

**Before the
DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
National Telecommunications and Information Administration**

In the Matter of Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy)) Docket No. 130927852-3852-01)) Submitted Nov. 13, 2013)))))))
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Comments of the Motion Picture Association of America¹

I. Introduction

Copyright is driving innovation not just in the production and delivery of creative video content, but throughout the growing digital economy. Copyright promotes a robust, competitive environment that constantly generates new sources of original video programming for audiences to enjoy. That, in turn, supports investments in the many related applications, devices, and other technologies viewers rely on to access this content with increasing ease and flexibility. The primary goal of policymakers should be to preserve or expand the incentives in copyright law that have yielded this unprecedented success for consumers.

The marketplace is evolving rapidly. Fans of motion pictures and television programming have never had so many choices for watching on multiple platforms and devices what they want, where they want, when they want. As technologies emerge and achieve scale, the Copyright Act enables creators to realize the benefits of the property interests in their creative works. Protecting those property rights also provides businesses room to experiment with new models. This further enables and encourages creators, distributors, and other stakeholders to enter into innovative arrangements for reaching viewers as technology and consumer expectations change. Doing so certainly benefits creators, who are able to earn a return on their investment and creativity. But it also benefits society at large. As copyright holders disseminate their works, the marketplace for creative content continues to grow, generating additional expressive works to serve a more diverse and demanding audience. That is precisely the rationale behind Article I, Section 8, of the Constitution, which authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

¹ The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA’s member companies are Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

The video marketplace is undergoing a significant and exciting transformation as distribution channels and consumption patterns evolve with technology. Whether one examines the transition from silent films to talkies, movies to television, black and white to color, analog to digital, broadcast to cable to satellite to Internet, or stationary to mobile, the video marketplace has always adapted to the unique challenges of innovative technologies and changing consumer demand. Those transitions are to be celebrated and encouraged. A copyright law that gives clear effect to the exclusive rights of creators, without undo interference or limitation, not only provides creators the tools to thrive during such transitions, but also helps drive the transitions in the first place, to the ultimate benefit of creators and audiences alike.

The motion picture and television industry is made up of media and technology companies. They invest billions of dollars per year in creative talent, skilled workers, and supportive technologies. They produce movies and television programs that inspire, thrill, and educate audiences around the world while supporting 1.9 million jobs here at home. They are responsible for 108,000 businesses across all 50 states, 85 percent of which employ fewer than 10 people. In 2011, the industry supported \$104 billion in wages; \$16.7 billion in sales tax, state income tax, and federal taxes; and a \$12.2 billion trade surplus. None of this would be possible without a robust, effective copyright system. We are pleased here to set forth our initial views on the diverse set of topics raised by the Federal Register Notice.²

II. The Online Licensing Environment

The MPAA agrees with the comment in the Notice that “[b]uilding the online marketplace is fundamentally a function of the private sector, and that process is well under way.”³ The online marketplace is working, and evolving at a rapid pace. It has never been easier for viewers to connect with the content they love. The motion picture and television industry is constantly experimenting, both individually and with leading technology companies. Innovative platforms and services such as UltraViolet, HBO GO, Hulu, Crackle, WatchESPN, and Epix HD enable audiences to enjoy a plethora of video content where they want, when they want, on any video device they want. MPAA member companies are also engaging with other parties creating compelling avenues for film and television distribution, such as TV Everywhere (through cable and satellite services), iTunes, Amazon Prime Instant Video, Netflix, Vudu, and Target Ticket. Content creators, distributors, and technology stakeholders are devoting substantial resources to develop innovative models for consumers to access content. New services, devices, and discovery mechanisms are competing for a share of the burgeoning digital market. More than 90 legitimate Web-based services are already making movies and TV shows available in the United States on any number of devices; the ever-growing list can be found at www.wheretowatch.org.

The great genius of the Copyright Act is that recognizing creators’ property interests in their creations facilitates the market for the production, dissemination, and consumption of content—ultimately benefiting society at large. So long as the law provides a framework for the effective enforcement of those property rights, the government need not manage the underlying

² Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61,337 (Oct. 3, 2013) (“Notice”).

³ *Id.*, at 61,339.

business relationships. That can be left to creators, distributors, consumers, and competitive forces. To promote the steady growth of a robust online licensing environment, the government should maintain its market-based approach and ensure that parties continue to respect in the digital networked environment the intellectual property rights that have been vital to the success of America's copyright industries and the Internet. Failure to do so would impede the further development of a legitimate online marketplace and harm the interests of consumers. Encouraging voluntary initiatives, discussed in the next section, can play an important role in this regard.

The Notice also asks about providing better access to standardized rights-ownership information and the use of databases.⁴ We support efforts already underway by the Copyright Office to improve access to information that facilitates licensing of creative content, including refining the ability to search for ownership information or providing links to other countries' databases. Such steps would also help minimize the population of orphan works. At the same time, it is not clear that the rapidly growing video marketplace or the availability of licensing is suffering from a lack of access to a more comprehensive rights database. As the Notice suggests, private sector initiatives could be helpful here.⁵ A number of sources for rights ownership information already exist, including the Entertainment Identification Registry ("EIR"), an industry-driven classification database. We welcome further discussion to identify any gaps in the availability of rights ownership information, and believe voluntary, private sector initiatives are best suited to supplement Copyright Office information.

III. Multistakeholder Dialogue on Operation of DMCA Notice and Takedown

The MPAA supports the Notice's proposal to convene a series of meetings on improving the effectiveness of the DMCA's notice-and-takedown system.⁶ All stakeholders in the Internet ecosystem—including search engines, advertising networks, payment processors, and cloud storage providers—should be actively seeking to reduce support for infringing websites. These parties should be engaging in serious discussions with copyright holders about taking commercially reasonable, technologically feasible steps to achieve that important goal. It has been and should be in the government's interest to encourage these discussions and for them to succeed.

Voluntary initiatives resulting from such a process could help promote a safe, secure, and sustainable Internet for the benefit of content creators, Internet-based businesses, citizens, and our economy as a whole. The 2007 User Generated Content Principles⁷ and the Copyright Alert System launched in 2013⁸ are good examples of voluntary initiatives aimed at combating online theft of content in a balanced and responsible manner. All of us in the Internet ecosystem share a responsibility to curb abusive practices online, including copyright infringement. And we all must play a role in finding voluntary solutions that mean less infringement and more high-quality, legitimate choices for audiences. It is vital for all stakeholders to work together to

⁴ *Id.*, at 61,340.

⁵ *Id.*, at 61,339.

⁶ *Id.*, at 61,340.

⁷ See www.ugcprinciples.com.

⁸ See <http://www.copyrightinformation.org>.

protect and promote an Internet that works for everyone.

The Notice seeks specific comment 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).”⁹ Such dialogue could be immensely helpful and was part of the legislative intent behind the DMCA. Congress created the safe harbor provisions of the DMCA to promote shared responsibility and coordination among copyright owners and various Internet intermediaries. Indeed, the Section 512 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.”¹⁰

Unfortunately, these provisions have yet to fulfill their full potential. As the Notice observes, “the system can be too resource-intensive and require[s] constant re-notification as to the same content.”¹¹ To illustrate the enormous volume of infringement, in just the six-month period from March through August 2013, the MPAA’s six member companies sent 25.2 million takedown requests to non-UGC websites and search engines to remove infringing content located at specific URLs. Of those requests, 13.2 million were to a site to remove an infringing file and 12 million were to a search engine to remove a link from search results. From those requests, they received only 8 counter-notices. And even when the notices result in takedowns, copies of or links to the same works often reappear on the same web site or through the same search engine within minutes because of the ease of uploading infringing content. We agree with the proposal in the Notice that the next step should be to gather stakeholders to develop best practices for improving how the system works within the existing legal framework.¹² We hope to collaborate with other participants in the digital ecosystem to find a better way to fulfill the goals of the DMCA, including a rapid and effective way of removing infringing content and keeping it from re-appearing.¹³

Discussions exploring such initiatives should include representatives of the content community, Internet service providers, “cyberlockers,” search engines, linking sites, and technology solution providers that offer content identification, filtering, and verification capabilities. All players in the digital ecosystem have a role to play in creating a healthy digital marketplace for the exchange of ideas, goods, and services. Perfect solutions are unlikely straight out of the box. This will be an iterative process. If all stakeholders work in good faith, it will be possible to launch new and effective initiatives for combating piracy, which will also promote creativity, investment, innovation, and job creation.

IV. Remixes

The flexible framework of our nation’s current copyright regime is promoting innovative uses of content, including remixes. Indeed, the marketplace is responding to the advent of video-

⁹ *Notice*, at 61,337.

¹⁰ S. REP. NO. 105-190, at 20 (1998).

¹¹ *Notice*, at 61,340.

¹² *Id.*

¹³ S. REP. NO. 105-190, at 21.

editing tools and user-generated-content web sites by facilitating within current law the creation and dissemination of fan-made works. Although calling a work a “remix” does not automatically make it legal, the sheer volume of such works and the business models growing around them indicates that the creation of remixes is not being unacceptably impeded and that legal change is unnecessary. Put simply, the copyright laws are operating as intended: as technologies and consumer desires change, the marketplace is responding, for the most part without undue friction.

The Notice asks whether there are efficient ways right holders can be compensated for remixes where fair use does not apply.¹⁴ The answer is yes. YouTube’s Content Management System, for example, enables copyright holders to claim ownership of their content when used in remixes by others, thereby allowing copyright holders to reap the proper rewards from their investment. Commercial services like ZEFR assist rights holders in this process.¹⁵ Kindle Worlds enables the creators of underlying works and fan-generated spin-offs to share proceeds.¹⁶ This rewards not only the creators of the underlying works for their creativity and investment, but also the creators of the spin-offs, which encourages creation of additional underlying works and spin-offs. To the extent interest in remixes continues to grow, creators of both underlying works and remixes will experiment further with business models that meet consumer demand while compensating the content creators.

V. “Digital First Sale”

The already thriving market for movies, television programs, music, and books in digital (*i.e.*, non-physical) form allows consumers to choose different combinations of access, flexibility, and price to not only one but multiple electronic copies of a work. The first sale doctrine is an inherently “analog” concept, designed to enable further, non-duplicated distribution by a consumer of physical goods that contain intellectual property, providing other consumers an alternative to purchasing a new copy at full price. The electronic world we live in now, however, provides users unprecedented choice to experience content in tailored ways that go far beyond the mere purchase of a copy of a work at full price, including by sharing it lawfully within a household or across locations.

Our nation’s copyright laws enable and encourage creators to find innovative ways to meet consumer demand for their works as technology and consumer expectations evolve. A wide and growing range of services offer consumers access to movies and TV programs in a variety of forms (hard copy, digital download, on-demand transmission, and streaming), and according to various business and usage models (purchase, rental, and subscription). Leading examples include TV Everywhere, Amazon, iTunes, Hulu, Netflix, Vudu, Flixster, and HBO GO. Some services are affiliated with UltraViolet or other cloud storage options that provide flexible means of multi-copy, multi-format access to content anywhere, at any time, by multiple members of a household and on multiple devices and platforms. Some are bundled with physical copies such as DVDs and Blu-ray discs; some are free and ad-supported; some carry subscription charges; still others permit users to

¹⁴ Notice, at 61, 338.

¹⁵ See <http://www.zefr.com/>

¹⁶ See Olga Kharif, *Amazon Wants to Sell Your Fan Fiction Through Kindle Worlds*, Bloomberg Businessweek, available at <http://www.businessweek.com/articles/2013-06-13/amazon-wants-to-sell-your-fan-fiction-through-kindle-worlds>.

access individual films and TV episodes.¹⁷ These models deliver additional value to consumers by facilitating portability across locations and devices, enabling multi-copy sharing among multiple users, protecting against loss and damage, and offering a measure of compatibility as technology advances. The marketplace is clearly working to provide consumers with an unprecedented variety of options to access the movies and TV shows they want, when and where they want them.

As with remixes, there is no need to alter the balance the current copyright framework creates by permitting the unauthorized copying of digital files (as a “digital first sale” doctrine would necessarily do). In fact, doing so would undermine the very benefits consumers and creators alike enjoy in the current competitive digital environment. The ways consumers access digital goods have become fundamentally different from the ways they access physical goods. The secondary marketplace envisioned under a “digital first sale” doctrine would unnecessarily allow unlimited transfers of perfect quality duplicates, resulting in a form of file-sharing. The availability of such perfect copies would crowd out of the market the growing variety of digital purchase, rental and subscription offerings, which currently include a wide variety of usage models and price points tailored to consumers’ needs. We believe the Notice constrains the inquiry too narrowly by focusing solely on the benefits of the first sale doctrine and whether those benefits are present in today’s digital marketplace. Those questions merit discussion. But so does consideration of the safeguards and limitations around application of the first sale doctrine in the analog environment that prevent it from unreasonably prejudicing the interests of creators and copyright owners, and the extent to which those same safeguards and limitations exist in the digital marketplace.

As consumer expectations continue to evolve so, too, will the marketplace, benefiting consumers and encouraging even more investment in new technologies, business models, and creative works. The scope of rights in the Copyright Act is sufficiently flexible to support a robust marketplace in intangible goods, making further limitations not only unnecessary but indeed harmful for consumer choice. The Copyright Office was correct to recommend against creation of a digital first sale doctrine when it examined this topic in 2001.¹⁸ All that has occurred in the intervening years only reinforces that recommendation.

VI. Statutory Damages

Statutory damages ensure the market for digital distribution of content will continue to thrive by deterring wide-scale but difficult-to-measure online infringement, especially by for-profit businesses that engage in, facilitate, and encourage piracy. Statutory damages do not hinder the development of new, legitimate services and platforms for delivering content. To the contrary, statutory damages promote new services and platforms by giving the creators of movies, television programs, and other content, as well as legitimate entrepreneurs, a measure of security that their investment and effort will not be misappropriated without consequence. While we understand the concerns giving rise to the discussion around statutory damages in the Green Paper, the MPAA does not believe the experience in practice supports altering the existing regime, which has fostered investment and innovation not just in the production of content but

¹⁷ A comprehensive list of the more than 90 legitimate services offering online access to movies and television shows to consumers in the U.S. can be found at <http://www.wheretowatch.org/>.

¹⁸ See United States Copyright Office, DMCA Section 104 Report, August 2001, available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

also with respect to applications, devices and other digital technologies.

Copyright owners face substantial hurdles in quantifying the actual harm from illegal uploading and downloading of movie, television, and music files over peer-to-peer and other systems, which the Supreme Court has characterized as “infringement on a gigantic scale.”¹⁹ Content creators also constantly encounter new methods of infringement beyond peer-to-peer. Examples include unauthorized, real-time streaming of television programming to millions of Internet users around the globe, or distribution via “cyberlockers” like Megaupload. Proving the amount of actual damages in such cases (including the impact upon licensed outlets) can also be exceedingly difficult.²⁰

Statutory damages play an essential role in redressing the financial harm caused by such infringement and punishing the wrongdoers (including secondary infringers that support and enable wide scale infringement). But, perhaps most importantly, statutory damages deter others from engaging in similar misconduct, advancing the societal goal of promoting innovation and creativity. As the United States Department of Justice argued in a recent brief:

[S]tatutory assessments are not intended solely to safeguard the pecuniary interests of private parties. Rather, they also seek to redress and deter harm to important public interests.... This public interest cannot be realized if the inherent difficulty of proving actual damages leaves the copyright holder without an effective remedy for infringement or strips the trial court of any effective means of deterring further copyright violations.²¹

The MPAA is confident that juries will continue to award statutory damages only in appropriate cases, in appropriate amounts, taking into consideration all salient factors (including the specific circumstances of the case), to serve the public interest.

¹⁹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 US 913, 940 (2005). Other examples of infringing businesses that MPAA believes are (or were) appropriately subject to statutory damages include Aimster, Limewire, Usenet.com, Torrentspy, and Isohunt.

²⁰ See, e.g., *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 286 (2d Cir. 2012) (damages from unauthorized streaming of television programming over the Internet “may be difficult or impossible to quantify”) (citation omitted).

²¹ Brief for the United States as Intervenor/Cross-Appellee in *Thomas-Rasset v. Capitol Records, Inc.*, Nos. 11-2820 & 11-2858, at 21, 25 (filed March 22, 2012); see also *Sony BMG Music Entm’t v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013) (“Statutory damages under the Copyright Act are designed not only to provide ‘reparation for injury,’ but also ‘to discourage wrongful conduct.’” (quoting *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 US 228, 233 (1952))); *Top Rank, Inc. v. Allerton Lounge, Inc.*, 1998 WL 35152791, at *1 (S.D.N.Y. 1998) (“statutory damages must be sufficient enough to deter future infringements and should not be calibrated to favor a defendant by merely awarding minimum estimated losses to a plaintiff”) (Sotomayor, J.).

The MPAA appreciates this opportunity to provide our views in response to the Notice. We look forward to providing further input and working with the Department of Commerce, the PTO, and the NTIA going forward.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael O'Leary", with a long horizontal flourish extending to the right.

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