DEPARTMENT OF COMMERCE
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National Telecommunications and Information Administration

Docket No. 130927852-3852-01

**Response of Andrew P. Bridges to the Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy[1]**

I appreciate this opportunity to comment on the Department of Commerce Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy. I write in my individual capacity as an attorney with over twenty years of experience in the realm of intellectual property. I regularly represent the interests of entrepreneurs, start-up companies, and mature global companies in copyright, trademark, and Internet- and technology-related cases, both in litigation and in high-stakes counseling matters. Many of my clients have become some of the most successful companies in America, while others have died from being crushed by the costs and risks of intellectual property litigation.

I write purely on my own behalf – not on behalf of my current law firm or any previous law firm, or on behalf of any client. No client, other company, trade organization, or public interest group has proposed that I submit a comment, has suggested any point of view or position for it, or has furnished any consideration for it. Some of my clients may disagree with my views, and I do not speak for them here.

I welcome the RFC's inquiry into "the appropriate calibration of statutory damages in the contexts of individual file sharers," as there is a desperate need for a broad recalibration of the statutory damages scheme in that and many other contexts. Statutory damages are one of the most controversial aspects of U.S. copyright law, and the U.S. is one of very few countries around the world that provide for this extraordinary remedy.[2] Expressed justifications for these damages have identified two distinct, and often divergent, purposes: to award damages where assessment of actual harm is difficult, and to deter infringers.[3]

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[1] Prepared by Michael Basile, Christine Casaceli, and Ryan Schneer, student attorneys under the supervision of Brandon Butler, Practitioner-in-Residence, the Glushko-Samuelson Intellectual Property Clinic at American University, Washington College of Law.

[2] *See* Pamela Samuelson, Phil Hill, and Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, But for How Long?* 60 J. COPYRIGHT SOC'Y USA __ (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240569.

[3] Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy In Need of Reform*, 51 WM. MARY L. REV. 439, 509 (2009) (arguing that most of the problems with statutory damages arise from the "unholy melding" of these two impulses).

Based on my years of experience, I believe that the current statutory damages regime has badly distorted copyright litigation, has corrupted a number of copyright plaintiffs, and has undermined respect for U.S. copyright law.

Regarding the first justification, actual damages are no more difficult to assess in copyright litigation than in patent litigation, yet there are no statutory damages in patent litigation. Regarding the second justification, the application of statutory damages has gone far beyond any principled or legitimate deterrence function.

With respect to individual file-sharers, the Request for Comments asks, "To what extent is application of the current range of statutory damages necessary for effective deterrence?" The answer is that the current range of statutory damages far exceeds the appropriate level of damages to deter individual file-sharers. But the answer applies across the board and not only with respect to individual defendants.

Major copyright industry players have tacitly acknowledged the broken nature of the copyright enforcement system as applied to individual users of Internet services by creating parallel systems of private enforcement that are radically different from the one that copyright law embodies. From YouTube's ContentID system to the Center for Copyright Information and its alerts to ISP subscribers, various companies and associations have chosen to take approaches to individual infringers that involve much lower stakes (removing the sound from an allegedly infringing video, sending a letter to notify the subscriber of an allegedly infringing download) and no demand of money payments. If astronomical statutory damages were necessary to deter individual file-sharers, the major copyright owners and enforcers would not have embraced an alternative approach.

The use of statutory damages as a threat to deter copyright infringement is not new. From 2003-2008, the height of the peer-to-peer file-sharing phenomenon, RIAA-affiliated record labels filed, settled, or threatened legal actions against 30,000 individuals.[4] Because most defendants settled, the first big award based on statutory damages didn't come until Capitol Records' lawsuit against Jammie Thomas-Rasset resulted in a series of verdicts between 2007 and 2012 that prompted one judge expressly to ask Congress to revisit statutory damages.[5] A Native American single mother of four, Ms. Thomas-Rasset faced at one point in the case's

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[4] The Electronic Frontier Foundation, *RIAA v. The People: Five Years Later*, https://www.eff.org/files/eff-riaa-whitepaper.pdf (2008) at 1.

[5] Capitol Records v. Thomas, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) ("The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court.").

lengthy history[6] a $1.92 million damages verdict for downloading 24 songs – with no evidence that she had actually shared those songs with anyone else. The total value of the downloads was only $23.76. On appeal, the record label trimmed its claim to $222,000, or $9,250 per download.

In its campaign against piracy, the RIAA also targeted technology providers such as the owners of the peer-to-peer file-sharing program Limewire.[7] RIAA member Arista Records pursued a statutory damages award against Limewire based on each alleged instance of infringement, i.e., every file that had been shared through the program.[8] As the judge observed, this would lead to an award that would reach into the trillions, and give the plaintiffs "more money than the entire music recording industry has made since Edison's invention of the phonograph."[9]

The net effect of this campaign is still the subject of debate, and others have written extensively about the issue.[10] What is not debatable is that the public developed a strong sense of resentment towards the RIAA and its members for suing, among others, mothers, grandmothers, and children for such irrational sums of money.[11] The RIAA, seeing that suing and infuriating the very people it sought as potential customers was not a good business strategy, announced that it had abandoned the practice of seeking statutory damages for music downloads.[12]

Other actors, however, do not have customers to worry about offending. They looked at the huge awards that were possible, and the fear these potential awards struck into the hearts of defendants, and saw dollar signs. They saw that it was possible to seek windfall financial gains by intimidating users with the specter of outrageous statutory damage awards. My comments here focus on what I will call predatory enforcement, also known as copyright "trolling." The predatory enforcer (PE) of copyright is an entity that owns a copyright or a license (or, in some cases, merely pretends to own such a right) and asserts that right to extort settlements from

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[6] Capitol Records v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010). The award was later reduced to the original award of $222,000, or $9,250 per song, which Judge Davis had called "unprecedented and oppressive." *Capitol Records*, 579 F. Supp 2d at 1228.

[7] Arista Records LLC v. Lime Group LLC, 784 F.Supp.2d 313 (S.D.N.Y. 2011).

[8] *Id*. at 317.

[9] *Id.*

[10] See, e.g., Electronic Frontier Foundation, *supra* n. 4.

[11] Sarah McBride and Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL STREET JOURNAL (December 19, 2008).

[12] *Id.*

alleged infringers (and not, for example, to develop licensing or retail arrangements with willing partners, or to protect such arrangements).

The balance of these comments will describe the phenomenon of predatory enforcement in more detail, describe two paradigm cases, draw out the connections between statutory damages and predatory enforcement, describe some of the harms that predatory enforcement causes, and propose a solution that would discourage would-be PEs.

## I. Predatory Enforcement

As Judge Otis Wright of the United States District Court for the Central District of California has aptly put it, PEs have "discovered the nexus of antiquated copyright laws, paralyzing social stigma, and unaffordable defense costs,"[13] and are exploiting that nexus to reap outrageous profits, doing great harm to the public, the legal system, and the credibility of the copyright laws in the process. While there are, as Judge Wright points out, other factors that help make predatory enforcement possible, the availability of statutory damages as remedies for copyright infringement is a necessary condition for any PE's extortionate scheme. They use the threat of statutory damages of up to $150,000 per infringement, together with the high cost of defending oneself in court, as cudgels to demand settlements "calculated to be just below the cost of a bare-bones defense."[14] These entities have sent thousands of demand letters and have collected millions of dollars in protection money from unsuspecting citizens.[15] Far from seeking to deter infringement, PEs *depend* on widespread alleged infringement as a necessary condition for their business model. Indeed, they may *encourage* infringement in order to lay the groundwork for massive financial rewards.

PEs do not participate in the cultural or scientific ecosystem that copyright is designed to facilitate. They do not gain their rights through creation of works or through collaboration with authors to make works more widely available. They do not sue in order to deter infringement or recover actual losses. Rather, they claim copyright enforcement rights through assignment or sometimes through fraudulent means, with no goal other than profiting from settlements. Many target individual Internet users or small companies, rather than larger intermediaries, to ensure they are dealing with defendants with little money or bargaining power. Like other shady enterprises, some PEs have used multiple affiliated "shell companies" to hide assets and frustrate the rare defendants who fight back and recover damages or attorneys' fees.

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[13] Ingenuity 13, LLC v. Doe, No. 2:12-cv-8333-ODW(JCx) (C.D. Cal. May 6, 2013) at 1. Social stigma plays a powerful role in the cases that involve alleged downloading of pornography, but there is also significant social stigma attached to being haled into court for any alleged wrongdoing.

[14] *Id.* at 2.

[15] *Prenda's massive trolling take revealed: $1.9 million in 2012*, ARS TECHNICA, (October 2013) http://arstechnica.com/tech-policy/2013/10/prenda-massive-trolling-take-revealed-at-least-1-9-million-in-2012.

The stories of Righthaven and Prenda help illustrate how PEs operate and the role statutory damages play in their schemes. I represented companies whom both of these PEs victimized. I personally witnessed the disruption, the distraction, and the fear that they have caused to legitimate businesses. These particular PEs have finally collapsed in scandal, but others are still at it. The statutory damages that attracted them virtually guarantee that more will follow in their footsteps.

A. Righthaven

Righthaven was a firm that a group of attorneys established to enter into agreements with *The Las Vegas Review-Journal*, the *San Jose Mercury News*, and *The Denver Post*.[16] Righthaven made these agreements with the intent to search the Internet for any infringers that it believed used material from partner websites. It would then sue individuals or operators of small websites for copyright infringement in order to extract a settlement from them.[17] Righthaven targeted bloggers, political activists, non-profit organizations, and others who quoted from the newspaper, and threatened whomever they found using the material with the maximum statutory damages award, $150,000.[18] Righthaven was not the owner or creator of any of these copyrighted materials. Nor was it even a genuine licensee. Rather, Righthaven only held a bare right to sue on behalf of its newspaper partners.

Righthaven's victims were generally engaged in harmless activities, some of which they reasonably believed to be fair use. Indeed, in one case a Righthaven defendant's posting of an entire article was found to be fair use. When Vietnam War veteran Wayne Hoehn posted a 19-paragraph editorial from the *Las Vegas Review-Journal* entitled "Public Employee Pensions: We Can't Afford Them" on an online message board,[19] Righthaven went after the decorated veteran,[20] suing him for the maximum statutory damage award of $150,000.[21] U.S. District Judge

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[16] Daniel Kravetz, *Newspaper Lawsuit Factory Sues Over "Death Ray" Image*, WIRED, (December 21, 2010) http://www.wired.com/threatlevel/2010/12/death-ray-lawsuits.

[17] *Is it "Fair" to Link to News Articles?*, NAT'L L. REV. (Dec. 15, 2010), http://www.natlawreview.com/article/it-fair-to-link-to-news-articles.

[18] RIGHTHAVEN LAWSUITS, www.righthavenlawsuits.com (Last Visited November 5, 2013).

[19] Righthaven LLC v. Hoehn, 716 F.3d 1166, 1168 (9th Cir. 2013); s*ee generally* David Kravetz, *Righthaven Loss: Judge Rules Reposting Entire Article Is Fair Use*, WIRED, (June, 20, 2011) http://www.wired.com/threatlevel/2011/06/fair-use-defense.

[20] *See* Denise Nichols, *Veterans Come Together to Oppose Righthaven,* MAL CONTENDS, (April 24, 2011) http://malcontends.blogspot.com/2011/04/veterans-come-together-to-oppose.html (outlining Hoehn's awards from Vietnam).

[21] Righthaven LLC v. Hoehn, 716 F.3d at 1168 (9th Cir. 2013)

Philip Pro granted summary judgment in favor of Hoehn, saying there was "no genuine issue of material fact that Hoehn's use of the work was fair."[22]

Righthaven showed little shame in "enforcing its copyrights" and sued anybody who posted articles from its partner newspapers regardless of how sympathetic the defendant's use may have been. For example, Righthaven went after Thomas A. DiBiase, a former Assistant United States Attorney for the District of Columbia.[23] DiBiase runs a website that provides information to help track murder investigations. In the context of this service, DiBiase posted some *Las Vegas Review-Journal* stories about unsolved murders.[24] Although this was at least arguably a fair use, Righthaven nonetheless demanded $75,000 in damages as well as DiBiase's website.[25] These are two of the handful of cases that were actually litigated, as the threat of up to $150,000 in penalties coerced most defendants to settle out of court.

Righthaven's practices finally ended when the Ninth Circuit Court of Appeals ruled that the acquisition of a right to sue, separate from acquisition of a copyright, did not give it standing under the Copyright Act.[26] Eventually, a judgment creditor caused a seizure of Righthaven's bank account,[27] and its assets were sold off to pay $323,128 in sanctions[28] for repeated misconduct.[29] Shortly after the government gained access to its finances, Righthaven became insolvent and filed for bankruptcy protection.[30] Until the day of its ultimate demise, Righthaven disrupted the lives of hundreds of people, costing them thousands of dollars, and wasting

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[22] Righthaven, LLC v. Hoehn, 792 F. Supp. 2d 1138, 1151 (D. Nev. 2011). The fair use holding was vacated on appeal, not on the merits, but rather as a consequence of the appellate panel finding that Righthaven had no standing to sue in the first place, and that the district court therefore lacked jurisdiction over the fair use issue.

[23] Righthaven, LLC v. DiBiase, 2011 WL 2473531 (D. Nev. June 22, 2011). *See generally, Righthaven v. DiBiase*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/cases/righthaven-v-dibiase (Last Visited November 5, 2013)

[24] *Id.*

[25] *Id.*

[26] *Hoehn*, 716 F.3d at 1168 (9th Cir. 2013)("assignment of the bare right to sue for infringement, without the transfer of an associated exclusive right, is impermissible under the Copyright Act and does not confer standing to sue.").

[27] Timothy B. Lee, *Defendant asks US Marshals to drag Righthaven principals to court*, ARS TECHNICA (Dec. 20, 2011) http://arstechnica.com/tech-policy/2011/12/defendant-asks-court-to-drag-defeated-righthaven-into-court.

[28] RIGHTHAVEN LAWSUITS, *Supra,* note 8.

[29] *Id.*

[30] David Kravetz, *Creditor Moves to Dismantle Copyright Troll Righthaven*, WIRED, (Oct. 29, 2011) http://www.wired.com/threatlevel/2011/10/creditor-righthaven.

significant judicial resources in its abuse of the copyright system.[31] Righthaven filed 276 cases and extracted $352,500 dollars in settlements between 2010 and 2011.[32] We may never know how many individuals settled with Righthaven to avoid a threatened lawsuit.

B. Prenda Law

The Prenda Law group became one of the most notorious groups using alleged copyright ownership to extort settlements by threatening litigation. Four attorneys with "shattered law practices" conducted the Prenda operation.[33] These attorneys established shell corporations to hide their role as real parties in interest as they acquired copyrights for the sole purpose of entrapping alleged infringers.[34] The Prenda group then monitored traffic on BitTorrent trackers, through which users search for films, to see which IP addresses downloaded their videos.[35] An affidavit in recent proceedings claims Prenda actually seeded its own videos to BitTorrent and waited to see who took the bait. [36] It then filed federal copyright infringement actions in order to subpoena service providers for the names associated with the implicated IP addresses. It sometimes threatened service providers with allegations that the service providers themselves, or their employees, were personally responsible for infringements. On occasion it would deliver its threat with a copy of a state-court complaint in a distant part of the country, naming numerous "Doe" defendants, alleging that the victim of the threat was already one of the "Does" in the pending litigation.

Armed with a list of victims, Prenda sent thousands of demand letters invoking the statutory maximum of $150,000 in damages per download, but indicating it would be willing to settle each case for a few thousand dollars.[37] Prenda also intimidated defendants by threatening to release their names, along with the name of the adult movie that was allegedly downloaded. In addition to bullying individual alleged file-sharers with lawsuits, Prenda's actions went beyond mere vexatious litigation to actual fraud on the courts. It acquired ownership in at least one

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[31] Righthaven LLC v. Realty One Group, Inc., 96 U.S.P.Q. 1516 (D. Nev. 2010).

[32] RIGHTHAVEN LAWSUITS, *Supra,* note 8.

[33] Ingenuity LLC v. Doe, No. 2:12-cv-8333-ODW(JCx), Order Issuing Sanctions at 3.

[34] *Id.* at 4.

[35] *Id.*

[36] *Prenda seeded its own porn files via BitTorrent, new affidavit argues*, ARS TECHNICA (June 3, 2013) http://arstechnica.com/tech-policy/2013/06/prenda-seeded-its-own-porn-files-via-bittorrent-new-affidavit-shows.

[37] Ingenuity LLC v. Doe, No. 2:12-cv-8333-ODW(JCx), Order Issuing Sanctions at 4.

copyright by stealing the identity of a groundskeeper and forging his signature.[38] When the victim alleged identity theft, the Prenda lawyers sued him for defamation, though none of the facts he alleged were ever shown to be untruthful.[39]

Prenda has been a huge drain on the legal system, filing hundreds of complaints.[40] It turned manipulation of the legal system into a lucrative business model, as it was able to extract $1,900,000 in 2012 alone from settlements with individual alleged infringers. [41] In 2013, Prenda was fined for fraud and misconduct during litigation on multiple occasions.[42] Prenda's behavior has been described as criminal-like, with a judge who reviewed one of its cases suggesting that Prenda resembled a racketeering group.[43] In a brazen display, mere days after being slapped with over $80,000 in sanctions from a federal judge, Paul Duffy, one of the principals of the group, continued to send out a new batch of threat letters.[44] This time, in addition to threatening being named in a lawsuit, Duffy threatened the recipient with exposing his name to his neighbors in connection with the downloaded adult video.[45]

After Judge Wright of the Central District of California imposed $80,000 in sanctions and referred the Prenda actions to the Criminal Investigation Division of the Internal Revenue Service,[46] Prenda has found itself in disarray. One of Prenda's attorneys has been ordered off cases in the Ninth Circuit and has been referred to the ethics board of the Minnesota bar based on

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[38] *Id*. at 5.

[39] Mike Masnick, *Angry Judge Tells Prenda To Stop Falsifying Alan Cooper's Signature; Calls It Fraud*, TECHDIRT (May 21, 2013) http://www.techdirt.com/articles/20130521/14172323158/judge-not-impressed-prenda-alan-cooper-lawsuit.shtml

[40] Ingenuity LLC v. Doe, No. 2:12-cv-8333-ODW(JCx), Order Issuing Sanctions at 3.

[41] *Prenda's massive trolling take revealed: $1.9 million in 2012*, ARS TECHNICA (October 2013) http://arstechnica.com/tech-policy/2013/10/prenda-massive-trolling-take-revealed-at-least-1-9-million-in-2012.

[42] *See, e.g.* Ingenuity LLC v. Doe, No. 2:12-cv-8333-ODW(JCx), Order Issuing Sanctions at 10.

[43] *Id.*

[44] *Ethically handicapped Prenda's "boss" Paul Duffy signs a new batch of extortion letters*, FIGHT COPYRIGHT TROLLS, (May 12, 2013) http://fightcopyrighttrolls.com/2013/05/12/ethically-handicapped-prendas-boss-paul-duffy-signs-a-new-batch-of-extortion-letters.

[45] *Id*.

[46] Ingenuity LLC v. Doe, No. 2:12-cv-8333-ODW(JCx), Order Issuing Sanctions at 10.

his activities with the group.[47] Finally, in 2013 one of Prenda's process servers was revealed to have participated in a high profile drug deal that resulted in the overdose of an Illinois State Judge.[48]

While much of what Prenda did in running its predatory enforcement operation appears to have been illegal or unethical on other grounds, current copyright law enabled and supported its demand for statutory damages, the *sine qua non* of its scheme. The Prenda scheme collapsed because of its flagrantly fraudulent behavior in other aspects of its cases. The statutory damages vehicle for its abusive business plan remains in place, and all that is needed for a similar entity to prevail would be to avoid fraudulent activities. There is something deeply wrong when the copyright statutory damages regime and "anti-piracy" campaigns become tools of organized crime in this fashion.

## II. Why Statutory Damages Encourage Predatory Enforcement

The current structure of statutory damages gives PEs the weapons they need to extract significant settlements from accused infringers without regard to the truth of their allegations or the harm of the alleged infringing, just as Righthaven and Prenda did. One need only allege that there was copying in order to seek a subpoena unmasking anonymous online defendants, at which point PEs can send letters threatening maximum damages of up to $150,000 per infringed work and extract settlements without proving infringement, much less any harm. As there is such a small burden of proof, and the damages can multiply quickly, even innocent persons are at risk for huge amounts of damages. This risk leads many accused infringers to pay the settlement demand, at very little cost or burden to the predatory plaintiffs.

The copyright holder's ability to demand astronomical statutory damages has led to some infamously excessive jury awards. The Jammie Thomas-Rassett case, discussed above, was a landmark, but not an anomaly. In a later case against Joel Tenenbaum, a jury awarded the record label plaintiffs $675,000 in damages for downloading thirty songs, more than double the per-song penalty ultimately awarded against Thomas-Rassett.[49] The defendant was twenty years old at the time of the infringement. These verdicts attract predatory enforcers not because they hope to obtain a similar windfall judgment, but because they know their victims are aware that

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[47] Joe Mullin, *Prenda lawyer gets kicked off 9th Circuit case*, ARS TECHNICA, (May 20, 2013) http://arstechnica.com/tech-policy/2013/05/prenda-lawyer-gets-kicked-off-9th-circuit-case.

[48] Jim Suhr, *FBI: Illinois man admits selling cocaine to 2 judges*, STATE JOURNAL-REGISTER (May 28, 2013) http://www.sj-r.com/breaking/x1039449023/Investigator-Man-admits-selling-cocaine-to-two-judges.

[49] Sony BMG v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011).

copyright infringement lawsuits can involve damages completely divorced from reality, and will be frightened into quick and lucrative settlements.[50]

## III. Effects of Predatory Enforcement

### A. Chilling of the Very Purposes of Copyright

The Constitutional purpose of copyright is to "promote the Progress of Science and useful Arts."[51] Numerous provisions of the Copyright Act support that purpose. Among them are not only the allocation of exclusive rights to copyright holders in section 106 of the Act but also the enactment of the fair use doctrine in section 107. Fair use promotes the constitutional purpose of copyright by encouraging new, creative uses of previous works. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). But fair use is often characterized as a difficult doctrine; because it turns on particular facts of a case, its application by a court can seem difficult to predict. Indeed there are cases where no two successive court decisions in the course of an appeal of the same case have had the same result. *See, e.g., Sony Corp. v. Universal City Studios, Inc.,* 464 U.S. 417 (1984)(Supreme Court reversed the Ninth Circuit, which had reversed the district court); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (Supreme Court reversed the Fourth Circuit, which had reversed the district court).[52]

Given the complexity of fair use determinations and widely varying court evaluations of the same conduct, someone who wishes to engage in fair use (such as a blog quoting an excerpt from a newspaper article in a case Righthaven brought) may have to take risks in relying on the doctrine. For someone on a low budget, or a budget too small to negotiate with some copyright holders, there is no alternative to taking the fair-use risk other than failing to engage in the fair use. But under the current statutory damages regime, the risk can be outrageous and untenable, at an exposure of $150,000 per work. The potentially ruinous damages exposure will deter the fair use. Similarly, some business plans rely on fair use as an underpinning of a service or technology that interacts with millions of works, such as Internet search engines. In two cases I

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[50] Supporters of enormous statutory damages awards like to point to allegedly unsavory aspects of the character of defendants in certain cases, alleging that they lied in their testimony or wrongly tried to pin blame for downloads on others. But indeed whether a defendant is loathsome does not make the extraordinary awards any less outrageous. A loathsome person who jumps a New York City subway turnstile (loss to the system, about two dollars) does not deserve a $300,000 penalty for being loathsome. *See* Andrew P. Bridges, "Forget SOPA, Hollywood Already Had a Field Day With the Justice System," Pando Daily (Jan. 18, 2012), available at http://pandodaily.com/2012/01/18/how-hollywood-twisted-theft-laws-long-before-sopa/.

[51] U.S. Const., art. I, sec. 8, cl.8.

[52] At the same time, the last decade has seen substantial consensus emerge in the courts applying the fair use doctrine in the wake of *Sony* and *Campbell*. *See, e.g.,* Neil Netanel, *Making Sense of Fair Use,* 15 Lewis & Clark L. Rev. 715 (2011). Of course, an emerging consensus is small comfort for someone who risks being a painful exception to the rule.

defended, one minor and unsuccessful pornography publication alone (Perfect 10) sued major Internet search engines for over one billion dollars each in statutory damages with no proof of actual harm. Very few companies, founders, or investors are willing to take the risks those major Internet search engines took, and the world will never know what exciting new technologies or how many new businesses died an early death because of the mere risk of statutory damages. I have personally witnessed the early deaths of several companies for that very reason.

B. Waste of Judicial Resources

One of the most pressing effects of predatory enforcement is the waste of judicial resources. For example, Prenda filed suit against over 1,000 John Does in a single case in order to get discovery on the defendants that would allow Prenda to extort settlements.[53] It misidentified as many as 30% of the defendants.[54] Righthaven filed 276 cases between 2010 and 2011.[55]

These types of mass litigation schemes clog dockets and drain judicial resources with no clear public benefit as a result. Righthaven's charter states that it had the purpose of suing for copyright infringements of material it had no part in creating or distributing.[56] Righthaven's goal was not to deter infringement or to protect any legitimate market, but rather to monetize infringement itself. The cost of litigating these frivolous cases is substantial, as evidenced by the sanction against Prenda lawyers of over $80,000 in a single action. Put simply, the predatory enforcement business model is frivolous litigation, using courts and tying up judicial resources where no legitimate public interest or private right is at stake.

C. Legitimacy of the Copyright Act

Predatory enforcement undermines respect for copyright law. As the Supreme Court said in *Sony*, "[the] purpose of copyright [law] is to create incentives for creative effort."[57] Predatory enforcement does nothing to incentivize creativity. Instead, it perpetuates a popular image of copyright as an arbitrary, unbalanced system that is rigged in favor of clever lawyers and the industries who employ them, and in favor of favored industries with special influence over

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[53] AF Holdings LLC v. Does 1-1,058 et al, case number 12-7135 (D.C. Cir.) (2013). This case is waiting decision on appeal in the D.C. Circuit Court of Appeals.

[54] Claire Suddath, *Prenda, The Copyright Troll,* Bloomberg Businessweek, (May 30, 2013) http://www.businessweek.com/articles/2013-05-30/prenda-law-the-porn-copyright-trolls.

[55] RIGHTHAVEN LAWSUITS, *Supra,* note 8.

[56] Righthaven LLC v. Hoehn, 716 F.3d 1166, 1168 (9th Cir. 2013).

[57] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

Congress. Stories of outrageous statutory damages verdicts and predatory copyright enforcement contribute to the skepticism and even cynicism that many young people feel about copyright. A law that enables widespread extortion of individual Internet users will have a hard time winning over a generation that already questions whether copyright makes sense in the Internet age.[58]

D. Harmful to Individuals

The harm to individual victims of predatory enforcement is clear: they are swept up into a large-scale extortion scheme with no option but to pay thousands of dollars in settlement fees. One defendant in Washington state found herself named in three separate suits with three separate judges for a single download of a movie being shown in South Africa.[59] The plaintiff hadn't realized it had sued the same IP-address in three separate cases. Between 2010 and 2011, Righthaven filed 276 lawsuits and extracted an estimated $352,500 through settlements.[60] Prenda allegedly oversaw a team of lawyers that threatened over 25,000 persons and companies with lawsuits.[61] There are many examples of individuals and companies who have advocated or utilized statutory damages to engage in "get rich quick schemes."[62]

For all of these reasons, the current statutory damages scheme does not promote the goals of copyright law. It arose and evolved at a time when most copyright litigants were part of the same community of authors, publishers, and performers, where most lawsuits were about single works and where the value of exploitation of a single work was significant. Today the advent of the digital era means that new technologies and communications platforms may touch millions or billions of works at a time, with millions or billions of users, and the exploitation value of a single work by a single person may be trivial, such as the 99-cent value of a single downloaded song. It is time to recognize this enormous shift in the landscape and to bring statutory damages into the modern age by overhauling it.

IV. Proposals for Reform

During the recent effort to enact the Stop Online Piracy Act and the PROTECT-IP Act, supporters of the legislation repeatedly claimed that "piracy is a real problem." Real problems,

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[58] See, e.g., Dan Stewart, *I was plagiarized by Rand Paul, and I don't care*, THE WEEK (November 6, 2013) ("There's a generation coming that considers the concept of intellectual property a puzzling anachronism.").

[59] Zembezia Film Ltd. v. Does 1-66, 2013 WL 2325621 (W.D. Wash.).

[60] RIGHTHAVEN LAWSUITS, http://www.righthavenlawsuits.com (last visited Nov. 4, 2013).

[61] Sudath, *supra* n. 57.

[62] *See* http://danheller.blogspot.com/2007/06/making-money-from-your-stolen-images.html (describing how photographers may wish to adopt business plans of seeking statutory damage windfalls through targeting persons who misappropriate photographs).

in the copyright context, lead to real harms that a copyright holder can prove in seeking actual damages. A copyright holder can recover statutory damages of up to $150,000 for a single infringement even when the actual harm is mere pennies.This proportion is unreasonable.

I understand that some may consider it beneficial to create a mechanism for a copyright plaintiff to bypass proof of actual damages in cases where actual damages may be small. Copyright law already has a provision that favors litigation of small claims, by providing an award of attorneys' fees to a prevailing party. 17 U.S.C. 505. I propose that copyright law retain a limited statutory damages mechanism for that purpose. I propose Congress amend the Copyright Act to provide that a copyright holder may elect statutory damages, as an alternative to actual damages, *in an amount not to exceed $150,000 against all defendants in any single case*, *regardless of the number of works,* and not to exceed an aggregate of $150,000 in all cases the copyright holder files against the same defendants in a single 36-month period. (The aggregate provision ensures that copyright holders will not clog courts by dividing claims into multiple cases to "game" the system.) In the case of individuals whom a copyright holder proves to have violated only the reproduction right, and only by making reproductions in copies that individual possesses, the statutory damages should be further limited to no more than 500 times the normal exploitation value by that individual (such as 99 cents for a downloaded song or $15 for a motion picture).

The United States is one of a very few countries in the world to include statutory damages in its copyright law. Of 177 WIPO member states, only twenty-four members allow statutory damage awards.[63] Most of those countries have "emerging and developing economies."[64] Only five WIPO member states, including the U.S., have both advanced economies and a statutory damages regime.[65]

The U.S. should harmonize its copyright statutory damages policy with copyright policy in the majority of countries around the world. Even countries that have previously used a statutory damages scheme have recognized the different landscape in the digital economy. Canada recently adopted state-of-the-art statutory damages provisions in its copyright modernization efforts, reducing statutory damages to between $100 and $5,000 per lawsuit for

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[63] *See* Pamela Samuelson, Phil Hill, and Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, But for How Long?*, 60 J. COPYRIGHT SOC'Y USA __ (forthcoming 2013).

[64] *Id*.

[65] *Id*.

noncommercial users.[66] In addition to reducing the maximum statutory damage award, Canadian statutory damages provisions include clear guidelines for the imposition of awards. Unlike U.S. law, in which the only guidance is based on the willfulness of the infringement, Canadian law requires awards to be based on several factors. Included in these factors are (1) the good faith of the defendant; (2) conduct of the parties before and during the proceedings; (3) deterrence of other infringers; (4) the need for the award to be proportionate to the infringements in light of the hardship the award may cause the defendant.[67] The public and the courts have no such guidance in the U.S., allowing plaintiffs legally to seek the maximum award and coerce individuals into settlements. If the U.S. revises its statutory damages regime to include these guidelines, the public would be less likely to face intimidation by the threat of statutory damages and the predatory enforcement business model would disappear.

As Professor Samuelson points out, the two goals of statutory damages (compensation and deterrence) can be untangled by revising them into separate provisions.[68] With a choice between one provision to address compensation where harm is difficult to calculate and another provision for enhanced awards to deter egregious infringers, courts would not be tempted to confuse the two and award beyond-punitive damages against everyday individual infringers.[69] Accordingly, courts should be able to award less than the current statutory minimum of $750 per infringement in cases involving file-sharing, where the amount of statutory damages would be greatly disproportionate to the actual harm, and where there is no need to deter an egregious infringer (e.g., a commercial pirate).[70]

Limits on statutory damages will ultimately remove the allure of threatening individuals and small companies with litigation to extract settlements. If the potential to obtain high statutory damages is removed, then only plaintiffs who truly suffer harm will have an incentive to enforce their rights.

Of course, copyright reform should leave actual damage awards in place. These damages, which the vast majority of developed countries have long found adequate to protect copyright,

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[66] *Id.* Included on the government website explaining the new copyright act was an FAQ section, and one of the questions addressed was whether the new bill would allow record labels to seek huge damage awards for minor infringements, such as the downloading of individual songs, as is the case in the U.S. The Canadian government ensured that the revised statutory damages scheme would prevent entities from being able to seek disproportionately high awards. *Questions and Answers*, GOV'T OF CANADA (Nov. 29, 2011), available at http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html#record.

[67] Copyright Modernization Act, § 38.1(5).

[68] Pamela Samuelson, *Statutory Damages: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 509, November 2009.

[69] *Id*.

[70] *Id*.

ensure that rightsholders can recover their actual losses, no matter how large or small. The right to recover actual damages is and will always be an important right of a copyright holder. Any interest in windfall statutory damages and incentives for predatory behavior do not similarly comport with the constitutional interest in promoting "the Progress of Science and useful Arts."

## V. Conclusion

As Judge Wright sagely observed, in the context of extraordinary statutory damages claims and their resulting abuses, "copyright laws originally designed to compensate starving artists allow starving attorneys in this electronic-media era to plunder the citizenry."[71] The US system of statutory damages has fallen behind in the digital age and requires modernization by curbing its excesses and abuses. My proposal would restore a legitimate justification for statutory damages in accord with copyright's constitutional purpose. Statutory damages under current law no longer serve this purpose.

Please address communications to me as follows:

Andrew P. Bridges
115 Sheridan Way
Woodside, California 94062
apbridges@gmail.com

with a copy to:

Brandon Butler
Glushko-Samuelson IP Clinic
American University, Washington College of Law
4801 Massachusetts Ave NW
Washington, D.C. 20016

[71] Ingenuity LLC v. Doe, No. 2:12-cv-8333-ODW(JCx), Order Issuing Sanctions at 3.