



The ICC is pleased that the Notice makes clear that the multi-stakeholder process envisioned by the Green Paper would in no way propose changes to the DMCA. The DMCA has been central to the growth of the participatory Internet, making possible enormous economic opportunity and job growth in the United States. SOPA-like attempts to try to force sweeping changes to this framework have not been fruitful and have risked harming the security and openness of the Internet.

The Green Paper's effort to find balanced solutions and to work toward consensus is a refreshing and commendable approach in copyright policymaking. At the same time, it is important to tailor the Green Paper proposals carefully to avoid overbroad proposals that fail of their own weight and focus on improving the existing process.

II. Proposed Multi-Stakeholder Process on Notice and Take Down

While the ICC is generally supportive of using appropriately tailored multi-stakeholder processes to advance Internet policy discussions, we caution the Internet Policy Task Force that other multi-stakeholder processes have demonstrated that in order to achieve success a core group of parties from a cross-section of different constituencies must first agree on carefully and specifically defined goals and objectives. This requires initial discussion among those parties and agreement on scope, as occurred in the Department of Commerce mobile transparency multi-stakeholder process.

Clear focus and definition are essential to make a multi-stakeholder process work effectively. Amorphous goals, such as the concept of whether materials alleged to infringe can "stay down," are the proper subject of workshops, not multi-stakeholder discussions, where they would lead to prolonged and contentious discussions and controversy over the technical feasibility, cost and the overbreadth of a wide range of potential solutions.

To be effective and to represent legitimately all concerned stakeholders, the multi-stakeholder group would need to include consumer and civil liberties advocates, including those who have expressed deep reservations about overbreadth risks of existing automated tools designed to identify and remove allegedly infringing material.

We commend the Internet Policy Task Force for making clear that the goal of this discussion would not be to change the law. Indeed, in order for discussions to be productive, existing law (including current court interpretations) should be taken as given, and negotiations should address measures that are consistent with § 512.

While the ICC would not oppose a multi-stakeholder process on notice and take down that is fully consistent with the text of § 512 of the DMCA, we believe that it must be carefully calibrated if it is to have legitimacy and to be productive, focusing on improving existing processes, rather than creating new obligations outside the DMCA framework.



First, the process needs to be transparent to be legitimate. In any productive process discussions will of course occur outside the room, but if the government acts as a convener, it has to hold open sessions to solicit and receive input.

Second, any notice and take down process should be confined to the scope of notice and take down provided for in § 512(c). That means notice and take down requests directed only to hosts who are in a position to take down allegedly infringing material – not Internet access providers, or other providers that are not in a position to remove specific content.

The Green Paper is correct that non-compliant DMCA notices remain a significant problem. It may be that the goal of discussions should be to make the notice and take down process more efficient, rather than solely focusing on reducing volumes. However, the volume of invalid DMCA notices clearly suggests a problem. For example, in October 2013, one ICC ISP member received 1.4 million notices alleging copyright infringement for content believed to be residing on its system or network. In reality, virtually all of the notices related to allegations of peer-to-peer (P2P) copyright infringement for material that does not reside on its system or network and were therefore invalid under §512(c), or failed to comply with the notice requirements of that subsection. In the same month, another ICC ISP member received more than 500,000 such notices. Both members participate in the Copyright Alert system, but still continue to be deluged with invalid DMCA notices – including significant numbers submitted on behalf of (although not necessarily with the knowledge of) content owner participants in the Copyright Alert System.

These misuses of the “notice and takedown” process make it more difficult for ISPs to respond promptly to legitimate notices. The DMCA contemplates that those who send notices will act in good faith and provides sanctions for knowing material misrepresentations of alleged copyright infringement. *Cf.* 17 U.S.C. § 512(f). However, this has not reduced invalid DMCA notices.

Balanced discussion of this topic would need to address the practices of enforcement vendors and the incentives rights owners give them, measures to ensure accuracy of notices and to remedy erroneous notices, the volumes of notices sent to different service providers, costs to content owners of searching for and requesting take downs of user postings, and potential benefits (e.g., in the form of quicker response) to content owners who provide accurate notices that meet § 512(c) notice requirements.

This discussion would benefit from the involvement of: (1) enforcement vendors, who are the entities are best positioned to provide information about how their detection and notice systems are engineered and what steps are taken to reduce errors; (2) Internet users who have been the subject of erroneous notices; and (3) medium and smaller sized service providers. The Task Force should consider methods to obtain comments and other feedback from those constituencies.



III. Statutory Damages

A balanced package of proposals to reform the Copyright Act would need to address squarely the problem of Copyright Trolls, who exploit the threat of potentially large statutory damage awards and the embarrassment of being named in a suit involving pornographic content to threaten and harass Internet users to agree to quick settlements without a single case ever going to trial. The suits have included significant numbers of alleged Doe Defendants who in fact seem to be following the law. Serial copyright plaintiff A.F. Holdings provides a particularly salient example of this sort of business model – fraudulently purporting to assert copyrights to adult films that A.F. Holdings does not own, it and inappropriately joining thousands of John Doe defendants together in courts nationwide. The trolls engage in forum and judge shopping in federal and even state courts hoping for minimal judicial supervision to collect the identities of potential defendants for quick settlements. They routinely seek expedited discovery from ISPs as to the identity of alleged infringers in order increase pressure to settle. *See. e.g., A.F. Holdings v. Does*, CASE 0:12-cv-01445-JNE-FLN, at 1 (D. Minn. Nov. 6, 2013); *Ingenuity 13, LLC v. John Doe*, 2013 U.S. Dist. LEXIS 64564, at *6-7 (C.D. Cal. May 6, 2013); *A.F. Holdings v Does 1-1,140* (D.D.C. 2102).

We also believe that high statutory damages for individual infringement in federal court copyright infringement actions are poorly tailored to address problems of individual infringement. For this reason, we support the Copyright Office’s suggestion to create a small claims court cause of action that can be brought in a cost-effective way against individual infringers. The result would be an enforcement option for rights owners that both is far much less expensive to bring and that yields damage awards that are proportionate to the offense and enjoy broad legitimacy.

Finally, we note that very large statutory damages for direct and secondary infringement risk chilling technology innovation, particularly by smaller companies that cannot carry the risk of bankrupting statutory damages against a business model that is developed in good faith and is not intentionally infringing.

IV. Digital First Sale

The ICC wishes to direct the task force’s attention to one particular facet of the digital first sale debate that involves the doctrine of fair use. Individuals who lawfully obtain digital copies of copyrighted works need to be able to store that information in the cloud or on different devices. It is important that however the digital first sale discussion is resolved, rights to fair use in space shifting not be constrained if consumers are to obtain the benefit of their bargain in purchasing or licensing works.



Capital Records v. ReDigi, ___ F. Supp. 2d ___, No. 12 Civ. 95(RJS), 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013), accepts this principle, but contains confusing language that creates some concern as to implications for lawful cloud back-up services. The court’s broad holding that

courts have not previously addressed whether the unauthorized transfer of a digital music file over the Internet – where only one file exists before and after the transfer – constitutes reproduction within the meaning of the Copyright Act. The Court holds that it does

id. at *5, has potentially sweeping implications for fair use and use of cloud services for lawfully obtained works without an express license from the rights owner.

To the extent that the Internet Policy Task Force addresses Digital First Sale, it should be sure to protect cloud or other remote storage of works as to which the end user has a valid license to download the work to the end user’s computer.

V. Conclusion

As final matter, we note that online music licensing is needlessly challenging, inefficient, time-consuming, and complex. The ICC and its members look forward to further discussions on this important topic with the goal of working to identify ways in which digital marketplaces can work more efficiently to grow the economic “pie” for all stakeholders.

We look forward to working with the Internet Policy Task Force in order to advance balanced copyright solutions that strengthen the market for lawful dissemination of copyrighted works, and thank you for considering our views.

Respectfully submitted,

A handwritten signature in purple ink that reads "Jim Halpert".

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