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Comments of the Consumer Electronics Association

The Consumer Electronics Association (“CEA”) is pleased to submit these comments in response to the inquiry of the U.S. Patent and Trademark Office (“PTO”) with respect to copyright issues critical to economic growth, job creation, and cultural development. CEA is the principal U.S. trade association of the consumer electronics and information technologies industries, with more than 2,000 member companies. CEA appreciates the intention of the PTO and the Department of Commerce (“DOC”) Internet Policy Task Force (“Task Force”) in seeking a balanced approach to these issues. The Green Paper released on July 31, 2013 already reflects extensive consultation and is a valuable resource. CEA appreciates that by planning stakeholder roundtables that include representatives of the technology, user, and public interest communities the PTO will further encourage calm and reasoned evaluation of emerging copyright issues. These issues reflect the evolution of our society, its technology, and our past and future innovation.

The Request For Comments (“Request”) invites discussion of any or all of five principal issues. CEA addresses each of these, starting with those with which CEA members have had longstanding concerns.

Statutory Damages

CEA has urged statutory damage reform since the time a member manufacturer was obliged to “bet the company” on a paradigm-changing product, the consumer videocassette recorder (“VCR”).¹ This product was the first to afford consumers the choice of when and with whom they would enjoy motion picture content. Ultimately the VCR created a new and substantially larger market for content providers. Yet the first company to market VCRs to consumers had to consider that the product’s copyright status was a “gray area” in U.S. law, and that therefore the company faced potentially ruinous statutory damages if courts did not

¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

agree that it would be legal to distribute this product to consumers. Sony Corporation's innovation and investment remained safe from ruin by the narrowest possible margin: a five-to-four vote, after rehearing, in the United States Supreme Court. But one of the pioneers of a successor technology, the Digital Video Recorder ("DVR"), was essentially sued out of business.²

CEA is gratified that the Green Paper recognizes that for online services the potential for out-of-scale statutory damages can chill investment by the largest as well as the smallest entities. This recognition, however, is incomplete. As the Replay DVR case illustrates, innovation in mass *hardware and software* products – successors to the VCR in the Internet age – poses risks of similar scale. Thus the focus of roundtables or forums discussing statutory damage reform should be on devices and software, as well as on services.

Since the *Sony* litigation, CEA (like the Green Paper) has focused on potential claims of indirect infringement – contributory, vicarious, and “inducement” – as the major threat to innovation. The chill of statutory damages has grown alongside courts' consideration of secondary liability, beyond the contributory infringement allegation considered in *Sony*. In *Grokster*³ the Supreme Court, while essentially preserving *Sony*'s contributory safe harbor for products with commercially significant non-infringing uses, opened the door to “inducement” liability for the same conduct. This doctrine continues to evolve so remains unclear to innovators and potential plaintiffs alike. Plaintiffs and some courts⁴ also continue to bypass the *Sony* safe harbor for innovation by expanding the doctrine of vicarious liability, and in such cases the trend is to seek liability against investors and officers as well as the corporation,⁵ exposing them to potential damage claims that would be ruinous for most individuals and families.

Given the continuing legal uncertainties about the precise boundaries between direct and secondary infringement, the chilling effect of statutory damages on innovation is not

² CEA's CEO Gary Shapiro testified before the Senate Judiciary Committee on July 22, 2004: “On November 14, 2001, three major motion picture studios made the following independent allegation against a manufacturer of personal video recorder consumer electronics devices: ‘The Seeking, Recording, Sorting and Storage Features’ Defendants cause, accomplish, facilitate and *induce* the unauthorized reproduction of Plaintiffs' copyrighted works in violation of law. *** The ReplayTV 4000 device provides expanded storage, up to (currently) a massive 320 hour hard drive, which allows the unlawful copying and storage of a vast library of material. *** ReplayTV 4000's expanded storage and sorting features organize disparate recordings into coherent collections, and *cause, facilitate, induce and encourage* the storage or ‘librarying’ of digital copies of the copyrighted material, which harms the sale of DVDs, videocassettes and other copies, usurps Plaintiffs' right to determine the degree of ‘air time’ a particular program receives in various cycles of the program's distribution *Metro-Goldwyn-Mayer Studios, Inc. et al. v. ReplayTV, Inc.*, No. 01-09801, Compl. of MGM, Orion Pictures, Twentieth Century Fox, Universal City Studios, and Fox Broadcasting, ¶¶ 24-25 (C.D. Cal. Nov. 14, 2001) (only bolded emphasis is supplied). These allegations were grouped and made *separately* from those concerning the ‘distribution’ (¶¶ 19-23) and ‘autoskip’ (¶¶ 28-29) features that received more press attention.” Replay's parent company filed for bankruptcy in March, 2003, citing legal expenses. See Katie Dean, *Bankruptcy Blues for PVR Maker*, Wired, Mar. 24, 2003, <http://www.wired.com/entertainment/music/news/2003/03/58160>.

³ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁴ See *Disney Enterprises Inc. v. Hotfile Corp.* No. 11-20427-CIV-W ILLIAMS, slip op. at 78 – 84 (S.D. Fla. Sept. 20, 2013) (slip opinion, “Hotfile”).

⁵ *Id.* at 84 – 92.

Based on these trends, CEA urges that in considering the need for statutory damage reform the PTO roundtables and forums should focus on the range of “gray area” innovation that may now be chilled. At a minimum, the focus should include:

- Widely distributed hardware and software products, by encountering large numbers of works, are potentially subject to massive claims for statutory damages.
- Online services are threatened by claims of direct as well as secondary liability.
- The innovation threatened is that of small businesses and startups as well as of established companies, and concerns data as well as entertainment.
- In the context of roundtable discussion (as opposed to legislation), CEA believes that these subjects cannot be divorced from the underlying litigation trends – novel direct claims against service providers, and novel indirect claims against product distributors and service providers. Hence, the subject of statutory damages cannot be considered in isolation.
- The potential for statutory damage claims in marginal cases to chill innovation and entry has been well documented through exhaustive study,¹³ yet the benefits of giving plaintiffs the statutory damage weapon in “gray area” cases has been scarcely documented, because current law does not require any threshold determination that the remedy is appropriate to the case.¹⁴ In particular, proponents of the status quo must come forward with evidence suggesting that the application of statutory damages claims to service providers, where such awards can amount to trillions of dollars, actually provides meaningful marginal deterrence value. After all, there is no real difference to most companies between a damages award measured in hundreds of millions, and one measured in trillions. These statutory damages provisions have been in the Copyright Act for decades; accordingly, it should be expected that those who support them should have a rich body of evidence derived from application of these provisions against blameworthy technology innovators. Anecdotal accounts, however, suggest that some of the most publicized judgments are far in excess of what defendants are able to pay, which again raises questions about the marginal deterrence value of these massive sanctions.¹⁵ A focus of discussion, therefore, should also be whether and to what extent the availability of statutory damages actually does provide a deterrent against calculated infringement of copyright.

¹³ Carrier, *id.* at 48.

¹⁴ Samuelson *et. al, id.*, IV.B.

¹⁵ See, e.g., *Columbia Pictures Indus., Inc. v. Fung*, No. 2:06-cv-05578-SVW-JC, Defendants’ Supplemental Brief Regarding Jury Instructions at 14 – 15 (C.D. Cal. Oct. 10, 2013) “Plaintiffs are attempting to avoid ever having to provide discovery about the value of and damages for particular works, because they have refused to identify them in time for Defendants to complete any meaningful investigations or conduct discovery,” and quoting plaintiffs’ counsel, in response to a question from the court as to why \$600 million in statutory damages has been demanded, “we believe a couple to a few million dollars would exhaust Mr. Fung’s or defendants’ ability to pay...” *Id.* at 4.

Online Services and The DMCA

CEA agrees with the Green Paper perspective that the present focus should be on reviewing practices and transparency, rather than on any prospective change to the statute. The PTO should establish clear “ground rules” that the multi-stakeholder discussions must be premised on the existing section 512 statutory regime (as interpreted by the courts). There will be no progress if content owners immediately raise “out of scope” issues that have already been repeatedly rejected by courts, such as mandatory content filtering or “takedown-staydown” obligations.

CEA offers these initial observations:

- Transparency expectations should extend to content providers as well as service providers. Service providers continue to improve the respects in which they make data available about their own practices and responses to requests. This has not been balanced by information on their policies and practices regarding the sending of takedown notices. For example, content owners should be asked to disclose how many notices they send, to which service providers, and the actual costs to content owners of searching for and requesting the takedown of user postings. Perhaps most importantly, content owners should be asked to define their definition of “success” when submitting notices, as unrealistic goals can color the perceptions of participants. In addition, content owners should be prepared to discuss what strategies they have put into place to ensure accuracy in their submission procedures, as well as what steps have been taken to allow users whose materials have been erroneously targeted to object to such notices.¹⁶ Transparency on these issues is a prerequisite to any objective discussion about where burdens ought to lie.
- Any forum should recognize that the universe of service providers includes small entities as well as large, and that users also have a stake. A look at the Copyright Office’s registry of Copyright Agents makes it clear that thousands of service providers, including many startups and small and medium businesses, rely on the DMCA safe harbors. A mechanism should be sought for incorporating their concerns in any discussion regarding the burdens of the notice-and-takedown process. Smaller service providers lack the resources of larger ones yet sooner or later will be faced with similar expectations. When standard practices are discussed, this should be kept in mind.
- Just as the diversity of “content owner” statutory damage plaintiffs and defendants has grown, so too have potential parties to Section 512 claims become more numerous and diverse. Future discussions should acknowledge that there are stakeholders other than the major entertainment and service companies, and that the works at issue extend beyond music and motion pictures. In particular, there is now a thriving market for online copyright enforcement vendors (as can be seen in Google’s Transparency Report) with varying expertise and differing market specializations. Given that these entities increasingly represent the operational expertise when it comes to sending takedown

¹⁶ See *Hotfile* at 28 – 33.

notices, any discussion should also require them to disclose their methods, pricing, and strategies to ensure accuracy.

CEA believes that a full exploration of each of these factors and expectations is necessary before any conclusions might be drawn about how well the Section 512 processes are working, and about whether there should be any change in what is expected of any of the present or future participants in this process.

Digital First Sale

A right of digital first sale should continue to be discussed as technology and media evolve. The first sale exception, so important to open commerce and competition, must remain meaningful. Yet a trend in contracts and case law would derogate this right in favor of adhesive contracts that serve to strengthen the market power enjoyed by some copyright holders.¹⁷

Particularly in light of extended copyright terms, a healthy right of first sale is needed to preserve works for future generations. Copyright proprietors promote and thus preserve only so many works – today, public domain works from the 19th Century are more readily available than are books published in the last several decades.¹⁸ Digitization of works and storage efficiencies ought to be tools that preserve and protect copyrighted works but, without a right of digital first sale, may have the opposite effect. Technical progress entails changes in media formats. The absence of a digital first sale right means that as current storage formats give way to successors, the works stored on them become inaccessible to those who purchased them, and to those to whom they might be given or bequeathed. Whereas purchased discs and books are alienable, digitally stored works face oblivion. Consumers have been obliged to repurchase works on successor media, but can do so only so long as the rights holder supports the work and can be found.

The fact that copyright term outlasts the viability of digital storage formats puts an unfair burden on consumers and threatens to remove works from the literary, as well as the

¹⁷ See *Vernor v. Autodesk*, 621 F.3d 1102, 115 (9th Cir. 2010) in which the court acknowledges, but dismisses in light of precedent, concerns that “our decision (1) does not vindicate the law's aversion to restraints on alienation of personal property; (2) may force everyone purchasing copyrighted property to trace the chain of title to ensure that a first sale occurred; and (3) ignores the economic realities of the relevant transactions, in which the copyright owner permanently released software copies into the stream of commerce without expectation of return in exchange for upfront payment of the full software price. ... [and] that a broad view of the first sale doctrine is necessary to facilitate the creation of secondary markets for copyrighted works, which contributes to the public good by (1) giving consumers additional opportunities to purchase and sell copyrighted works, often at below-retail prices; (2) allowing consumers to obtain copies of works after a copyright owner has ceased distribution; and (3) allowing the proliferation of businesses.”

¹⁸ Rebecca J. Rosen, *The Hole in Our Collective Memory: How Copyright Made Mid-Century Books Vanish*, The Atlantic, July 30, 2013, quoting research by Paul J. Heald: “The data suggest that publishing business models make books disappear fairly shortly after their publication and long before they are scheduled to fall into the public domain. Copyright law then deters their reappearance as long as they are owned.” <http://www.theatlantic.com/technology/archive/2013/07/the-hole-in-our-collective-memory-how-copyright-made-mid-century-books-vanish/278209/>.

public, domain. In the absence of technical measures, fair use may allow some consumers to preserve some of their purchases. But, particularly where technical measures are present, a better solution, involving a general right and ability to store a work in successor formats, is necessary. Accommodations for libraries and educational institutions will provide some core protection, but in CEA's view this is not enough. Rights of first sale, generally, ought to evolve along with technology.

Remixes

CEA generally has favored the recognition and preservation of fair use rights of users who store, render, or generate content, as opposed to one-off exceptions or licenses. Code-like approaches can raise questions or implications about areas not covered, and can also give rise to dissatisfaction, by both content owners and users, as technologies or circumstances change. Therefore, valuable initiatives like Creative Commons and Google's Content ID System should be viewed as complements rather than alternatives to fair use.

Whether or not sampling is involved, all music is influenced by what has gone before. Fair use and core notions of what can be protected similarly evolve. Over time conventions emerge, such as that chord progressions and titles of songs are not protectable, even when explicitly and knowingly copied. Reports of a recent study indicate that at least some remixes tend to be promotional in nature and thus enhance rather than detract from sales of the underlying work.¹⁹ This finding aligns with those of earlier studies of audio home recording practices,²⁰ which have demonstrated that consumers who are most active in obtaining music on an unlicensed basis are also the more active in purchasing or listening to music on a licensed basis.

Online Licensing Environment

CEA applauds the private sector efforts to bring some coherence to the processes of identifying rights holders and obtaining licenses, but believes that there is much to be done before a central database or platform would be workable or could ever solve all problems. The Internet enables the creation of copyrighted works in numbers that exponentially exceed any other era. Yet even for published works, registration is

¹⁹ See Anthony Wing Kosner, *Study Shows That Hip Hop Sampling Boosts Sales of the Songs Sampled*, Forbes, Oct. 18, 2013, <http://www.forbes.com/sites/anthonykosner/2013/10/18/study-shows-that-hip-hop-sampling-boosts-sales-of-the-songs-sampled/>. The draft of a study by W. Michael Schuster, presently under revision, found that, to a confidence level of 92.5 percent, the works sampled by a popular performer on free recordings have sold better after being sampled than before. An abstract is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340235.

²⁰ See, e.g., Office of Technology Assessment, *Copyright and Home Copying: Technology Challenges the Law* (1989), available at http://www.princeton.edu/~ota/disk1/1989/8910_n.html; Yankelovich, Skelly & White, Inc., *Why Americans Tape: a survey of home audio taping the United States* (1982), available at <http://www.worldcat.org/title/why-americans-tape-a-survey-of-home-audio-taping-in-the-united-states/oclc/30568502>; See generally, Felix Oberholzer-Gee & Koleman Strumpf, *File-sharing and Copyright*, Working Paper 09-132 (2009), available at www.hbs.edu/faculty/Publication%20Files/09-132.pdf.

uncommon.²¹ Content owners also do not universally rely on registries. For example, SoundExchange, a statutory license administrator, relies on its own data and registrations; ISRC codes are collected but not relied upon.²²

CEA believes that additional incentives will be necessary before public databases can be considered sufficiently reliable. CEA agrees with the PTO that this process should be driven primarily by the industries involved, building on the steps being taken by the Copyright Office. The idea of a “hub” should be considered only once these steps have been taken and evaluated.

* * *

CEA appreciates this opportunity to provide its views.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Petricone". The signature is fluid and cursive, with a large initial "M" and a stylized "P".

Michael E. Petricone
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²¹ See generally, Daniel I. Cohen & Roy Rosenzweig, *Digital History, A Guide To Gathering And Presenting The Past On The Web* (2006), <http://chnm.gmu.edu/digitalhistory/copyright/4.php>.

²² See In The Matter of Notice of Inquiry of the Copyright Office, Library of Congress Regarding Technological Upgrades To Registration and Recordation Functions, Docket No. 2013-2, Comments of SoundExchange, Inc. at 3 – 4 (May 21, 2013). All comments received are available at http://www.copyright.gov/docs/technical_upgrades/comments/.