashups.” Instead, publishers would encourage stakeholders to continue collaborating to develop market solutions, including micro-licensing, where appropriate, to easily and efficiently allow individuals to create these new works while ensuring that copyright owners maintain their ability to set and collect fair compensation for use of their creative works.

c. Question 6: What specific changes to the law, if any, should be considered? To what extent are there approaches that do not require legislation that could constructively address these issues?

At this time, AAP does not believe that the Copyright Act needs to be amended in order to facilitate legitimate use of copyrighted content in the context of “remixes” and “mashups.” It would be better to focus on clarifying the nature of such “remixes” and “mashups” in terms of the statutory concepts of “derivative works” and “compilations” in order to better understand how fair use and licensing practices

should effectively be applied. Existing and developing market-based solutions, evolving with technological advances and new business models, do not require legislation to address these issues.

2. The relevance and scope of the first sale doctrine in the digital environment.

a. General Statement

While there are many similarities between books in physical and digital form, some key features of digital books that are most appreciated by consumers, such as the ability to access them instantly online, their exponentially-enhanced portability, and their capacity to withstand deterioration from repeated use, are significant differences that make the acquisition and transfer of digital books implicate the exclusive rights of copyright more substantially than do such transactions involving a physical book. Attempting to apply the “first sale” doctrine to digital books⁸ would ignore these significant differences and create a broad, new exception to the exclusive rights of copyright owners in a manner that would fundamentally depart from the underlying rationale of the traditional first sale doctrine.⁹ A broad digital first sale exception would unreasonably prejudice the rights of copyright owners of software and other digital works who utilize a variety of business models, including licensing, to offer a variety of price, content, authorized use and customization options to consumers of such works.

As the Task Force itself acknowledges, the first sale doctrine “originated to ensure a consumer’s control over her tangible physical property.”¹⁰ This makes sense because a rights holder has to relinquish possession of physical copies of its works, making it impractical for the original purchaser to

⁸ AAP recognizes that the Copyright Office, as of 2001, believed that digital works embodied in a *physical* object, e.g., a CD, would be subject to the traditional first sale doctrine, though, subsequent caselaw has brought this conclusion into question. See Copyright Office, *DMCA Section 104 Report*, (2011), http://www.copyright.gov/reports/studies/dmca/dmca_study.html (hereinafter “Section 104 Report”). The Copyright Office report concluded that, for a work in a digital format which is embodied in a DVD, CD or other physical object the ownership of which has been acquired by a consumer, library, or other third-party, the first-sale doctrine applies to the copy of the work embodied in the physical object. Thus, a library would be allowed to “sell or otherwise dispose of the possession of that copy,” *i.e.*, lend the particular copy embodied on the particular physical object. However, subsequent case law concerning the intricacies of licensing software that is embodied in a physical object complicated the application of the first sale doctrine to such works, and, by analogy, to digital books that are embodied in a physical object and “sold” subject to a licensing agreement. See *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010); *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011) (establishing a fact-specific balancing test for determining whether a digital work embodied in a physical format can be “owned” (and thus be subject to the first sale doctrine) by a third-party who acquires the physical object, or whether such third-party only acquires a license to use the digital work without reference to the first sale doctrine. Specifically, the courts require examination of whether the putative license agreement: (1) specifies that the user is granted a license, (2) significantly restricts the user’s ability to transfer the copy of the work, and (3) imposes notable restrictions on the purchaser’s use of the work. If so, the user has a license to use the work but no ownership of the copy of the work and no first sale rights with respect to that copy. If not, *i.e.*, where the license is not so restrictive, the user will be treated as an owner of that copy of the work and can distribute it subject to the first sale doctrine. In any event, it is clear that the first sale doctrine does not apply to eBooks that are *not* embodied in a physical format.

⁹ See *Section 104 Report* at 83-84 <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>. (noting that: “Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright owner’s market, no longer exists in the realm of digital transmissions. The ability of such ‘used’ copies to compete for market share with new copies is thus far greater in the digital world.”)

¹⁰ Green Paper at 35.

subsequently obtain permission from the rights holder to lend or sell that book. With respect to digital works, however, the advent of cloud technology, streaming, and the like have made the obstacles associated with the physical distribution model irrelevant in the online environment.

As the Task Force correctly states, the first sale doctrine is a limitation to “the scope of the exclusive distribution right [which] allows the *owner* of a *physical* copy of a work to resell or otherwise dispose of the copy without the copyright owner’s consent.”¹¹ In addition, the Task Force states that the first sale doctrine “does not apply to digital transmissions where copies are created implicating the reproduction right.”¹² While this statement is true, it would be more accurate to say that the first sale doctrine does not apply to any digital copies of copyrighted works¹³ regardless of the technological means for transmitting the work from one user to another.

As discussed below, and as explained in the 2001 Copyright Office report on this question, “the extension, by analogy, of the first sale doctrine to the online environment has significantly greater negative impact on copyright owners’ legitimate interests than does the traditional first sale doctrine in the realm of tangible copies.”¹⁴ Thus, while publishers understand the desire to simply “extend,” into the digital environment, the flexibilities that currently allow the subsequent distribution of physical copies, the key differences between physical and digital copies that caution against such an extension have not lessened, but have in many ways increased as technologies permitting downloading, cloud storage, streaming, and multi-device access have evolved and the variety of business models for distributing digital works continue to proliferate. Thus, the question of whether the first sale doctrine should be extended to digital copies of copyrighted works by amending the statute should focus on whether the first sale doctrine’s historical meaning and legal justification would make its extension to works in intangible digital formats unreasonable and unworkable, as well as unnecessary and inappropriate. In other words, copyright law must continue to ensure that the exclusive rights granted to rights holders under the Copyright Act remain meaningful in the digital environment and are able to provide adequate incentives to develop new business models and creative works in the future. A “digital first sale” doctrine would undermine this fundamental aim of U.S. copyright law.

b. Question 7: What are the benefits of the first sale doctrine? And to what extent are those benefits currently being experienced in the digital marketplace?

While being limited to tangible copies and the exclusive right of distribution, the first sale doctrine has provided important public benefits and will continue to do so. With respect to books, it is because of the first sale doctrine that U.S. libraries can lend physical books in their collections to the public and used physical books can be sold and resold without directly involving the owners of the copyrights to those works.

¹¹ 78 Fed. Reg. 61,338 (emphasis added).

¹² 78 Fed. Reg. 61,339.

¹³ See *supra* note 8.

¹⁴ Section 104 Report at 91.

Currently, all of the major trade publishers (i.e., publishers of popular fiction and non-fiction books) have each developed their own policies on library lending of eBooks. Additionally, although the unauthorized resale of digital copies of copyrighted works was found to infringe the exclusive rights of copyright owners in *Capitol Records, LLC v. ReDigi, Inc.* 2013 U.S. Dist. LEXIS 48043 (S.D.N.Y. March 30, 2013), AAP is aware that there are efforts, by ReDigi and others, to obtain rights holder authorization for resale of digital copies of various types of copyrighted works.¹⁵ Thus there are concrete examples of market-based approaches to make the current library lending and resale benefits of the traditional first sale doctrine available in *new* ways in the online environment. While these market-based solutions are not yet fully-developed, the recent momentum behind these endeavors should not be halted by awkwardly and impractically attempting to graft a doctrine crafted for the physical environment onto the online environment.

- c. *Question 8: To what extent does the online market today provide opportunities to engage in actions made possible by the first sale doctrine in the analog world, such as sharing favorite books with friends, or enabling the availability of less-than-full-price versions to students?*

In addition to the development of eBook lending policies and the potential development of *authorized* digital resale platforms,¹⁶ there are a number of ways that the online market provides opportunities that not only offer the benefits made possible by the first sale doctrine in the analog world, but in some cases, go beyond such benefits. AAP does not endorse any specific business model, however, the following list illustrates the various ways the publishing industry is making the benefits of the first sale doctrine available online: (1) widespread availability of online e-textbook rentals;¹⁷ (2) opportunities to purchase e-chapters instead of entire books;¹⁸ and (3) options for sharing eBooks between libraries¹⁹ as well as between multiple devices and with friends.²⁰

¹⁵ Presentation, John Ossenmacher, The Resale Market, (May 20, 2013) (noting that “Redigi can, and wants, to participate with you”) (on file with author).

¹⁶ Amazon and Apple are pursuing patents on new business models and technologies to facilitate digital resale activities in anticipation of either a change in law or development of market-based solutions. See e.g., Laura Owen, *Like Amazon, Apple wants to Create a Marketplace for Used Digital Goods*, PAID CONTENT (Mar. 8, 2013), <http://paidcontent.org/2013/03/08/like-amazon-apple-wants-to-create-a-marketplace-for-used-digital-goods/>.

¹⁷ See generally, Course Smart, <http://www.coursesmart.com/> (last visited Nov. 12, 2013) (providing access to “over 90% of all textbooks in use today” and offering innovative rental packages at significant cost savings, for example, “access to as many as 6 e-textbooks for [150 days for] \$200.”).

¹⁸ See, e.g., <http://classroom.synonym.com/buy-textbooks-chapters-2682.html> (explaining that “the cost of both new and used college textbooks can be prohibitive for many students. In the end, it may not seem worth it to buy the entire book if your professor only intends to use a few chapters throughout the course. The good news is that it is now possible to purchase a textbook by the chapter as a digital file. One popular means of doing this is through the website CengageBrain.com.”).

¹⁹ Matt Enis, MELSA, *3M Develop New Ebook Sharing Feature Consortia*, LIBRARY JOURNAL: THE DIGITAL SHIFT, <http://www.thedigitalshift.com/2013/11/ebooks/melsa-3m-develop-new-ebook-sharing-feature-consortia/> (Nov. 5, 2013) (explaining a new digital inter-library loan service that permits “consortial lending” so long as the publisher does not expressly prohibit such sharing.) To be sure, AAP has members that permit such lending and others that oppose such lending, but this diversity of licensing illustrates how copyright owners and users can experiment with market-based solutions to develop models that address their respective needs.

²⁰ The standard practice is for the eBook retailer, such as Amazon or Barnes & Noble, to permit sharing of eBooks between friends *only when* the specific publisher has authorized such sharing. See, e.g., <http://techchannel.radioshack.com/can-share-purchased-books-between-kindles-2139.html> (describing “[s]haring books between Kindle devices [as] both quick and easy. When you buy a book for a Kindle, it is available on any other Kindle devices you own through your Amazon account. If you

- d. *Question 9: If the market does not currently provide such opportunities, will it do so in the near future? If not, are there alternative means to incorporate the benefits of the first sale doctrine in the digital marketplace? How would adoption of those alternatives impact the markets for copyrighted works?*

With respect to books, many of the benefits associated with the first sale doctrine are becoming more widely available (e.g., personal sharing and library lending of eBooks) or are even better than what is available in the analog world (e.g., e-textbook rental and chapter-specific purchasing). Thus, while market approaches to literal “resale” of eBooks are just starting to emerge, the diversity of distribution models for eBooks, such as streaming, subscriptions, downloads, rentals, etc., many permitting access on multiple devices, raises the question of whether the equivalent of physical resale for the online environment is even necessary or desirable. Publishers and distributors of books and journals exist in a very competitive marketplace that drives solutions to meet customer needs. Therefore, it is certain that, if the exclusive rights afforded to copyright owners under Section 106 are meaningfully protected, copyright owners will be able to continue to invest in new ways to enhance their digital products to provide even greater customer experiences.

- e. *Question 10: Are there any changes in technological capabilities since the Copyright Office’s 2001 conclusions that should be considered? If so, what are they? For example, could some technologies ensure that the original copy of a work no longer exists after it has been redistributed?*

AAP appreciates that technological change over the past two decades has been a primary impetus for the various current reviews of the Copyright Act by the Task Force, Congress, and others. However, with respect to the viability of a “digital” first sale doctrine, the import of technological capabilities to “ensure that the original copy of a work no longer exists after it has been redistributed”²¹ is truly a red herring.

Given the fact that many users of digital content (typically, but not always, pursuant to an authorizing license) can currently download multiple copies on multiple devices (desktop computer, laptop, tablet, e-reader, smart phone, etc.) or access copies through remote cloud storage, the practical likelihood that any technology could ensure compliance with a “forward and delete” requirement is virtually nil, and the copyright owner’s ability to monitor or enforce such compliance is essentially non-existent. As emphasized in the Green Paper, effective enforcement is needed in order provide the meaningful copyright rights that foster creativity.²² Therefore, regardless of technological advancements, the inability of copyright owners to effectively monitor or enforce “forward and delete” requirements should render this question moot.

have the Kindle app on a phone or tablet, you can download the book to those devices as well. Some publishers make the Kindle editions of their books available for lending. If this is the case for your book, you can lend it to a friend for 14 days so she can enjoy it, too.”).

²¹78 Fed. Reg. 61,337.

²²See, Green Paper at 38-42.

f. *Question 12: How will the Supreme Court’s decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013), impact the ability of right holders to offer their works at different prices and different times in different online markets? How will any such changes impact the availability of and access to creative content in the United States and elsewhere?*

U.S. publishers strive to satisfy the substantial and growing worldwide demand for their published works through sales of U.S. editions, as well as tailored licensing arrangements and the creation of special editions of their works for sale in specific foreign markets. The ability to differentiate between markets based upon regional or local factors of affordability and intended use has greatly enhanced the ability of copyright owners generally, and publishers in particular, to compete globally while benefitting residents in foreign countries with greater access to U.S. copyrighted works.

In the *Kirtsaeng* decision, a divided Supreme Court reversed a Second Circuit panel and ruled that the first-sale doctrine limits a copyright owner’s right to prohibit unauthorized importation of *tangible* copies of its works that are manufactured and intended for distribution only outside the United States.²³ Therefore, with respect to physical books, the *Kirtsaeng* decision eliminates, as a practical matter, the ability of U.S. copyright owners (including publishers) to engage in foreign market segmentation based on necessary price differentials. However, because the first sale doctrine does not apply to digital copies of works, the ruling in *Kirtsaeng* does not apply to online markets for digital copies of copyrighted works.

With respect to physical books, however, the ruling eliminates a copyright owner’s ability to utilize the protections of the Copyright Act to prevent arbitrageurs from importing low-priced foreign copies into the U.S. for sale (online or offline) to U.S. retailers and consumers in competition with the copyright owners’ domestic versions of those products. In other words, the ruling incentivizes arbitrageurs from developed countries to buy up low-priced editions to resell at a profit in developed countries (i.e, the ruling encourages arbitrageurs to take from the poor to benefit the rich).²⁴ The result is that the countries most desiring and in need of low-priced, U.S.-quality educational content may end up being deprived of access to these materials. Thus, the consequences of the *Kirtsaeng* decision, ironically, will be felt most acutely by publishers of physical textbooks that have worked hardest to make their content accessible to students of meager means around the globe.

More generally, without a right to control parallel importation, export trade in U.S. copyrighted works, which currently benefits the U.S. economy, job markets, and consumers, will decline. And letting the *Kirtsaeng* decision stand, which unilaterally changed U.S. trade policy from national to international “exhaustion” of copyrights, will undermine the predictability of U.S. trade policy and weaken the U.S. Government’s credibility and good will with developing nations (both of which are likely to further

²³See *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11-697, slip op. 3 (U.S. 2013).

²⁴This is, in fact, exactly what the defendant in *Kirtsaeng* did by generating between \$900,000–\$1,200,000 in revenue from importing low-priced editions from Thailand to sell to U.S. students. *John Wiley & Sons, Inc., v. Kirtsaeng*, 654 F.3d 210, 215 (2d Cir. 2011).

diminish as the reach and influence of U.S. instructional materials dwindle along with their availability in such countries).

Unfortunately, publishers are now confronted with a Hobson's choice. Either they can continue to produce versions of their works that are affordable in less affluent foreign markets based on price differentiation from their U.S. editions, while being unable to rely on the protections afforded by the Copyright Act to prevent those foreign editions from being imported into the U.S. to compete directly with their more expensive domestic product. Or, they can eliminate the price differentiation that enables such unfair domestic competition based on arbitrage and parallel importation, at the risk of also eliminating the affordability of their products in foreign markets and foreclosing their practical ability to participate in those markets. Regardless of the road taken, another result will be an increase in the risk that such works will be pirated as former customers turn to counterfeiters to fulfill their needs at prices that are sustainable in their economies. For many "mission-based" publishers (i.e., professional societies, university presses, etc.), this choice may not even exist because certain works, such as the American Psychiatric Association's DSM-V, are considered "mission-critical" and must remain available at affordable prices in developing markets. To the extent that publishers have a choice and decide that the latter course of action is a more rationale response to the consequences of the Supreme Court's decision, those parties who have celebrated how such arbitrage and parallel importation opportunities benefit U.S. consumers with lower-priced alternatives to the U.S. edition of the work will see such opportunities and benefits quickly disappear.

3. The appropriate calibration of statutory damages in the contexts of individual file sharers and of secondary liability for large-scale infringement.

a. General Statement

AAP agrees with the Task Force that "in the online environment, where the scope of the infringing use will often not be ascertainable, making it hard to prove actual damages, the availability of statutory damages is increasingly important."²⁵ However, the difficulty of proving actual damages is not the only reason Congress provided for statutory damages as an appropriate remedy for copyright infringement.

Congress also intended statutory damages to serve as a deterrent, or as the Supreme Court put it, "a punishment for the violation of a public law, [the amount of which] the Legislature may adjust...to the public wrong rather than the private injury."²⁶ Furthermore, while publishers recognize that "there are...arguments about...the need for a proportionate level of deterrence," the Supreme Court in *St. Louis IM & S. Ry. Co. v. Williams* confirmed that nothing requires that statutory damages "be confined or proportioned to [the aggrieved party's] loss or damages."²⁷

²⁵78 Fed. Reg. 61,339.

²⁶*St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919); see generally, *Sony BMG Music Entertainment v. Tenenbaum*, No. 12-2146 (1st Cir. 2013); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012).

²⁷ *Williams*, 251 U.S. at 66.

To be sure, in *two* cases, unbiased juries decided to award copyright holders statutory damages that were characterized by the defendants as “unconstitutionally large.”²⁸ The appellate courts in both cases, however, rejected such Due Process claims, and the Supreme Court has found no reason to question these decisions.²⁹ Importantly, both appellate decisions noted that one of the reasons Congress raised the statutory damages limits in 1998, was to create a “more effective deterrent in response to widespread copyright infringement on the Internet.”³⁰ Certainly, if anything is clear from the Green Paper, it is that, since 1998, technology has only become more efficient and effective at distributing copyrighted content, with or without authorization, and that such technology has become far more commonly and widely used.³¹ Therefore, Congress’s original rationale for providing statutory damages, along with its rationale for raising the limits of such damages, has been strengthened rather than diminished.

In this context, AAP believes that recalibrating statutory damages to correspond to some pre-determined notions of proportionate deterrence, with respect to individual file sharers or online services, would be an imprecise and, ultimately, arbitrary task that would undermine the intentions of Congress to entrust the courts and juries with discretion to award statutory damages, as appropriate, taking into consideration the specific facts of each case. Furthermore, it is AAP’s position that the current range of statutory damages provided under the Copyright Act³² is broad enough to apply fairly to individual file sharers and online services and does not require amendment. Lastly, to the extent that any jury awards may be “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable,” the safeguards of *remittitur* and appeal will continue to provide appropriate checks available to defendants and the courts to ensure the constitutionality of such awards.³³

4. Whether and how the government can facilitate the further development of a robust online licensing environment?

a. General Statement

As explained in the Green Paper, “the most basic prerequisite for obtaining licenses is reliable, up-to-date information about who owns what rights in what territories,”³⁴ and the three elements that are necessary for providing this information are: (1) “registries (i.e., the data of who owns what); (2) exchanges (i.e., the services providing the transactional interface between owners and users); and (3) a

²⁸See generally, Pam Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53 (2009), <http://pennumbra.com/debates/pdfs/CopyrightDamages.pdf>

²⁹See generally, *Sony BMG Music Entertainment v. Tenenbaum*, 660 F.3d 487, 508 (1st Cir. 2011), *cert denied*, 132 S Ct 2431 (2012); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012), *cert. denied* (Mar. 18, 2013).

³⁰See *Sony BMG Music Entertainment v. Tenenbaum*, 660 F.3d 487, 500 (1st Cir. 2011) (stating that “Congress increased the minimum and maximum statutory awards under the Copyright Act because of new technologies that would allow Internet users to steal copyrighted works); see also *Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012).

³¹See e.g., Green Paper at 1 (stating that “no prior technological change has impacted copyright with a magnitude comparable to the development of the Internet. Never before has there been such widespread and immediate access to such a broad array of creative works; never before have content creators – ranging from individuals to large corporations – been able to reach a global audience so effortlessly and inexpensively; and never before has it been possible for members of the public to create, transform or distribute multiple perfect copies of works seamlessly, without regard to national borders.”).

³²The Copyright Act provides for damages between \$750 and \$150,000 for each willful violation. 17 U.S.C. § 504(c).

³³*Williams*, 251 U.S. at 66-67.

³⁴Green Paper at 89.

standardized communication layer (i.e., the standardized identification, metadata and messaging to communicate between the registries and exchanges).”³⁵ While there is certainly a place for government support in the development of a robust online licensing environment, AAP appreciates the Task Force’s recognition that “building the online marketplace is fundamentally a function of the private sector, and that process is well underway.”³⁶

With respect to building the infrastructure for a robust online licensing environment, there are a number of industry-led initiatives to create exchanges, develop international and inter-industry standards, and improve private registries that are active in the U.S. and abroad.³⁷ And, with respect to direct licensing to consumers, the Green Paper accurately points out that, “in recent years, numerous services have launched across copyright sectors to provide consumers with unprecedented access to content in a wide variety of formats”³⁸ and, in particular, “the online publishing market is rapidly growing.”³⁹ The diversity of the new access channels within the online publishing market include *à la carte* digital downloads of eBooks (Amazon.com, B&N.com), monthly subscription services (Scribd.com),⁴⁰ annual blanket licenses and pay-per-use services (CCC), as well as e-textbook rentals (Course Smart), to name a few.

Still, AAP recognizes, as both a producer and user of copyrighted works, that improved online licensing for high-volume, low-valued uses would improve the market for existing works and facilitate greater access to and additional creative uses of such works. More could also be done in public-private partnerships and internationally to provide “comprehensive and reliable ownership data interoperable standards enabling communication among databases, and more streamlined licensing mechanisms.”⁴¹

Specifically, the U.S. Government, and in particular the Copyright Office, is in the best position to consult and collaborate with the various stakeholders within the copyright industries to develop “better access to standardized rights ownership information.”⁴² AAP recently submitted comments to the Copyright Office on this issue, advocating additional incentives to register works and maintain up-to-date ownership information through the recordation system.⁴³ Continued discussion of the government’s

³⁵ *Id.* at 97 n.536.

³⁶ *Id.* at 98.

³⁷ See generally, Green Paper at Section IV(C); Martin Carstens, *Linked Content Coalition – The Answer to Online Copyright Law Woes*, MEMEBURN (Apr. 25, 2012), <http://memeburn.com/2012/04/linked-content-coalition-the-answer-to-online-copyright-law-woes/> (providing a basic description of the goal of the Linked Content Coalition to bring together technical “experts from [across] the media industry” to develop recommendations on how “to link the various strands of rights-management data needed for the modern management of online copyright[s].”

³⁸ Green Paper at 99.

³⁹ *Id.* at 79.

⁴⁰ See, In the News, *The New Scribd*, SCRIBD (Oct. 1, 2013), <http://blog.scribd.com/2013/10/01/the-new-scribd/> (describing the launch in October 2013 of Scribd’s eBook subscription service which provides subscribers with “instant access to a vast collection of books to read, across a wide array of the top digital devices, all for one low monthly price.”).

⁴¹ 78 Fed. Reg. 61,339.

⁴² Green Paper at 98.

⁴³ Comments from AAP in response to Copyright Office, Notice of Inquiry on Technological Upgrade to Registration and Recordation Functions, 78 Fed. Reg. 17,722 (Mar. 22, 2013), submitted May. 21, 2013, http://www.copyright.gov/docs/technical_upgrades/comments/AAP.pdf.

role in facilitating a robust online licensing environment, in coordination with the process initiated by the Copyright Office, would be beneficial.

- b. Question 16: What are the biggest obstacles to improving access to and standardizing rights ownership information? How can the government best work with the private sector to overcome those obstacles?*

Organizations currently engaged in developing international and inter-industry standards, such as the Linked Content Coalition,⁴⁴ are better positioned than AAP to address the specific obstacles that may be hindering the definition of standardized rights ownership information. In general, however, to the extent that content industry stakeholders are able to devise interoperable rights ownership information standards that are actionable from a business perspective, there will still be a role for the U.S. Government to encourage the implementation of such standards on a global scale through government-to-government communications.

With respect to accessing rights ownership information, the Green Paper thoroughly addressed the issue that international copyright norms prohibit formalities such as registration, which means that the Copyright Office registration and recordation records do not establish a complete rights ownership database and that more incentives and education to raise public awareness of the benefits of registration and recordation are needed.⁴⁵ AAP appreciates that efforts are underway at the Copyright Office to consult with copyright industry, business, and technology experts to address these issues.

Improving access to and standardization of rights ownership information could bring clarity and efficiency to the licensing market; help avoid the creation of future orphan works; and document chain of title in business transactions and legal disputes, to name just a few benefits. Thus, publishers believe that the federal government should work with stakeholders to develop greater incentives to record copyright claims, transfers and up-dated contact information. Additionally, it should work with the private sector to leverage existing databases and technological advancements to create a more robust and searchable Copyright Office rights database.

- c. Question 20: Would a central, online licensing platform for high-volume, low-value uses (a “copyright hub”) be a useful endeavor in the United States? If not, why not? If so, how can the government support such a project?*

In general, AAP agrees that “online licensing can be more efficient and less time-intensive than traditional licensing involving real-time negotiations [with respect to] automated online licensing [of] low-value transactions...that would involve disproportionate transaction costs to determine ownership and seek clearances.”⁴⁶ The value of providing these types of licenses is well-documented in the Green Paper and well-understood in the publishing industry, as evidenced by the ever-expanding array of

⁴⁴See *supra* note 35 (describing Linked Content Coalition).

⁴⁵See Green Paper at Section IV(C)(1)(a).

⁴⁶Green Paper at 87.

licensing options provided by the Copyright Clearance Center.⁴⁷ Furthermore, with plans to improve the Copyright Office’s recordation and registration systems, there may well be a role for the federal government to play in supporting the infrastructure of a “copyright hub” to facilitate such licensing across all types of copyrighted content.

AAP supports public and private initiatives to improve online licensing and looks forward to continuing discussions with industry and government stakeholders to facilitate such efforts. At this early stage of discussion, however, publishers need a clearer understanding of how a central, online licensing platform for high-volume, low-value uses would be established and operated.

d. Question 21: What role should the United States government play in international initiatives at WIPO or elsewhere?

The United States may not need to have a specific “role” in initiatives such as Licenses for Europe or the Copyright Hub, given that they focus on particular foreign markets. However, it is important for the United States to engage in government-to-government communication about these initiatives to ensure that any domestic initiatives are developed in a flexible manner to facilitate later goals of global interoperability. Furthermore, to the extent that there is interest at WIPO to develop a comprehensive, globally-linked rights database, AAP believes it is appropriate for the United States to actively contribute its experience with rights databases to such a dialogue in order to encourage a more robust online marketplace for copyrighted works. Certainly, it is clear from the Green Paper that, although there is room for improvement, the public registration and recordation system in the United States is currently the most comprehensive and accessible among WIPO members.⁴⁸ And, as the largest producer of copyrighted works globally, it is also in the best interest of the United States to work with WIPO to ensure the accuracy, accessibility, and comprehensiveness of a global database keeping track of rights ownership information.

5. Establishing a multi-stakeholder dialogue on improving the operation of the notice and takedown system for removing infringing content from the Internet under the Digital Millennium Copyright Act.

a. General Statement

Effective enforcement of copyright law is essential to ensuring that the rights afforded to creators under Section 106 of the Copyright Act are meaningful and serve as an incentive to create new works in the future. Congress’s 1998 enactment of the DMCA was intended to provide such effective enforcement in the online environment. However, advances in technology have been a double-edged sword, fostering new opportunities for legitimate as well as unauthorized dissemination of creative works on a massive global scale. The emergence and proliferation of various types of sites offering systemic unauthorized online access to copyrighted content, in combination with a number of questionable court decisions

⁴⁷See generally, *id.* at Section IV; Copyright Clearance Center, *Products and Solutions*, COPYRIGHT.COM, <http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions.html> (last visited Nov. 13, 2013).

⁴⁸Green Paper at 91 n.494.

regarding the application of various DMCA provisions, has rendered this well-intentioned enforcement statute ineffective and impractical in many respects.

AAP appreciates the Task Force's recognition that "effective enforcement can create a more level playing field, enabling new business models to attract investment and thrive."⁴⁹ Clearly, if "rights holders, ISPs, and content creators, have all identified respects in which [the DMCA notice and takedown system's] operation can become unwieldy or burdensome," there is work to be done to improve this enforcement mechanism.⁵⁰ Indeed, AAP believes that it may take legislative change to make the overall U.S. copyright enforcement system truly effective in regard to the online environment. We are mindful, however, that the goal of this present exercise by the Task Force "is *not* to identify ways to change the law, but rather to determine how the operation of the existing system can be improved within the existing legal framework."⁵¹ Therefore, below we offer a few examples of areas which may be appropriate topics for the establishment of best practices through the Task Force's planned, multi-stakeholder dialogues, as well as our preliminary suggestions for structuring these dialogues.

b. Question 22: The Task Force believes that at least the following issues could be constructively addressed through a notice and takedown multi-stakeholder dialogue. What other issues could be considered? For each issue to be considered, who are the stakeholders needed at the table?

The five issues already identified by the Task Force for discussion within the multi-stakeholder dialogue represent a good starting place for establishing best practices to improve the operation of the notice and takedown system. Best practices are critically needed to mitigate the financial and administrative burdens the system, as currently implemented, is placing on rights holders and ISPs to generate and respond to notices as a result of the volume and constantly recurring nature of infringing activity which has emerged.

More specifically, any best practices that result from these dialogues will need to clearly identify the roles and responsibilities of all parties which have a stake in the online economy. Additionally, because all interested stakeholders agree that the notice and takedown system can be "unwieldy and burdensome," all stakeholders should focus on reasonable and proactive steps to efficiently remove infringing content and improve discoverability and access for legitimate content. Lastly, court decisions which have adjudicated issues pertaining to various aspects of the notice and takedown system should *not* be permitted to serve as roadblocks to discussing or adopting appropriate and effective best practices.

⁴⁹*Id.* at 77.

⁵⁰78 Fed. Reg. 61,340.

⁵¹*Id.*

Below, AAP provides a few high-level suggestions for sub-issues to include within the five identified issues, as well as three additional issues that may also be able to be “constructively addressed” through the dialogue.

i. Sub-issues to Include within Identified Areas for Discussion

First, within the context of the multi-stakeholder dialogue aimed at “reducing the volume of takedown notices sent to service providers,” relevant stakeholders should determine best practices for sending and processing notices containing “representative lists” of infringements as allowed under Section 512(c)(3)(A)(ii).⁵²

Second, if the goal of this dialogue is to find ways to improve the operation of the notice and takedown system within the current terms of the DMCA by, for example, “minimizing reappearance of infringing material,” effectuating Congress’s intention for stakeholders to develop “standard technical measures,” as indicated in Sections 512 (m) and (i), should be a priority.

Despite Congress’s express efforts to factor-in the development of standard technical measures to identify and protect copyrighted works, which were meant to augment the notice and takedown process, such standards were never developed. Furthermore, the DMCA’s “no duty to monitor” provision in Section 512(m) is serving only as a disincentive for sites to implement reasonable preventive technical measures to keep infringing content off of their services. So, while ISPs are on the cutting edge of inventing and adopting technologies that facilitate their users’ experience, they are, by and large, in the “stone-age” in combating piracy.

Legitimate content sites, such as YouTube and Scribd, that implement technical measures to prevent the appearance (and reappearance) of infringing content on their sites are current examples of how developing standard technical measures would greatly reduce the number of takedown notices sent to service providers by reducing the prevalence of infringing content. Moreover, the technical measures adopted by these legitimate sites, which vary in size and content,⁵³ clearly establish that such measures can be tailored and implemented in ways that are both economically and technically feasible as part of a sustainable, or growing, business model.

As discussed in AAP’s December 2010 comments, sending thousands of notices is costly and time consuming for publishers.⁵⁴ Service providers with a good faith desire to comply with copyright law have explained that responding to notices is time consuming and costly for them as well.⁵⁵ With both those who send and those who receive notices agreeing that the current system is inefficient, and with technology providing reasonable measures to prevent the appearance (or reappearance) of infringing

⁵² 17 U.S.C. §512(c)(3)(A)(ii) (including in the criteria for a proper notice the “[i]dentification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a *representative list* of such works at that site.”).

⁵³ Scribd.com primarily hosts literary content, whereas, YouTube primarily hosts audio and visual copyrighted content.

⁵⁴ See AAP Dec. 2010 PTO Comments at 9-11.

⁵⁵ See generally, Green Paper at 56-57 (summarizing service provider views regarding flaws of the current notice-and-takedown system).

content growing increasingly effective and affordable,⁵⁶ there is no reason not to work toward development of the standard technical measures that Congress factored into its crafting of the DMCA 15 years ago.

Due to the technical nature of this discussion, however, AAP suggests creating a sub-group, with technical expertise, to find ways to use innovative technologies to provide effective frontline protection for copyrighted works through the deployment of reasonable and appropriate standard technical measures.⁵⁷ Furthermore, AAP would like to see the creation of a multi-industry body that is led by the National Institute of Standards and Technology (NIST) to devise a wide range of generic technical measures that ISPs can implement to reduce infringement without materially harming the legitimate functionality of the sites. Different types of technical measures can be developed for different types of ISPs. High volume ISPs that upload and download all types of content would obviously need a different type of technical measure than a small ISP that posts modest numbers of links to content stored at other locations. The goal of the multi-industry process would be for NIST to provide ISPs with a menu of potential technical measures they can adopt depending on their size and functionality. NIST would be extremely well-suited for this responsibility, considering its track record in spearheading and supporting innovative technological developments, including security mechanisms, such as the open process pursuant to which it recently developed the preliminary version of the Cybersecurity Framework.

ii. New Issues for Discussion

Streamlining Notices

Stakeholders should draft best practices for standardizing the content, format and manner in which notices are provided. With respect to the content, it may be useful for copyright owners and service providers to establish a list of criteria to serve as a benchmark for assessing whether a notice contains “information *reasonably sufficient* to permit the service provider to locate the [infringing] material.”⁵⁸ Additionally, these stakeholders should agree on templates for one-off notices as well as notices providing a “representative list” of infringed works. Furthermore, best practices should be established for sending, accepting, and responding to electronic notices, including but not limited to addressing certain current barriers such as the use of “CAPTCHAS” which prevent the automated sending of takedown notices.

⁵⁶There are a number of companies offering technological measures to protect sites against unauthorized posting of copyrighted content, with a variety of pricing and implementation models. *See e.g.*, Audible Magic <http://audiblemagic.com/solutions-compliance.php> (last visited Nov. 13, 2013) (providing “turnkey compliance and filtering solutions powered by sophisticated and patented digital fingerprinting technology”); Gracenote, http://www.gracenote.com/case_studies/itunes/ (last visited Nov. 13, 2013) (being used for more than “filtering” as it underlies iTunes Match as well); Vobile, <http://vobileinc.com/> (last visited Nov. 13, 2013); Sandvine <https://www.sandvine.com/downloads/general/success-stories/success-story-40-successful-value-added-services-deployments.pdf> (last visited Nov. 13, 2013) (explaining how its service allows broadband networks to efficiently and cost-effectively filter content).

⁵⁷AAP recognizes that what is reasonable and appropriate for a particular size or type of site will vary, and thus we do not attempt to define those differences ourselves, as they can only be accurately defined through an open and transparent multi-stakeholder dialogue.

⁵⁸17 U.S.C. § 512(c)(3)(A)(iii).

Developing best practices for standardizing the sending of notices falls squarely within the purview of these dialogues as many of the inefficiencies experienced by rights holders and service providers with respect to the notice and takedown system stem from a failure to implement the plain language of Section 512(C)(3)(A)-(B) in good faith. For example, “substantial compliance” has essentially been read out of the requirements for a valid notice, resulting instead in requirements that copyright owners identify every URL leading to infringing content they wish to have removed from a particular site.⁵⁹ Requiring this level of specificity imposes an unnecessary burden on rights holders. With the sophistication of search technology constantly increasing, there seems to be no reason why stakeholders cannot constructively discuss benchmark criteria to restore meaning to the plain language of Section 512 (C)(3)(A)(iii)’s requirement to provide “reasonably sufficient” information to locate infringing material—a benchmark that would not start at URL-specific notices. Additionally, creating commonly accepted notice templates would help individual copyright owners and other small-scale rights holders proactively and economically enforce their rights and could decrease processing time for service providers.⁶⁰ Moreover, creating and implementing best practices for sending and accepting electronic notices, such as providing guidance for sending “batches” of notices where a rights holder identifies multiple infringements on a particular site, would facilitate a more efficient notice-sending process.

Repeat Infringer Policies

The Task Force’s multi-stakeholder dialogues should also establish best practices for implementing effective “repeat infringer” policies. The DMCA, in section 512(i)(1)(A), conditions an ISP’s receipt of safe-harbor protection on the adoption and implementation of “repeat infringer” policies.⁶¹ However, to date, those policies have not generally been effective. Some specific areas to develop best practices for implementing effective “repeat infringer” policies include defining:

- a baseline for what actions characterize a user as a repeat infringer;
- criteria for appropriately tracking repeated infringing activity, including parameters for user identification tools on sites that allow users to upload and distribute infringing content; and
- protocols for notifying copyright owners about repeat infringer activity.⁶²

⁵⁹17 U.S.C. § 512(c)(3)(B)(i) states that “a notification from a copyright owner . . . that fails to *comply substantially* with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.” Thus, Congress intended notices that substantially comply with the notice requirements provided in Section 512(c)(3)(A) to be evidence of a service provider’s actual or constructive knowledge of infringing activity.

⁶⁰See, Comments of AT&T in response to USPTO & NTIA, Notice of Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 72,790 (Nov. 26, 2010), submitted Dec. 10, 2010, 9 (stating that “content owners continue to use different formats for notices...[however,] we believe that more uniformity may significantly enhance the efficacy of any automated notice forwarding process) <http://ssl.ntia.doc.gov/comments/100910448-0448-01/attachments/NTIA%20FFI%20Inquiry%20on%20Copyright%20Policy,%20Creativity%20and%20Innovation%20in%20the%20Internet%20Economy%20Dkt%20100910448%200448%2001%20121010.pdf>.

⁶¹17 U.S.C. §512(i)(1)(A).

⁶²See Comments from AAP in response to U.S. Patent & Trademark Office, Notice of Inquiry - Voluntary Best Practices Study, 78 Fed. Reg. 37,210 (Jun. 20, 2013), submitted Aug. 21, 2013, <http://www.uspto.gov/ip/officechiefecon/PTO-C-2013->

Also, as these policies affect users, the best practices should require each service provider to make its specific repeat infringer policy publicly available in simple terms on its site.

Takedown Response Time

Lastly, when it enacted the DMCA, Congress did not specifically define how quickly a service provider should respond to a notice by removing infringing content, except to qualify the protection of the safe harbor on the provider “expeditiously...remov[ing]...the [infringing] material” after receiving a notice.⁶³ This was prudent in 1998, back before Google was a household name.⁶⁴ However, stakeholders have now had 15 years of experience with the takedown process and the technologies that facilitate these actions. Therefore, stakeholders should now be able to develop best practices to more accurately define what constitutes “expeditious” removal, i.e., effective response times.

- c. Question 23: How can the Task Force ensure participation by all relevant stakeholders, as well as effective and informed representation of their interests?*

In order to ensure that all relevant stakeholders at least have the opportunity to participate in these dialogues, the Task Force should provide live-streaming of any roundtables and a written notice and comment process to evaluate proposals for specific best practices. Additionally, the Task Force should maintain a thorough record of the discussions at stakeholder roundtables (including transcripts of the sessions) and make these records publicly available in a timely manner. Creating a user-friendly webpage or news feed as a central location for all updates and documents associated with the dialogues would also help to ensure that stakeholders have access to all relevant information.

- d. Question 24: Are there lessons from existing multi-stakeholder processes in the realms of Internet policy, intellectual property policy, or technical standard-setting that could be applied here? If so, what are they and to what extent are they applicable?*

The operating protocols for the Telecommunications and Electronic and Information Technology Advisory Committee (TEITAC) could serve as a useful starting point for developing a successful multi-stakeholder process for discussing and agreeing to best practices to improve notice and takedown.⁶⁵ TEITAC was comprised of 41 organizations representing various stakeholders, from foreign

[0036.pdf](#) (suggesting information that would be useful to provide to rights holders, including: titles, actions taken by the ISP, identity of infringers).

⁶³17 U.S.C. §512(c)(1)(C).

⁶⁴ Google formally incorporated and hired its first employee in September of 1998. *See Our History In Depth*, GOOGLE, <http://www.google.com/about/company/history/> (last visited Nov. 12, 2013).

⁶⁵Telecommunications and Electronic and Information Technology Access Advisory Committee, *Operating Protocols*, ACCESS BOARD (Sept. 27, 2006) <http://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/background/advisory-committee-operating-protocols>. Additionally, AAP acknowledges that the recommendations that TEITAC provided to the Access Board to update the Section 508 standards have not yet been implemented. The delay stems from additional notice and comment requirements for adopting these recommendations as a further refined set of new enforceable standards. However, the Task Force, with respect to notice and takedown, is looking for models for developing voluntary best practices that work within the current terms of the law, and *not* to develop new enforceable regulations. The process undertaken by TEITAC to develop a set of recommendations amenable to all represented stakeholders was open, effective, and efficient and thus still represents a good framework on which to model multi-stakeholder discussions to devise best practices for improving the notice and takedown process.

governments to technology manufacturers to accessibility advocates.⁶⁶ Despite the wide variety of interests represented on this committee, in less than two years from its inception, TEITAC was able to deliver its final report and recommendations for updating a set of technical and functional standards critical for government procurement decisions.⁶⁷

Developing a framework for open and effective discussion and resolution of potentially contentious issues is not an easy task, but the following principles from TEITAC's operating principles provide a solid foundation to work from:

- clearly define the goal of the working group and the desired final product of the group;
- set a schedule (e.g. "meetings will be held approximately once each four to six weeks");
- encourage openness by requiring stakeholders to: (1) exchange information to the fullest extent practicable; (2) maintain the confidentiality of such information; and (3) refrain from unauthorized announcements to the media or other discussions with the media characterizing the position of the working group until best practices are final;
- provide for open meetings, i.e., announced previously in the Federal Register, with time for public comment;
- require attendance, with a strong preference for in-person participation, and remove an organization's delegate for failure to attend two consecutive meetings;
- give an organization's alternate full authority to negotiate on behalf of their organization and instruct regular delegate to fully-brief alternates, should they need to participate; and
- explicitly set the expectation that stakeholders agree to participate fully, openly, and in good faith aiming for a speedy and amicable set of best practices.⁶⁸

6. Conclusion

Based on the various digital distribution models discussed in these comments, it is clear that publishers continue to embrace the new opportunities technology has created to bring digital books and journals to a global audience of readers, students, and professionals. The rapid growth and popularity of digital content and the online markets, however, have intensified the need to secure the rights of copyright owners and to facilitate transactions in these contexts. Reasonable yet effective copyright enforcement is a central tool for ensuring that such rights remain meaningful and are capable of incentivizing future creativity—and such enforcement is not only compatible with, but is required for,

⁶⁶See TEITAC, TEITAC Report: Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology, Executive Summary, Access Board (Apr. 3, 2008), <http://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/background/teitac-report/1-executive-summary>.

⁶⁷*Id.* (assessing a variety of issues within that two year period, such as: types of technologies to be covered by the standards and guidelines; barriers to the use of such technologies by persons with disabilities; solutions to such barriers, if known, and research on such barriers; contents of the standards and guidelines; and harmonization with international standards); *see also* <http://www.access-board.gov/guidelines-and-standards/communications-and-it/72-ict-refresh> (listing the timeline for the actions of the TEITAC: (1) July 6, 2006 TEITAC board members named (2) April 3, 2008 - TEITAC presents final report to the Access Board.

⁶⁸Telecommunications and Electronic and Information Technology Access Advisory Committee, *Operating Protocols*, ACCESS BOARD (Sept. 27, 2006) <http://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/background/advisory-committee-operating-protocols>.

the continued growth of a robust and innovative online environment. AAP looks forward to continued engagement with the Task Force and the various stakeholders to further explore ways to make copyright meaningful in the twenty-first century.

Sincerely,



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