

The Copyright Act authorizes statutory damages of a minimum of \$750 for infringement of one work, for example, a song that could be purchased on iTunes for less than \$1.00. Even if the court finds that the infringement is innocent, the minimum statutory award is still \$200. The maximum award is \$30,000 per work infringed. In cases of willful infringement, a plaintiff may seek up to \$150,000 per work infringed. Under the Copyright Act, a plaintiff need not demonstrate actual harm. The award of significant statutory damages without the plaintiff needing to demonstrate any harm is a novel concept in the United States Code. Ostensibly, the intent for such an unusual framework was the perceived difficulty for plaintiffs to determine the number of infringing copies made by a defendant or to assess accurately the economic impact that infringing copies might have on the market for the underlying work.

The concept of secondary liability for infringement does not appear in the Copyright Act. The concept is judge-made law. Its use by rightsholders to enforce their copyrights is controversial, unsettled, and evolving. Earlier this year, the National Research Council of the National Academies posited the question: to what extent should enterprises that facilitate consumer access to copyright content be held responsible for illegal activities carried out by users?² Indeed, it is interesting that theories of secondary liability for copyright infringement are used as enforcement tools in a way that is not found in analogous contexts (*e.g.*, the highest speed limits in the United States are generally 75 MPH, yet manufacturers of automobiles for sale in the United States sell cars that exceed these legal limits are not widely considered accountable for speeding-related crashes).

Nor is this legal uncertainty limited only to secondary liability. Although the Task Force seeks comment only on issues of secondary liability, rightsholders have sued technology companies on claims of direct infringement, seeking to produce case law that shifts the volitional action from the consumer to the company providing the means of transmission or copying. In *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008) (“*Cablevision*”), for example, the plaintiff based its theory of liability entirely on direct infringement even though the copying was performed at the customer’s direction. The Second Circuit rejected the imposition of direct liability on third parties that furnish equipment that customers then use to make copies. *Id.* at 133. More recent cases have rejected similar attempts to hold parties liable as direct infringers for providing technology that allows their customers to make personal use copies. *See, e.g., Fox Broadcasting Co., Inc. v. Dish Network, LCC*, 905 F.Supp. 2d 1088, 1103 (declining to hold Dish liable for direct infringement where the user is “the most significant and important cause of the copy”) (internal citations and quotation marks omitted). The chilling effect on innovators applies equally to any developer of a new product or service which involves large volumes of copyrighted works, whether subject to claims of direct infringement or secondary liability. We therefore urge the Task Force to expand the inquiry to examine how the risk of statutory damages adversely affects innovation across the ecosystem.

The awareness of the scale of the Internet was not even a glint in Vint Cerf’s eye when the Copyright Act was amended in 1976. Today, two billion people use the Internet and the amount of traffic they generate has increased fourfold in the past five years and will increase

² *See* Copyright in the Digital Era: Building Evidence for Policy, National Research Council, Board on Sci., Tech. & Econ. Pol’y at 41 *available at* http://www.nap.edu/openbook.php?record_id=14686&page=41 (last visited Nov. 11, 2013).

threefold in the next five.³ By 2015, over one trillion devices will be connected to the Internet. According to one estimate, Google has more than one billion unique visitors a month, Facebook and Yahoo have approximately 800 million unique visitors each per month, and Twitter has approximately 250 million unique visitors per month.⁴ On YouTube, more than six billion hours of video are watched each month and 100 hours of video are uploaded on YouTube every minute.⁵ At the first quarter of 2012, Amazon S3 (Amazon.com's simple storage service) hosted 905 billion objects and handled 650,000 requests per second for access to those objects.⁶ When uncertainties of applying copyright law to new digital technologies are paired with the Copyright Act's novel approach to statutory damages, and this combination is applied to the scale of the Internet, the resulting mixture can prove to be a toxic formula for innovation.

It was only 30 years ago that the Supreme Court held that the Sony Corporation was not secondarily liable for the illegal activities of purchasers of the Betamax VCR. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (“*Betamax*”). The *Betamax* decision launched a video motion picture revolution that benefited technology companies, consumers, and rightsholders.⁷ But the decision also marked the beginning of a new era of lawsuits by rightsholders over the introduction of new technologies.

Because of the ability of rightsholders to claim astronomical statutory damages in a lawsuit, nascent technology companies may not be able to withstand the litigation risk to even *offer* a technology over which it knows it will be sued. Those companies that are willing to bring a dual-use technology product or service to the market understand that they may be sued, and that the consequences of a statutory damages award should liability be found would almost certainly be calamitous. Smaller companies may not even be able to withstand the costs of the litigation process.⁸ Recently, the Computer and Communications Industry Association published an article cataloguing 15 different new technologies that have been sued over the last 30 years.⁹

³ Cisco Visual Networking Index, The Zettabyte Era—Trends and Analysis, May 29, 2013 *available at*

http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/VNI_Hyperconnectivity_WP.html (last visited Nov. 11, 2013).

⁴ “Top 15 Most Popular Websites: November 2013,” eBiz,

<http://www.ebizmba.com/articles/most-popular-websites> (last visited Nov. 10, 2013).

⁵ YouTube, Statistics, <http://www.youtube.com/yt/press/statistics.html> (last visited Nov. 10, 2013).

⁶ “The Cloud Scales: Amazon’s S3 Growth,” Amazon Web Services Blog, <http://aws.typepad.com/aws/2012/04/amazon-s3-905-billion-objects-and-650000-requestssecond.html> (last visited Nov. 10, 2013).

⁷ See Eduardo Porter, “Copyright Ruling Rings with Echo of Betamax,” N.Y. Times, March 26, 2013, *available at* <http://www.nytimes.com/2013/03/27/business/in-a-copyright-ruling-the-lingering-legacy-of-the-betamax.html> (explaining how *Betamax* “gave the kiss of life to the low-budget independent film” and, by 2000, half of Hollywood’s revenue came from the sale and rental of prerecorded video and DVDs).

⁸ See, e.g., Eliot Van Buskirk, “Veoh Files for Bankruptcy After Fending Off Infringement Charges,” Wired, Feb. 12, 2010, *available at* <http://www.wired.com/business/2010/02/veoh>

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This chilling effect of statutory damages on innovation falls indiscriminately on legitimate and illegitimate innovators.¹⁰ The Task Force mentions the role of statutory damages in providing deterrence. But deterrence of what? There is no reason that the statute should deter legitimate, noninfringing innovation. Moreover, the statute should not deter efforts where there is a good faith, objectively reasonable belief that a new technology is not infringing. The application of copyright law to new digital technologies will inevitably leave some disputed areas where reasonable minds can differ.¹¹ Here, the role of the statute should be to encourage innovation, and, if necessary, litigation that will clarify these disputed issues not only for the litigants, but for the public at large. This is exactly the dynamic that has produced cases like the *Betamax* case and *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), which have provided valuable guidance to innovators and rightsholders alike about the boundaries between exclusive rights and freedom to innovate.

Instead of encouraging this kind of litigation, the existing statutory damages regime has spawned a litigation business model where a plaintiff uses copyright law “not to protect its property from unlicensed use, but rather to generate profit from use even in the absence of articulable harm to” the plaintiff. James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 *UCLA Ent. L. Rev.* 79, 89 (2012). In cases where the rights to sampled works have been purchased and asserted well after the commercial success of the derivative works, “statutory damages create a windfall for a minimally injured plaintiff. Motivated by copyright law incentives, sample trolls are able to make money simply by enforcing rights in old works without creating their own new works.” *Id.* at 88.

Consequently, in any roundtable discussion, The IA encourages the Task Force to pursue the following items for further discussion:

- To what extent does the risk of statutory damages limit the development and release of innovative products and services that would benefit consumers?

files-for-bankruptcy-after-fending-off-infringement-charges (“History will add online video site Veoh to the long list of promising start-ups driven into bankruptcy by copyright lawsuits — despite the fact that unlike the others, it actually prevailed in court.”).

⁹ Ali Sternburg, “15 Technologies That Content Industries Sued After Diamond Rio,” *Disruptive Competition Project*, available at <http://www.project-disco.org/intellectual-property/100813-15-technologies-that-content-industries-sued-after-diamond-rio/> (last visited Nov. 10, 2013).

¹⁰ The fact that additional statutory damages are available against “willful” infringers does nothing to remedy the chill against legitimate innovators. As described above, even the minimum statutory damages amounts, when applied to the scale of online services, will be ruinous to even the largest companies.

¹¹ The Task Force provides a description of many of these disputed doctrinal questions in its report. See Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy*, July 13, 2013.

- Should statutory damages be available to plaintiffs suing intermediaries offering technology products or services with legitimate, lawful uses?
- Should the definition of “willfulness,” which is not defined in the Copyright Act mirror the definition in patent law (*i.e.*, “the infringer acted despite an objectively high likelihood that its actions constituted infringement. . . . If this threshold objective standard is satisfied, the patentee must also demonstrate that this objectively-defined risk . . . was either known or so obvious that it should have been known to the accused infringer.” *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc))
- If statutory damages are permitted, should such damages be calculated to approximate any actual damages?
- Should a plaintiff be required to demonstrate a minimum level of harm as a result of the infringing activity?
- Is the statutory damages regime’s harm to innovation outweighed by the benefit to the rightsholders in being able to enforce their copyrights? How should such a cost-benefit analysis be calculated?

II. Operation of the DMCA Notice and Takedown System

Essentially, the Internet is a series of copying machines. Routine communications are copied myriad times as they make their way from one end point to another. The Digital Millennium Copyright Act (“DMCA”) recognizes that the mere technical operation of the Internet, against the strict liability regime of copyright law, would make it impossible for Internet companies to make their services available to the public. The DMCA makes the Copyright Act and the Internet compatible with one another.

The DMCA strikes a well-reasoned and workable balance between the interests of rightsholders and the companies that transmit, cache, or host content, as well as companies that provide information location tools to content on the Internet. Each of the Internet services described above must comply with enumerated statutory obligations under the DMCA. By complying with those obligations, the companies that provide those services will not be subject to monetary liability for copyright infringement. In exchange, rightsholders receive a mechanism to get redress when they discover infringing copies on the Internet. This mechanism is radically less expensive and more expeditious than having to instigate court proceedings.

The necessity of complying with the DMCA is ingrained in the DNA of Internet companies. Every member of The IA complies with the DMCA. Venture capitalists understand that even a fledgling startup with limited funds must have a system for complying with the DMCA. The reason is simple. Against the threat of potentially astronomical claimed statutory damages, as explained above, the DMCA provides Internet companies with a degree of certainty that they can provide innovative services without the threat of being sued out of existence.

In addition, the DMCA codifies a bedrock principle of U.S. Internet policy—namely, that Internet companies cannot and should not police their platforms to discover and adjudicate the illegal activities of third parties who use their systems. Over the years, some rightsholders have promoted legislation to modify this key policy determination. Those efforts have rightfully failed.

Consequently, The IA supports the Task Force's view that the goal of the current docket should not be "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."¹² Nor does The IA support the use of this process to develop best practices that go beyond the requirements in the DMCA. The conversation around this subject should be limited to the operation of the DMCA.

The IA encourages the Task Force to consider the following items in any roundtable discussion of the DMCA:

- What mechanisms do rightsholders employ to ensure the accuracy or appropriateness of their notices? What mechanisms, if any, are employed by rightsholders to determine whether the work is being used pursuant to fair use? How do rightsholders assure that notices are being sent pursuant to the "good faith" standard required by the statute?
- Some Internet companies have begun a practice of providing transparent, public reports relative to DMCA takedown requests. Further discussion should explore the benefits of more transparency around the process in sending takedown notices, such as the number of notices submitted, the costs involved in generating a notice, and to whom such notices are sent. In addition, discussion should include what metrics should be used to determine whether such activities are beneficial to the rightsholders. Transparency reports by rightsholders, similar to those published by Internet companies, would greatly assist a meaningful discussion of the current operation of the DMCA.
- What can be done if a party uses the notice system not for its intended process but for competitive reasons or to suppress political speech?¹³
- The ecosystem relative to the DMCA is large and diverse. In policy circles, often the obligations of the DMCA are considered relative to only those companies with large legal departments. There are more than 60,000 entities that have registered Copyright Agents with the U.S. Copyright Office. The vast majority of Internet companies that comply with the DMCA have a very small compliance staff if any internal staff at all. Further

¹² U.S. Patent and Trademark Office, Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy," 78 Fed. Reg. 61,337, 61,340 (Oct. 3, 2013).

¹³ Recent cases have seen misuse of the DMCA for both purposes. *See* Tim B. Lee, "Patient sues dentist over gag order, gets Medical Justice to backtrack," Arstechnica.com, Nov. 30, 2011, available at <http://arstechnica.com/tech-policy/2011/11/patient-sues-dentist-over-gag-order-causing-medical-justice-to-drop-it/> (describing misuse of DMCA takedown procedures to stifle negative customer reviews); Center for Democracy & Technology, Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech, September 2010, available at https://www.cdt.org/files/pdfs/copyright_takedowns.pdf (last visited Nov. 11, 2013) (chronicling incidents of misuse of DMCA takedown procedures by political campaigns).

discussion should include as diverse and representative a group of stakeholders as possible. For example, there are Internet companies with substantial traffic but very little internal staff. There are Internet companies with little traffic that have no internal staff but must refer DMCA notices to outside counsel.

III. First Sale in the Digital Environment

The first sale doctrine limits a rightsholder's distribution right by "exhausting" the exclusive distribution right after the initial sale of a work. Because the first sale doctrine does not similarly exhaust the rightsholder's reproduction right, the first sale doctrine's applicability to the Internet has been limited to date. The IA supports further exploration of whether and how the first sale doctrine can apply to Internet services and technologies.

The IA supports the U.S. Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013). The decision enables consumers to employ the protection of the first sale doctrine without the problem of considering an arbitrary distinction based on where the work was made. The Task Force asks what impact the decision will have on the ability of rightsholders to offer their works at different prices and different times in different online markets. In response, The IA believes that the decision should have very little impact on the ability of rightsholders to engage in such differential pricing. Copyright law need not be the mechanism by which rightsholders engage in differential pricing. Rightsholders are able to use contract law, as well as other legal theories, to protect varying distribution models.

IV. Legal Framework for Remixes

The legal framework for remixes covers many different distribution technologies, business models, and consumer behaviors. We encourage the Task Force to spend the necessary time to fully explore this multi-faceted ecosystem and invite diverse organizations and individuals to the discussion.

The IA agrees with the Task Force that as a general matter, there are two methods for legal remixes to enter today's marketplace – fair use and licensing mechanisms. Despite the Task Force's observation that many remixes "may qualify for fair use of the copyrighted material they draw on," 78 Fed. Reg. at 61,338, there is scant case law to support this assertion. In large part, the threat of statutory damages, as described above, precludes much of the experimentation to create and market remixes in ways that technology now makes possible. Knowing that a lawsuit with claimed damages could result in substantial monetary penalties if the defendant loses, many creators choose to avoid remixes altogether. That disincentive has also stunted the development of case law in this area.

Thank you for consideration of these comments.

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