

November 13, 2013

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

RE: Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy (130927852-3852-01)

Dear Sir or Madam:

The Institute for Policy Innovation (IPI), a twenty-five year old non-profit public policy research institution, appreciates the opportunity to share our thoughts on the various topics that are the subjects of the discussion of the green paper.

IPI considers intellectual property protection as a foundational requirement of a dynamic and innovative economy in the modern era. Accordingly, we have made intellectual property policy an area of concentration, and have been for the past decade an accredited observer NGO with the World Intellectual Property Organization (WIPO) in Geneva, Switzerland, where IPI has not only participated in a number of committee meetings, but also has sponsored side events for WIPO member states.

We are well acquainted with the issues of contention within the IP policy arena, and are equally acquainted with the harmful ideological forces determined to weaken IP protections because of a misguided philosophy that assumes property rights and control are antithetical to consumer access to knowledge and to technology transfer.

Governing Principle

In general, we believe that *the key role for government in all of the areas in question is to protect property rights—to ensure that long-established rights are respected and not eroded, and to ensure the appropriate rule-of-law mechanisms are in place, such as a functioning judicial system and enforcement cooperation with rights holders.*

Private actors in a free market can usually solve real problems through cooperation, innovation, and through the price mechanism, so long as property rights are respected and the necessary institutions of a free society are functioning. “Problems” that cannot be solved by markets and by property rights are probably not true problems, but are rather more likely philosophical disagreements. It is thus important for government to distinguish between true market problems and the pleadings of a rent-seeker, malcontent, or ideologue.

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On Whether and How the Government Can Facilitate the Further Development of a Robust Online Licensing System

The first question is a case-in-point of our governing principle stated above. Already, without the federal government taking any specific actions, there has been robust development of new and innovative licensing and distribution models for content online, which belies the charge that piracy is a result of content owners not making their products more easily available.

Online music is available from a variety of services including iTunes, Spotify, Pandora, satellite radio, AOL Radio, Slacker, Grooveshark, Jango, Last FM, Songza, Sony Music Unlimited, and Turntable (to name just a few), offering a variety of services delivered under a variety of business models. In the video space, of course there is Ultraviolet, TV Everywhere, Epix HD, Hulu, Crackle, WatchESPN, and HBO Go, among others. There are a variety of ways to access online books, including Kindle, Nook, Forgotten Books, and a stunning array of online sources for free and for-purchase e-books.

The point is that private players in a free market will innovate and compete to offer new products and services to consumers, so long as the foundation of the property right is protected, as is generally the case today.

Property rights are the basis of markets. If you don't have clear ownership and confidence in your ability to defend your ownership, you cannot license and enter into contracts. Markets simply don't work without property rights.

Our conclusion is that there is nothing additional that the federal government needs to do to facilitate a robust online licensing environment other than to fully engage in its existing obligation to protect copyright and to ensure an environment where rule-of-law prevails and where rights holders can be assured of justice and enforcement of their rights.

Specifically and most often this means 1) not allowing the proliferation of sources that offer illegal access to protected works, and 2) not succumbing to activist pressure to weaken copyright protection.

On Establishing a Multistakeholder Dialogue on Improving the Operation of the Notice and Takedown System for Removing Infringing Content from the Internet under the Digital Millennium Copyright Act (DMCA)

In general, we have been pleased at how the DMCA has functioned over the past fifteen years. This has been somewhat surprising, because for the most part, government does a poor job of writing anticipatory legislation intended to deal with new technological developments, but with regard to the DMCA, Congress did an

admirable job. The law is not perfect, but has stood up not only under the test of time and changes in technology, but under the duress of a number of court challenges.

Obviously those who are obligated to process takedown notices under the DMCA are unhappy with the sheer volume of notices, while those who file takedown notices are unhappy with how quickly the inappropriately posted works reappear. Both sides of this equation have our sympathy. But even this frustrating system better serves the interests of all parties involved than do the most likely alternatives, such as rogue websites that illegally facilitate access to protected works and either spurn or exist geographically outside the reach of the law, a regime in which the DMCA never existed, or a doctrine of third party liability for network operators which would have truly stifled the development of rich online access to content.

Obviously, however, the language of the DMCA itself recognized its likely inadequacy and the need for future flexibility, noting in Section 512 that the notice and takedown provisions are designed to “preserve [] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” And indeed, despite the best designs of the legislation, copyright piracy has nonetheless exploded while the DMCA has been in effect. According to NetNames, the amount of Internet bandwidth consumed by piracy has increased by 160% in the period from 2010 to 2012, accounting for 24% of all Internet bandwidth.ⁱ

An attempt to improve the notice and takedown system, informed by the experiences of the past fifteen years, is a worthy endeavor, so long as the attempt is to improve the system for all involved and is not used to shift the burdens onto the backs of a subset of the Internet ecosystem.

The requirements of Section 512 are, however, the minimal requirements of the law. There is no reason why content hosting websites and search engines cannot innovate in cooperation with rights holders to develop systems that more efficiently identify violations and automatically take them down, subject to review. There is also nothing that we are aware of that bars an automated review process to take place before the content becomes available online. We note that there seems to be an assumption that any system that does not allow for the immediate availability of content freshly posted is somehow an unacceptable barrier to access; but importantly, there is no “right” to have your posted content appear immediately and be immediately available to the public. It is a common feature of websites that allow comments, for example, to have the comments moderated and subject to review before posting. It may be several hours to several days before posted comments pass review and appear live online. If an enhanced process for review means that there are delays in content becoming available online, this violates no one’s rights and in fact would help to mitigate the problem of violations reappearing immediately after takedown.

Importantly, a “presumption” of fair use for newly posted content (one proposed radical solution to the problem of the volume of takedown notices) or the creation of a broad new fair use exception for such would be a mistake. Under such a presumption, copyright holders would be subjected to very real harms resulting from mass piracy far in excess of the harms already being experienced today. Such a new presumption of fair use should be rejected.

It has been occasionally suggested that content owners must be obligated to consider whether a given violation may be governed by a fair use exception before they file a takedown notice. This, of course, turns the entire copyright system on its head, as under current law, fair use is an affirmative defense that allows for narrow, limited use of copyright protected materials without permission of the rights holder.ⁱⁱ It is also a disproportionate burden for the rights holder to have to conduct a legal analysis on each and every act of infringement before deciding whether to submit a takedown notice, most notably for small, independent creators such as photographers.

We would highlight the newly implemented Copyright Alert System (CAS) as an excellent example of a voluntary multistakeholder effort. While it is too soon to determine the effectiveness of the CAS, the experience with some of the graduated response mechanisms being implemented around the world suggests that significant reductions in piracy occur from simply alerting responsible consumers to the illegality of their actions.

IPI supports efforts to change or enhance the notice and takedown system that preserve the balance between the rights of content owners and the rights of network operators. We would not support solutions that make it radically more difficult for rights holders to enforce their rights, or to be placed on the defensive in asserting their rights.

We would observe that all stakeholders in the Internet ecosystem have an interest in preserving and growing an environment where users have convenient access to legal content. The interests of stakeholders are more closely aligned than polarized, though at times it may not seem so.

IPI supports the formation of a task force to determine best practices for improving the notice and takedown system. We urge that the meetings should include a broad range of stakeholders, including from the NGO community.

On the Legal Framework for Remixes

Much attention—perhaps too much attention—has been given to remixes or mashups through which new creative works are derived from combining or altering existing creative works. We say “perhaps too much attention” because to a large degree we

believe the issue has been hijacked by those who would like to use it to undermine copyright.

Remixes are certainly creative, but we assert that remixes are a subordinate form of creativity when compared with the original works.

The assertion that remixes are a subordinate form of creativity may seem harsh or controversial, but it is not without purpose—it is a necessary pushback against the assertions of many that, somehow, remixes are actually a superior form of creativity, and that the “right” to remix should not be hindered by being forced to respect the existing copyrights on the original works from which the remix is derived.

We believe this assertion privileging remixes is made because of 1) an attempt to use the remix argument to undermine copyright, 2) an assumption that somehow the new is inherently superior to that which preceded, and 3) because of a dark, almost nihilistic view of creativity—that somehow it’s no longer possible to be truly original or creative, and thus derivative creativity remains the only remaining potential.

Because the remix, though creative, is not superior to the original source materials, the rights of the remixer are not superior to the rights of the holders of the original source materials. In fact, the opposite should be true.

We would note that it has long been the tradition that a band that wished to “cover” the prominent work of a previous artist would seek the permission of the original artist in order to do the cover performance. Such a respect for copyright and the prerogatives of previous creators is a hallmark of a civil society, and not somehow an insurmountable barrier to creativity.

A concept that is being bandied about by those who would seek to trample the rights of copyright holders is the idea of “permission less innovation,” which would seem to assert a new societal virtue that anything that can be labeled “innovation” need no longer be bound by the niceties of the rule of law, such as copyrights and patents. Innovation is, of course, a crucial aspect of a growing, modern economy, and we consider ourselves to be champions of innovation. But to invent some new doctrine that innovators are innately privileged to trample over existing property rights is to fetishize innovation rather than encourage innovation.

Almost everything in a civil society requires either overt or implied consent or permission. I require permission to pull my car out onto the public roads. I require permission to hold consumer credit, or even to have access to the Internet. Permission from several different sources is required for me to hold a job, to say nothing of the permission my employer requires in order to employ me. Where did

we ever get the idea that innovation might be “permission less?” At best it is a naïve concept, and at worse it is, ironically, permission to trample over property rights.

Selling the idea of permission less innovation is required in order to justify the “right” to make use of the property of others in order to remix or mash-up. But it is an unfounded assertion that leads to the wrongful conclusion that remixes or mash-ups might be covered by a fair use exception or by compulsory licensing, as suggested in this proceeding.

Compulsory licensing is the original sin of any number of policy problems, including the difficult video retransmission issue. Compulsory licensing, when implemented, should be a specific legal solution to a specific dispute before a court of law, and not a blanket policy solution for a wide variety of actors and situations.

We strongly oppose the granting of any form of compulsory license or fair use exception for remixes or mash-ups. We strongly believe that permission is a feature, not a bug, of a civil society operating under the rule of law, and that to position the rights of remixers as superior to the rights of the creators of original works would be a terrible mistake for a society that claims to value original creativity and innovation.

We are convinced that a new regime creating an exception or compulsory license for remixes would result in the definition of remix suddenly becoming broad enough to allow for mass piracy of copyright protected works. Almost any alteration would suddenly be recategorized as a “remix.”

Perspective

Finally, we would like to push back against comments that we anticipate will be submitted by a variety of self-described public interest groups that have a philosophical bias that the rights of users and consumers should trump the rights of rights holders.

Any discussion of balance in copyright should begin with a reminder that copyright is a right, not a privilege or an exception. And copyright is a right granted to those who create—it is the most crucial element in the chain of factors that allows us “to promote the progress of science and the useful arts.”

Many critics of copyright today have some strange idea that somehow allowing copyright is antithetical to promoting science and the useful arts. We have even seen some say that the current copyright regime is unconstitutional, though the argument is a logical fallacy.ⁱⁱⁱ Promoting science and the useful arts is the *goal* of copyright; allowing rights holders to own their output and thus generate economic activity is the *means* toward achieving the goal. They are not in conflict, and to assume they are in conflict is to commit the bifurcation fallacy.

We must remember that control is inherent in ownership. If you can't exert control, you don't own. If you can't exclude, you don't own. Any concept of copyright that sacrificed the ability of rights holders to control would no longer be a property right, but would be reduced to an attribution.

The Institute for Policy Innovation (IPI) thanks you for allowing us to comment on the proceeding, and we would be delighted to work with you during this process to ensure that any proposed changes to our existing copyright regime are fully informed and vetted. Thank you for considering our perspectives.

Sincerely,



Tom Giovanetti
President

ⁱ <http://www.latimes.com/entertainment/envelope/cotown/la-fi-ct-piracy-bandwith-20130917,0,1550997.story#axzz2kZ5ssFVl>

ⁱⁱ <http://www.techpolicydaily.com/technology/fair-use-thoughtful-action-yes-legal-determination/>

ⁱⁱⁱ http://www.ipi.org/policy_blog/detail/the-logical-fallacies-of-mike-masnick-a-series