

In the Matter Of:
MULTISTAKEHOLDER FORUM

December 18, 2014

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1 UNITED STATES PATENT AND TRADEMARK OFFICE

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6 DEPARTMENT OF COMMERCE MULTISTAKEHOLDER FORUM

7 ON IMPROVING THE OPERATION OF THE DMCA NOTICE

8 AND TAKEDOWN SYSTEM

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11 SIXTH PUBLIC MEETING

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21 Alexandria, Virginia

22 Thursday, December 18, 2014

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AGENDA

OPENING REMARKS

SHIRA PERLMUTTER

Chief Policy Officer and Director for
International Affairs, USPTO

JOHN MORRIS

Associate Administrator and Director of
Internet Policy, NTIA

REPORT OF WORKING GROUP

SANDRA AISTARS, Copyright Alliance

JIM HALPERT, Internet Commerce Coalition

Panelists:

SHIRA PERLMUTTER

Chief Policy Officer and Director for
International Affairs, USPTO

1 Panelists (continued):

2 JENNIFER BLANK

3 Attorney-Advisor, Office of Policy and
4 International Affairs, USPTO

5

6 DAVID CARSON

7 Director of Copyright, Policy and
8 International Affairs, USPTO

9

10 DARREN POGODA

11 Attorney-Advisor, Office of Policy and
12 International Affairs, USPTO

13

14 JOHN MORRIS

15 Associate Administrator and Director of
16 Internet Policy, NTIA

17

18 DISCUSSION OF WORKING GROUP REPORT
19 AND NEXT STEPS

20

21 CLOSING REMARKS

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1 P R O C E E D I N G S

2 (9:12 a.m.)

3 MS. PERLMUTTER: Good morning,
4 everyone. For those who don't know me, I'm
5 Shira Perlmutter, Chief Policy Officer, at the
6 Patent and Trademark Office. And, once again, I
7 welcome all of you who are here in person and
8 all of you who are joining by webcast to this,
9 which is the sixth public meeting of the
10 Multistakeholder Forum on Improving the
11 Operation of the DMCA Notice and Takedown
12 System. I know it's quite a mouthful.

13 This is the last meeting scheduled for
14 this year and the last one we currently have
15 scheduled. So we began this process back in
16 March and established this forum with
17 participation from a very wide range of
18 stakeholders, including businesses and
19 individuals and different types of associations,
20 both trade associations and public interest
21 groups.

22 In May, we formed a smaller working

1 group which turned out to be not that small, so
2 we were very pleased to see the willingness of
3 so many people to roll up their sleeves and join
4 the working group with a commitment to really
5 invest and to engage in the process.

6 So we know that that group has worked
7 extremely hard over the past months to be able
8 to move forward to agreements on approaches to
9 improving the operation of the Notice and
10 Takedown System.

11 For every one of the six public
12 meetings, there have been multiple working group
13 meetings and calls, and plus, of course, a
14 drafting group that was formed in the last few
15 months. And I know that the members of that
16 group have also worked extremely hard.

17 The initial goal of the working group
18 was to tackle the subject of standardization in
19 the notice and takedown process, but, of course,
20 that work has evolved and morphed into something
21 rather broader.

22 So we do want, at this point in time,

1 to thank all of the participants for their very
2 impressive -- I won't use the word "herculean"
3 -- but very impressive efforts, and in
4 particular to recognize the major commitments of
5 time and effort by the working group's co-
6 chairs, Sandra Aistars and Jim Halpert.

7 So in prior public meetings, Sandra and
8 Jim, as chairs of the working group, have shared
9 with everyone the results of the group's ongoing
10 work as it moved from high level discussions and
11 ideas to the nitty-gritty of drafting.

12 And from the perspective of those of us
13 who have been watching from outside the virtual
14 rooms of the working group meetings and who have
15 not had to share the frustration in trying to
16 move forward day to day, the conversation has
17 been extremely valuable and constructive in
18 shedding light on concerns and really increasing
19 mutual understanding among a much wider group of
20 stakeholders than would normally have day-to-day
21 conversations on these subjects.

22 So as the group has moved from the

1 topic of standardization, which seemed like it
2 might be the easy one and the low-hanging fruit,
3 to a good and bad practices approach, we're
4 aware that the discussions in recent weeks have
5 sometimes touched on sensitive topics and we do
6 appreciate everyone's willingness to engage and
7 to keep trying to move forward.

8 So we look forward to hearing what Jim
9 and Sandra have to share with us today about the
10 outcome of these last weeks of discussion.
11 We've allotted time until noon today.

12 We're not sure how much discussion of
13 the document there will be at this point because
14 we do know it was relatively late yesterday that
15 something was produced. But, obviously, we'll
16 see where people are and how much discussion we
17 have, and then we'll talk a little bit about
18 where we proceed from what's been produced by
19 the working group.

20 So in the interest of time, I will stop
21 here and turn over the mic to my colleague, John
22 Morris, Associate Administrator and Director of

1 Internet Policy for NTIA.

2 MR. MORRIS: Great. Thanks, Shira.

3 Just to reiterate in terms of what she said in
4 terms of appreciation for all of the hard work,
5 especially for Sandra and Jim, and to say, as
6 NTIA observed in the privacy process, that these
7 engagements, I think, are kind of almost
8 guaranteed to lead to a higher level of
9 understanding by all parties and that's a really
10 positive thing, I think, in general.

11 And I think they end up not necessarily
12 reaching all of the issues that everyone
13 individually wants to bring to the table, but in
14 making good process, and it sounds like that's
15 happened here and that's tremendous.

16 So let me just express appreciation to
17 the whole group and turn it over to Jim and
18 Sandra who, I think, are now on deck.

19 MS. AISTARS: So thank you, everybody.
20 I think maybe before we go through our
21 discussion of status and the document, we should
22 start by actually thanking all the members of

1 the drafting committee.

2 There are a number of people who are in
3 the room here, so I would invite them to stand
4 up and get a round of applause, at least from
5 Jim and myself, for their cooperation and their
6 help. Don't be shy.

7 (Applause.)

8 MS. AISTARS: And there are also people
9 on the phone who were very active participants.
10 I know from my end, Ellen Seidler was really
11 helpful in these discussion and --

12 MR. HALPERT: Yes. And Fred von
13 Lohmann actually made the trip to Washington on
14 Sunday night because he didn't understand that
15 the timing of this meeting had been pushed back,
16 but he traveled all the way here and back and
17 unfortunately he couldn't be here today.

18 He worked tremendously hard on this as
19 did Jordan Gimbel of Yahoo, Patrick Flaherty of
20 Verizon, Sarah Feingold and Patricia Chang of
21 Etsy, a small company who put in a lot of time
22 during a busy time of year, and Sherwin Siy of

1 Public Knowledge is here today and provided
2 really invaluable input throughout the process,
3 including yesterday during the sort of last-
4 minute rush to get this ready. So did Corynne
5 McSherry who can't be here who's on the West
6 Coast from EFF.

7 But this was truly a group effort.
8 Obviously, in any multistakeholder process, nobody
9 gets their wish list. But in the end, I think
10 there were a series of compromises that produced
11 something that really advances the ball in terms
12 of improving the efficiency of the notice and
13 takedown process and protecting interests of users
14 as well as creators in that process.

15 MS. AISTARS: So just to give you a
16 sense of the status of what you have before you,
17 this is a draft that the drafting group has
18 produced and are recommending of good, bad, and
19 situational practices. It's not something that
20 has been fully discussed with the full working
21 group just because of the timing of the
22 discussions.

1 We also have talked amongst the
2 drafting group and recognize that there's some
3 final cleanup work necessary on the document to
4 finalize some examples and some appendices.

5 We've talked about having some
6 structured email formats included in the
7 document, and we're also scheduling a discussion
8 with folks at Chilling Effects to discuss ways
9 to prevent the site, which is intended and is
10 used for scholarly research, from being used in
11 unanticipated ways as a de facto database of
12 links to access removed content.

13 So there's a little bit of work that
14 we're still planning to do. But we haven't
15 planned any further in-person meetings. Rather,
16 we'll have some smaller groups designated to go and
17 have those conversations and then report back.

18 And then, I guess, later today we can
19 all speak as a group about how best to deal with
20 additional input on points that weren't already
21 discussed or issues that go beyond the scope of
22 this document.

1 MR. HALPERT: So the document is, and
2 we went through and edited this pretty
3 thoroughly, but the title should say "List of
4 Good, Bad, and Situational Practices" rather
5 than saying "Bad and Situational Practices Being
6 Developed" because we now have worked on those.

7 But it remains a series of lists of
8 these different categories of practices, good
9 ones that are held out for others in the
10 particular stakeholder category to look at
11 implementing for their organization; bad ones,
12 which are to be avoided and are, I guess,
13 implicitly criticized by this document; and then
14 situational practices, and we'll explain what
15 that term means a little bit later.

16 But they're organized by categories of
17 stakeholders. It may make sense to streamline
18 this a little bit more because in some cases all
19 the same practices apply, for example, to
20 entities that are using web forms or Usenet
21 provider, a separate category for Usenet that
22 we've now had to remove because we don't really

1 have a set of unique practices for Usenet.

2 So we probably need to look at these
3 categories a little bit. They may be
4 reorganized slightly and the title will be
5 reorganized. But you have a very heavily worked
6 document now with a lot of input being provided
7 through the working group and in the drafting
8 group processes.

9 And the stakeholders who participated
10 in the development of the best practices may
11 well differ in the interpretation of the
12 relevant law or laws that underlie this.

13 And the point of this is not to resolve
14 differences of legal interpretation in the best
15 practices. In fact, when there were different
16 legal interpretations, because it's impossible
17 to get consensus, we bypassed those issues. So
18 this is not the point of this document. It's
19 not a concession on either side about
20 interpretation of the law. But the stakeholders
21 did achieve compromise on issues that were
22 beyond the narrow scope of the initial work as

1 well as significant agreements on best practices
2 for notice and counter-notice senders as well as
3 for online service providers who receive these
4 notices.

5 MS. AISTARS: So we've been reporting
6 throughout the process on what we've been
7 discussing as a group and giving you drafts so
8 that there is an opportunity to weigh in and ask
9 questions and so forth. Rather than going
10 through a document line by line as we did at the
11 last plenary meeting, we'll just give you kind
12 of the highlights of a couple of issues that we
13 think we achieved significant progress on beyond
14 the initial scope of work that we had first set,
15 and in no particular order. We were able to
16 achieve progress concerning the use of automated
17 tools. We recommended various good practices
18 when using automated tools that are reasonable
19 under the circumstances and take into account
20 things about the site involved, how much
21 information is visible to the notifier, the
22 apparent volume of infringement on a given site.

1 And these practices are useful in determining
2 the online location where the material or a link
3 to the material resides and encouraging also
4 notice senders to appropriately consider whether
5 use of the material that's identified in the
6 matter of complained in the notice is not
7 authorized by the copyright owner or its agent
8 or the law.

9 MR. HALPERT: The second one, and this
10 was something that we worked on very heavily
11 over the past week, is accuracy of notices.
12 Suggested good and bad accuracy practices in
13 notice sending with respect to identifying
14 whether the allegedly infringing material or a
15 reference -- for example, an advertisement
16 saying, hey, we've got this material -- is
17 actually at the location that the notice is
18 referring to so that the service provider that
19 receives the notice can look for this and
20 actually find the material to be able to act on
21 it on the site.

22 MS. AISTARS: We were also able to

1 achieve agreement around guidelines, or at least
2 an approach, that third-party senders should
3 take to ensure that they're notifying consistent
4 with these best practices and taking those into
5 account when they act on behalf of other
6 individuals.

7 MR. HALPERT: And there was another
8 concern that has been expressed throughout the
9 process about so-called "nested links" that are
10 sometimes used by bad actors to keep repopulating
11 references to infringing material. And this was
12 something that, again, the working group made
13 progress on since the last draft, and it's
14 identified as a bad practice for service providers
15 that host a file that's associated with a link
16 identified in a valid DMCA notice to create multiple
17 links to the file in order to frustrate the DMCA
18 takedown process. We had heard earlier about this
19 problem about content repopulating immediately after
20 being taken down, that that was very frustrating and
21 this spells out very clearly is a bad practice setting
22 up these links by a service provider in order to

1 frustrate the takedown of the first link. And so
2 this is spelled out very clearly as a bad practice.

3 MS. AISTARS: Similarly, in terms of
4 notices to posters who re-post material after an
5 initial takedown notice has been issued, we were
6 able to agree that it's a good practice to send
7 a warning about termination of accounts in
8 response to repeated re-posting of allegedly
9 infringing material on a site.

10 MR. HALPERT: And, also, there has been
11 concern expressed, particularly at the initial
12 Berkeley meeting, about the use of language that
13 is designed to really intimidate people from
14 submitting valid notice and takedown notices by
15 posting stigmatizing language when somebody
16 actually has provided a valid takedown notice or
17 intimidating language threatening things that,
18 for example, just would not actually happen as a
19 matter of law. And these sorts of posts, where
20 they're designed to deter people from submitting
21 valid takedown notices, were recognized as the
22 bad practice that they are.

1 MS. AISTARS: Yes. And just to
2 supplement that, that would also apply to using
3 stigmatizing or intimidating language to deter
4 the sending of valid counter-notices.

5 MR. HALPERT: Yes, absolutely.

6 MS. AISTARS: And then I've already
7 mentioned in the introduction that we have
8 agreed also to continue our discussions and
9 specifically to schedule a discussion with
10 Chilling Effects about steps that might be taken
11 to prevent misuse of its database.

12 MR. HALPERT: And one thing I don't
13 think we have on our list but the chair pointed
14 out that we've worked on since the last meeting,
15 Andrew Bridges mentioned a series of tactics
16 that have been used by people who really don't
17 want their takedown notices to be acted on.
18 They provide a sort of pro forma, somewhat
19 deceptive or difficult-to-act-on notice on the
20 eve of filing a lawsuit. And we've included not
21 a reference to lawsuits, but as bad practices
22 references to sort of tricky things like sending

1 a fax without a cover sheet so that the fax
2 isn't directed to the designated agent, and
3 you'll see that as an addition in the document
4 responding to a concern that was expressed in a
5 full-group meeting, and the stakeholders and the
6 drafting group all agreed to language that
7 focuses on that.

8 MS. AISTARS: And so Jim mentioned
9 also, a few moments ago, that we've worked on
10 situational practices. There are various
11 practices that we identified through our
12 consultations with one another that are neither
13 good nor bad, but they affect the efficiency for
14 all parties concerned. And a further
15 explanation of circumstances in which they may
16 be appropriate to use or ways in which they may
17 be appropriate to use we felt would benefit
18 readers of the document, benefit people who are
19 contemplating setting up new services. And so
20 the document explains some of these issues.

21 MR. HALPERT: Yes. They all relate to
22 efficiency. So one item that's discussed and

1 the group focused on early is the use of trusted
2 sender notification programs which offer the
3 potential for greater efficiency of submission
4 of take-down notices, it's easier to do that,
5 and then conversely, can have conditions to
6 participate in the program that one is providing
7 high-quality notices that are clear to act on.
8 So this is a potential win-win. It's a
9 situational practice because it doesn't always
10 work on different platforms and you have to have
11 a certain scale to use them, but this is culled
12 out with some guidelines about how one might go
13 about creating this, what the elements typically
14 are, and then explaining why this can be a
15 significant boost to efficiency.

16 MS. AISTARS: Another situational
17 practice that we discussed and that you'll see
18 as additional language in the document relates
19 to the use of various security measures. One
20 example of a security measure that we spent
21 quite a lot of time discussing is the use of
22 CAPTCHA codes, and we all agreed that it was a

1 negative practice to use CAPTCHA codes and
2 multiple CAPTCHA codes and use them in a fashion
3 that's intended to frustrate the submission of a
4 notice. We also discussed the fact that CAPTCHA
5 codes are commonly used for pure security
6 purposes and so didn't want to have an
7 acknowledgement in the document that it's either
8 good or bad, but wanted to explain the
9 situations in which they are appropriate to use.
10 We further discussed the way that even using a
11 single CAPTCHA code in a submission process can
12 frustrate the use of automated tools to send
13 notices. And so the language, which I won't
14 attempt to characterize here, explains all of
15 the circumstances around CAPTCHA codes that are
16 worth considering.

17 MR. HALPERT: As well as some potential
18 alternatives to use in certain circumstances.
19 So it's absolutely neutral as to the use of this
20 and other security measures, but suggests some
21 considerations to think about to promote
22 efficiency.

1 Another issue is acknowledgement and
2 status reporting. This was something that the
3 notifiers expressed real interest in having.
4 There's a discussion about how this can
5 function, the sorts of conditions that one might
6 want to have to meet in order to provide this
7 sort of status reporting.

8 So if you send a junk notice that
9 doesn't contain the DMCA elements, for example,
10 or submit it to the wrong sort of provider,
11 providing the status reporting is not
12 appropriate, but if somebody is submitting a
13 notice that meets the DMCA elements, then under
14 some circumstances this can really promote
15 efficiency and this is a good practice.

16 So these talks about the context in
17 which the particular issue arises, use of a
18 CAPTCHA code to promote security is different
19 than setting up a CAPTCHA code process that's a
20 barrier to submission of a valid notice.

21 MS. AISTARS: And, actually, also on
22 the acknowledgement and status reporting point,

1 we had discussions early on, which continued to
2 be reflected to the group throughout the
3 process, for efficient correspondence between
4 the notice sender and the notice recipient, it's
5 very useful to provide an acknowledgement that
6 actually allows the notice sender to track which
7 notice it applies to.

8 People are often sending multiple
9 notices on multiple pieces of copyrighted
10 content, and just to facilitate the
11 communications and know whether the response
12 you're getting to a web form you submitted or to
13 an email you've submitted relates to one notice
14 or another notice is helpful for everyone.

15 MR. HALPERT: And the final situational
16 practice is requesting additional information in
17 order to make the notice processing by the
18 service provider more efficient.

19 If the information isn't necessary to
20 improve the response to the notice, this is
21 something that could be an inefficiency. On the
22 other hand, in specific situations, for example,

1 if there are multiple photographs at a
2 particular location, requesting additional
3 information in order to be able to identify the
4 particular photograph to know what should be
5 taken down may be a very good practice that
6 promotes efficiency.

7 And so the discussion here, again,
8 balances and discusses the different situations
9 where this may be a good practice that really
10 promotes efficiency and where it may not be.

11 MS. AISTARS: So that's it in terms of
12 our status report.

13 You all have the draft that resulted
14 from our conversations in your packets, and we
15 invite you to study the document itself for more
16 details and the actual language that was agreed
17 to on all of these provisions. And the document
18 will also be made available, as per our normal
19 practice, on the Commerce Department's website
20 replacing the earlier draft. Thanks.

21 MS. PERLMUTTER: Well, thank you very
22 much, Sandra and Jim.

1 I have to say we're really glad to see
2 that so much has been produced from these months
3 of work and that there is at least a fair level
4 of agreement and the drafting group was able to
5 produce this document.

6 I know that many people in the room
7 have only received it this morning. Rather than
8 take a break, because we anticipated a break
9 after a longer report, why don't we open the
10 floor now if anyone wants to make comments or
11 ask any questions about the document.

12 And, again, as I said, it may be that
13 this may turn out to be a shorter meeting than
14 we had allotted for, but we are happy to stay as
15 long as there are discussions to be had.

16 So let's open the floor now for
17 specific comments or questions about the
18 document, and then we'll move from there to
19 talking about what we do next. Anyone want to
20 take the floor? Vicky. And, again, if everyone
21 can come to the mic and just identify yourself
22 for those who are either new here or not in the

1 room.

2 MS. SHECKLER: It's Vicky with RIAA. I
3 just wanted to say thank you to Jim and to
4 Sandra for leading us through this process.
5 They didn't say it, but they did an incredible
6 amount of work and brought us back from bumping
7 heads quite a bit. So thanks both of you. We
8 appreciate it.

9 MS. PERLMUTTER: We could have a round
10 of applause for Jim and Sandra.

11 (Applause.)

12 MS. PERLMUTTER: Anyone else? Do we
13 have anyone calling in? No? Okay.

14 I think we're all pleased to have the
15 document and maybe want time to take a look at
16 it, and I know a lot of people in the room have
17 already been involved deeply.

18 So why don't we talk about where we go
19 from here. I suppose one question is I know
20 there's going to be, obviously, as Jim and
21 Sandra mentioned, some need to finalize the
22 document, tie it up, and figure out how exactly

1 to present it and if there will be a cover memo
2 or statement or what we would do.

3 MR. HALPERT: A pretty picture.

4 MS. PERLMUTTER: A pretty picture.

5 Okay. We clearly would expect to post it on the
6 PTO website, perhaps on the NTIA website as
7 well, perhaps on the Copyright Office website if
8 the Copyright Office would like to do that at
9 the appropriate moment, so I open the floor for
10 some discussion of what the timing might be for
11 that and what the process might be, and we're at
12 your disposal.

13 MR. MORRIS: So Shira is asking me for
14 a suggestion. Why don't we meet next Thursday,
15 next week, a week from today? Is that okay with
16 folks?

17 MS. PERLMUTTER: I suppose one question
18 is we can -- This was the last meeting, as I
19 said, that we had scheduled. So the question is
20 does the working group want to go off, do work,
21 and then circulate a document? Shall we
22 schedule one more in-person meeting in January

1 of the wider group to approve or adopt in some
2 way a final version of the document?

3 And, again, of course, the status of
4 this is just that it's just an agreement of the
5 people who are participating in the process
6 rather than a government document of any sort.

7 MR. MORRIS: So is it possible that we
8 should kind of defer to the working group, the
9 drafting group, as to whether we need to have
10 another meeting, or is there kind of broad
11 interest?

12 We would love for this to be as kind of
13 embraced and supported and kind of publicized
14 ultimately. The most important value of this is
15 to get this distributed to actually people who
16 are needing to submit notices, needing to
17 receive notices.

18 So we are interested in kind of
19 encouraging all of you to kind of get it in
20 circulation. So should we have one more meeting
21 to kind of come together and agree on kind of a
22 final text?

1 MS. PERLMUTTER: Yes, Matt, go ahead.

2 MR. SCHRUEERS: This may have been
3 discussed in --

4 MS. PERLMUTTER: Can you identify
5 yourself?

6 MR. SCHRUEERS: Matt Schruers with CCIA.
7 This may have been discussed in some of the
8 working groups, so to the extent that it has and
9 I wasn't there, I apologize.

10 But if this is going to reside on the
11 PTO website, for example, that would suggest a
12 certain amount of -- some measure of
13 endorsement, and to the extent that's -- Well,
14 it could be construed. I would agree that
15 absent some formal adoption, it shouldn't be,
16 but that aside, what is at a dot gov TLD is
17 relevant.

18 So with that being the case, if there
19 is going to be another meeting, it might be
20 worthy of considering whether that meeting
21 should happen after there is a chance for sort
22 of broader public comment on this.

1 I'm not suggesting a full notice-and-
2 comment proceeding or that this should be in the
3 Federal Register, but rather that it be put up
4 and more general comment be solicited in a time
5 frame when people might be able to weigh in.
6 And if there isn't any, that might suggest that
7 it would up at the right place.

8 I'm just wondering whether or not that
9 was something that was considered in the
10 meetings, and if not, maybe we could kick the
11 idea around right now.

12 MR. MORRIS: So let me just take a
13 crack at responding to good suggestions.

14 MS. PERLMUTTER: That's a technical
15 term.

16 MR. MORRIS: Two different points, I
17 think, Matt, you've raised. Would the document
18 have some sort of special significance if a
19 final version is posted on a government website?

20 In the privacy multistakeholder
21 context, we have generated final versions of
22 documents -- rather, not we -- stakeholders have

1 generated final versions of documents which we
2 do have posted on NTIA's website with
3 essentially an appropriate caveat for what this
4 is.

5 The process here, the process that you
6 guys have engaged in, isn't to develop
7 government policy. It is not to even tell us
8 what we should be doing because, in fact, if it
9 were to develop government policy or tell us
10 what we should be doing, we would have had to
11 comply with the Federal Advisory Committee Act
12 and this would have been a much bigger
13 rigmarole. You may have thought it was a big
14 rigmarole, but it would have been a worse
15 rigmarole.

16 I think we can be comfortable and I
17 think we can craft with you a statement that
18 places this work in an appropriate context that
19 you and everyone are comfortable with so that it
20 is available on a government website.

21 Because, frankly, again, as I said
22 earlier, we want to make it available because

1 the value of this is that as many implementers
2 on all sides of the process learn about it and
3 learn from it. So I don't think we have to have
4 another meeting because it's going to be on the
5 website.

6 Then the other idea you raised is do we
7 need kind of a bigger comment process.

8 Honestly, just speaking individually here, this
9 process has been pretty well publicized. I'm
10 not exactly sure what we would do to kind of let
11 people know, hey, this is a more serious time to
12 go focus.

13 I do think that when we post this
14 current document now, I think we could post it
15 with a header that says this is a near-final
16 draft the drafting group is looking to clean up
17 and finalize. It would be hard for us to do a
18 Federal Register notice on that kind of stuff
19 because, again, this process is not to tell us
20 what to do.

21 So we can put it up there, but I would
22 encourage stakeholders to broadly alert their

1 members and constituents to the fact that this
2 is in a final stage.

3 MS. PERLMUTTER: Let me add to that.
4 To be honest, if we didn't post the result of a
5 process that we've been facilitating and running
6 and have announced for many months now, there
7 would be a serious transparency problem.

8 So we've been very eager to make sure
9 that we do tell people what's going on here and
10 not keep it as something that's within a smaller
11 group, but also to say that this has been as
12 open and participatory a process as one could
13 possibly run with multiple, multiple
14 announcements saying anyone who wants to
15 participate should come.

16 The working group was open to anyone
17 who wanted to be on it. The drafting group was
18 open to anyone who wanted to be on it, I gather.
19 These meetings have all been open and webcast.
20 So there certainly have been multiple
21 opportunities for people to have input and there
22 will continue to be.

1 And at this point, it's a document that
2 just reflects the outcome of a particular
3 process of discussion by a particular group of
4 people and that's what it will be described as.

5 So, yes, there will be opportunities
6 for people to comment on it if we post it in the
7 current form that says "near-final draft."
8 There certainly will be opportunities for people
9 to send comments.

10 MR. SCHRUERS: Matt Schruers again.
11 So, certainly, I wouldn't suggest not posting
12 something for the transparency reasons you
13 indicate. If you're going to point an
14 instrument and sort of solicit feedback of any
15 kind, it would seem necessary to have some sort
16 of mechanism for internalizing any feedback.

17 On the other hand, if there's not going
18 to be any sort of way to act on the feedback --
19 you know, sort of soliciting comments isn't
20 really all that useful if nothing's going to
21 happen -- so I think what I was saying before
22 with respect to another meeting was not

1 encouraging another meeting for the sake of
2 another meeting -- I know everyone has a lot of
3 things to work on -- but that that would be sort
4 of necessary if there is going to be feedback
5 solicited, if this is going to be put out there
6 and say this document is, in its current state,
7 relatively fresh.

8 And so while people may have sort of
9 watched the process through now, it is
10 relatively recent. And so for that reason, I
11 think what I'm trying to say is, it might make
12 sense with this, as it stands now, to sort of
13 put it out and say this is the near-final
14 version, is there any feedback from the general
15 public. I realize that sounds like sort of a
16 notice-and-comment process, but it doesn't seem
17 to make a lot of sense to put it out for notice
18 if there's no vehicle for acting on that.

19 And I think this is, as I said before,
20 a relatively recent document. So, yes, people
21 could have participated in the process up until
22 now, but only now is there really something that

1 people can act on as sort of broader members of
2 the public.

3 MR. MORRIS: Stay up there. Don't go
4 sit back down. Let's kind of talk this out.

5 My reaction is that I would love a
6 thousand people out there to look at this
7 document closely and tell us that this word on
8 Page 3 really could be more clear if we used a
9 different word. But I'm a little less
10 enthusiastic about the idea of a lot of people
11 out there looking at this.

12 Every single one of you in this room
13 has really important issues that are not
14 addressed in this document, and because of the
15 difficulties and some of the challenges, every
16 stakeholder, every implementer has things that,
17 well, gosh, it should have done this, or what
18 about X, Y, Z issue.

19 And I'm concerned about whether that's
20 a fruitful process to kind of start where,
21 ultimately, I would just guess, we would get a
22 lot of people saying, well, this doesn't

1 accomplish enough. So I'm just not sure that
2 that's a useful use of our time and of the
3 drafting group's time to read through them.

4 You're raising a very valid question, and
5 after the meeting or whenever, we can kind of
6 figure out how would someone submit a
7 constructive comment.

8 So I don't have a good answer. You're
9 raising a very valid question, but I have
10 concerns about kind of opening it up very
11 broadly.

12 MS. PERLMUTTER: Can I just add
13 something to that. It's also difficult for us
14 in the government to ask for comments on a
15 document which isn't our document and which we
16 are not adopting in any way.

17 So if there were to be comments on this
18 version of it, I think they would have to be
19 comments that went to the drafting committee or
20 the working group to take into account.

21 MR. SCHRUEERS: Agreed. Yes,
22 absolutely.

1 MR. KUPFERSCHMID: This is Keith
2 Kupferschmid from SIA. I think there's somewhat
3 of a middle ground here.

4 As Matt points out, and it has been
5 pointed out by others, this document itself is
6 hot off the presses; okay? John, as you
7 mentioned, I mean, everyone has an opportunity
8 to listen to this webcast or be here,
9 participate in the working group, et cetera, so
10 I don't think it's necessary for sort of this
11 notice-and-comment period.

12 But I do think there should be a period
13 of time for the working group -- which I'm not
14 even sure that the larger working group has got
15 this document yet or not, I'm not sure -- but to
16 see what comments, if any, the larger working
17 group has and then, based on that input or lack
18 of response, we then decide, okay, do we need
19 another meeting or not. And I would defer to
20 Sandra and to Jim on that.

21 MR. MORRIS: Does that sound like a
22 reasonable approach? Allan?

1 MR. ADLER: Allan Adler with AAP. This
2 may be a premature question for you, but I
3 suppose it would inform your thinking in
4 response to this line of questioning.

5 And that is, presumably, you're working
6 on a paper or a compilation of your thinking
7 based upon the other processes that have taken
8 place pursuant to the Green Paper, the other
9 comments that you've received and all of that,
10 and, I suppose, thinking down the road how this
11 is going to fit into whatever you do with all of
12 that other input that you've received from
13 roundtables and from the comments and all of
14 that, how you think this fits into that, how
15 this would be characterized in that.

16 Because, if you're going to, at some
17 point later down the line -- and you may not
18 know at this point what that period is going to
19 be, how long it's going to take -- if you're
20 going to issue another paper addressing all of
21 that input and, presumably, that will be subject
22 to a Federal Register notice with further

1 comment being solicited, does that inform your
2 thinking in any way about how to deal with the
3 product here?

4 MS. PERLMUTTER: That's a good
5 question. Our current thought is that we are
6 going to continue to deal with the policy issues
7 that were discussed in the roundtables
8 separately from this process, that we see that
9 as being something where we will issue some
10 conclusions from what we've heard that will be
11 the Department of Commerce's thoughts about what
12 we've heard on those issues, and this will be
13 more a separate process of saying here's what
14 the stakeholders produced in the course of the
15 multistakeholder process.

16 So I wouldn't see them as being linked
17 and I would see them as being two separate
18 outputs. I mean, that's certainly where we
19 currently are.

20 Go ahead, Jim.

21 MR. HALPERT: Obviously, getting
22 feedback on a document is very important and

1 something that should happen. At the same time,
2 the nature of a multistakeholder process is to
3 funnel areas of potential agreement.

4 So there's certainly no down side and
5 there's a process value in getting feedback on
6 this document. It's a certainty to me and to
7 Sandra that people will say why is this issue
8 not in there, and the answer nine times out of
9 ten is going to be that somebody tried to get
10 that issue into the document and there wasn't
11 sufficient consensus to do that.

12 That said, any process with a heavily
13 negotiated document, as we were discussing,
14 Sandra and I, before this meeting, someone may
15 have an insight that a word is in here that
16 really doesn't fit, that people were talking to
17 each other and it got too coded and that the
18 text doesn't make sense in some way.

19 I think that both sets of comments are
20 appropriate to submit. One is much more likely
21 to result in some rethinking of the document
22 simply because the group hacked at a bunch of

1 these other issues and wasn't able to obtain
2 agreement.

3 There really are three types of
4 stakeholders, and typically at least one would
5 vehemently object to some issue coming on, so I
6 think it is entirely appropriate to ask for
7 comments somewhere to be submitted. It would be
8 helpful to get those comments by sometime in
9 early January.

10 Then, I guess, the drafting group can
11 sift through them and say, hey, is this
12 something that we didn't think about that
13 relates to something that was within scope and
14 think about whether we tweak the language
15 slightly to address that.

16 If there's some new issue that's really
17 very fundamental that the group didn't discuss,
18 we might come back to you and say, look, for
19 future workstream, here is an issue that the
20 group didn't think about that may be appropriate
21 down the road.

22 I think that's probably the most

1 productive way to do this, rather than going and
2 re-litigating a whole series of different issues
3 that had been raised, while having an
4 opportunity for public feedback on the draft
5 that just came in.

6 MS. PERLMUTTER: So would it make sense
7 then to post it with some ability for people to
8 send comments to the two of you that you would
9 then circulate to the bigger group?

10 MR. HALPERT: Yes. I think it probably
11 is helpful to -- There's just an issue of
12 resources for me and for Sandra to read a
13 thousand comments or something if they come in.

14 I think it may be helpful if we can
15 classify these and send them to -- if it comes
16 from a stakeholder perspective that was already
17 represented at the table, to forward this along
18 and ask one of the stakeholders to look at it
19 and see if this is something that had not been
20 thought of before.

21 I think we can probably do that.

22 Sandra, what do you think is a way to

1 efficiently handle the feedback?

2 MS. AISTARS: I guess I would suggest,
3 rather than sending to Jim and I however many
4 comments there may be, there are basically three
5 stakeholder groups represented. And so to the
6 extent that there's comments coming from what
7 I'll call the rightsholder group, send them to
8 me. If they're comments focusing more on issues
9 from the user perspective, send them to somebody
10 who is in an organization who represents that
11 stakeholder group in the drafting group so that
12 we've got help sort of funneling and organizing
13 the comments.

14 Otherwise, I would worry that if we get
15 a bunch of comments and we're trying to sift
16 through and figure out who they should be
17 forwarded on to, particularly during a holiday
18 period when people aren't necessarily focusing
19 on their email every day, that we lose comments,
20 and I wouldn't want to be responsible for not
21 getting a comment to the right place.

22 MS. PERLMUTTER: Well, could I suggest

1 maybe -- because I think probably the only way
2 to do that is to have them be self-selecting
3 because, otherwise, someone has got to be
4 responsible for reading them all and figuring
5 out how to characterize them -- so we let people
6 choose which basket they want to be in.

7 And maybe what we could do is talk
8 separately offline about how technically to get
9 you the comments. Because the conceptual idea
10 would be that the comments go to the chairs of
11 the working group rather than to the government,
12 but we could figure out how to make that happen.

13 MR. HALPERT: And we'll give our
14 personal cell phones so everybody can just text
15 us over the holidays.

16 MS. PERLMUTTER: And your home
17 addresses.

18 MR. HALPERT: And the names of our
19 children.

20 MR. MORRIS: I'll give Shira's personal
21 cell phone over the holidays.

22 Let's take the mechanics offline. I

1 think there needs to be an effective way that
2 doesn't burden you guys with being the first
3 screen.

4 MS. PERLMUTTER: Maybe what we should
5 be talking about is if we post this document
6 now, we'd be talking about giving people a month
7 until like January 18th to give those comments.
8 That gets past the holidays. Okay.

9 So I know we have at least one caller
10 on the phone, so, Hollis, do you want to
11 connect?

12 OPERATOR: Our first question or
13 comment comes from Teri Karobonik.

14 MS. KAROBONIK: Hello, this is Teri
15 Karobonik from New Media Rights, and I just had
16 one comment. The larger working group hasn't
17 actually received this draft, so if that draft
18 could be sent around it would be very helpful so
19 we could appropriately comment on it and take a
20 look at the documents.

21 MS. PERLMUTTER: Yes, absolutely. I
22 think it was just finished late last night, so

1 people have it in the room. But we'll make sure
2 that it's circulated.

3 MS. KAROBONIK: Thank you.

4 OPERATOR: There are no further
5 questions or comments from the phone lines.

6 MS. PERLMUTTER: Thank you.

7 So let me raise one additional
8 question.

9 Apart from the issue of meeting one
10 more time to finalize the form of this and how
11 it's described, the question is whether there
12 would be any value to having put together this
13 working group and gotten this wide array of
14 stakeholders talking to each other to have any
15 further meetings -- sorry, not of the working
16 group, but of the broader multistakeholder forum
17 to meet perhaps in March in a few months to see
18 whether there's issues that are worth continuing
19 to discuss.

20 And I'm thinking of the March date
21 partly because that seems to be a point in time
22 by which we might have a better idea of what's

1 going to happen with the copyright review in the
2 Congress and we see that there could be a value
3 in having a continued forum for occasional
4 conversations about the non-legislative aspects
5 of the notice and takedown system.

6 So we put that to you. We're perfectly
7 happy to convene meetings every few months if
8 that would be useful to just provide a platform
9 for discussion. If people don't feel it would
10 be useful at this point, we're also perfectly
11 happy not to, and no one's foreclosed, if we
12 don't plan anything now, from sometime in the
13 future saying it would be useful to reconvene.

14 But if it's useful to have a time and
15 place that's set up to get together and talk
16 about issues and continue conversations, not on
17 this document, of course, but anything else, we
18 would be happy to provide that opportunity.

19 MS. SHECKLER: This is Vicky with
20 Recording Industry Association of America. As
21 you may know, there were lots of issues that
22 were raised last December, I think, when we

1 first started this process. Several of those
2 issues are still outstanding and are important
3 to everybody within the stakeholder community.

4 So I appreciate your offer. I'd like
5 for us to reserve and think about it and get
6 through the holidays. But to answer your
7 question, yes, there's still several issues
8 outstanding that are worthy of discussion at
9 some point in some forum. Thank you.

10 MS. PERLMUTTER: Any other thoughts or
11 comments? And I suppose what we could do is,
12 again, leave that as a topic for people to think
13 about and we could put on the table just the
14 possibility that we schedule a meeting every two
15 or three months of the multistakeholder forum
16 here, which could be a couple of hours or
17 whatever people wanted, to discuss whatever
18 topics were decided upon by the group.

19 And what we could do is if we're going
20 to have a further meeting on this to finalize
21 it, at the same time we could talk about that
22 issue so people have time to reflect whether

1 that's a valuable possibility or not. I see no
2 objection. All right.

3 So I would suggest then, at this point,
4 what we do is post the draft. We can figure out
5 exactly what it will say on the website in
6 accordance with the conversation we've had here,
7 as for any comments from anyone who hasn't
8 participated in the process to go to the chairs
9 by January 18th, and we'll figure out the
10 technical details of how we make that happen.

11 And then we'll wait to hear from you as to
12 whether setting up a meeting in January is
13 useful, and that would be to finalize in
14 whatever form and whatever way this document,
15 and then at that point we could decide whether
16 further meetings on other topics would be
17 valuable for you or not.

18 MR. MORRIS: Just realistically
19 thinking it out, if we're urging kind of final
20 comments by January 18th, the drafting group
21 would need a little time to figure out and react
22 to those comments, make final edits. And then I

1 think we would want to be able to post the
2 final, final document kind of enough in advance
3 of an actual in-person meeting, if we were to
4 have it, so that it's not the night before,
5 something like that.

6 A meeting could slip until February, I
7 would think, but we can work with Jim and Sandra
8 on that.

9 MS. PERLMUTTER: And we can, meanwhile,
10 find some times that we can reserve space here
11 in case a meeting is needed because that's
12 always a problem.

13 All right. Any other comments,
14 thoughts from those who are here or calling in?

15 MR. McCOYD: Hi. Ed McCoyd of the
16 Association of American Publishers. I was one of
17 the members of the drafting committee, and I would
18 just like to reinforce something that Jim said.

19 Point totally well taken about the
20 ability of people to look at this document and
21 send comments within the next month. But at the
22 same time, I would just encourage people to take

1 into account that if there is a topic that you
2 don't see covered in the document, or more
3 likely it's covered in some way but perhaps not
4 as robustly as you would like, depending on what
5 stakeholder community you're in, you can be
6 assured that each item was discussed at length,
7 negotiated into the night down to the line, down
8 to the word.

9 An extraordinary amount of work was put
10 into this over the past six months by the
11 drafting committee with extensive input from the
12 technical working group at the public meetings
13 and also with our individual members of our
14 respective associations.

15 So I, for one, as a member of the
16 drafting committee encourage support of the
17 document, and I hope we're close to the finish
18 line, and I would like to thank everybody
19 involved in the process.

20 MS. PERLMUTTER: Thanks. And, again, I
21 can't say how much we value and appreciate all
22 the work people have put into this. I know

1 these are issues that matter to everyone, so it
2 wasn't an altruistic process.

3 But the tremendous cooperative efforts
4 and willingness to go back and forth, even on
5 things that each of the various sides initially
6 found unpalatable, and to try to continue to
7 have a conversation and see where there could be
8 a meeting of the minds and some mutual
9 agreement, we very much appreciate.

10 It was frustrating at times not to be
11 in the room listening to the conversation, but
12 we're very pleased that there was able to be a
13 positive and constructive outcome. So thank you
14 again, and we very much look forward to seeing
15 what the outcome is at the end of the next month
16 of comments and continuing to work with all of
17 you. So thank you very much.

18 (Applause.)

19 MR. MORRIS: And happy and safe
20 holidays to everybody.

21 (10:10 a.m.)

22

<hr/> 1 <hr/>	addition 19:3	amount 26:6 29:12	16:10,14,21 17:2, 22 18:21 19:13 21:8	caller 46:9
18th 46:7	additional 11:20 20:18 23:16 24:2 47:7	Andrew 18:15		calling 26:13
<hr/> 3 <hr/>	address 42:15	announced 33:6	balances 24:8	calls 5:13
3 36:8	addressed 36:14	announcements 33:14	ball 10:11	CAPTCHA 20:22 21:1,2,4,11,15 22:18,19
<hr/> 9 <hr/>	addresses 45:17	anticipated 25:8	barrier 22:20	case 29:18
9:12 4:2	addressing 39:20	apologize 29:9	based 38:17 39:7	cases 12:18
<hr/> A <hr/>	Adler 39:1	apparent 14:22	basically 44:4	categories 12:8, 16 13:3
a.m. 4:2	Administrator 7:22	appendices 11:4	basket 45:6	category 12:10, 21
AAP 39:1	adopt 28:1	applause 9:4,7 26:10,11	began 4:15	caveat 31:3
ability 43:7	adopting 37:16	applies 23:7	benefit 19:17,18	CCIA 29:6
absent 29:15	adoption 29:15	apply 12:19 18:2	Berkeley 17:12	cell 45:14,21
absolutely 18:5 21:19 37:22 46:21	advances 10:11	appreciation 8:4,16	big 31:13	certainty 41:6
access 11:12	advertisement 15:15	approach 7:3 16:2 38:22	bigger 31:12 32:7 43:9	cetera 38:9
accomplish 37:1	Advisory 31:11	approaches 5:8	bit 7:17 11:13 12:15,18 13:3 26:7	chair 18:13
account 14:19 16:5 37:20	affect 19:13	appropriately 15:4 46:19	boost 20:15	chairs 6:6,8 45:10
accounts 17:7	agent 15:7 19:2	approve 28:1	break 25:8	challenges 36:15
accuracy 15:11, 12	agree 17:6 28:21 29:14	areas 41:3	Bridges 18:15	chance 29:21
achieve 13:21 14:16 16:1	agreed 18:8 19:6 20:22 24:16 37:21	arises 22:17	bring 8:13	Chang 9:20
achieved 14:13	agreement 16:1 28:4 41:3 42:2	array 47:13	broad 28:10	characterize 21:14 45:5
acknowledgement 21:7 22:1,22 23:5	agreements 5:8 14:1	Associate 7:22	broader 5:21 29:22 36:1 47:16	characterized 39:15
act 15:20 16:5 20:7 31:11 34:18 36:1	ahead 29:1 40:20	associations 4:19,20	broadly 32:22 37:11	Chief 4:5
acted 18:17	Aistars 6:6 8:19 9:8 10:15 14:5 15:22 17:3 18:1,6 19:8 20:16 22:21 24:11 44:2	attempt 21:14	brought 26:6	children 45:19
acting 35:18	alert 32:22	authorized 15:7	bumping 26:6	Chilling 11:8 18:10
active 9:9	Allan 38:22 39:1	automated 14:16,18 21:12	bunch 41:22 44:15	choose 45:6
actors 16:10	allegedly 15:14 17:8	avoided 12:12	burden 46:2	circulate 27:21 43:9
actual 24:16	allotted 7:11 25:14	aware 7:4	businesses 4:18	circulated 47:2
add 33:3 37:12	alternatives 21:18	<hr/> B <hr/>	busy 9:22	circulation 28:20
		back 9:15,16 11:17 26:6 36:4 42:18	bypassed 13:17	circumstances 14:19 21:15,18 22:14
		bad 7:3 10:18 12:4,5,11 15:12	<hr/> C <hr/>	classify 43:15
			call 44:7	

clean 32:16	compromises 10:10	cooperation 9:5	designated 11:16 19:2	14:10 19:3,18,20 20:18 21:7 24:15, 17 25:5,11,18 26:15,22 27:21 28:2,6 30:17 32:14 34:1 35:6, 20 36:7,14 37:15 38:5,15 40:22 41:6,10,13,21 46:5
cleanup 11:3	conceptual 45:9	copyright 27:7,8	designed 17:13, 20	documents 30:22 31:1 46:20
clear 20:7 36:8	concern 16:8 17:11 19:4	copyrighted 23:9	details 24:16	dot 29:16
closely 36:7	concerned 19:14 36:19	correspondence 23:3	deter 17:20 18:3	draft 10:17 24:13, 20 32:16 34:7 43:4 46:17
co- 6:5	concerns 6:18 37:10	Corynne 10:4	determining 15:1	drafting 5:14 6:11 9:1 10:17 11:2 13:7 19:6 25:4 28:9 32:16 33:17 37:3,19 42:10 44:11
Coast 10:6	concession 13:19	counter-notice 14:2	develop 31:6,9	drafts 14:7
code 21:11 22:18, 19	conclusions 40:10	counter-notices 18:4	Developed 12:6	
coded 41:17	conditions 22:5	couple 14:12	development 13:10	E
codes 20:22 21:1,2,5,15	connect 46:11	cover 27:1	differ 13:11	
colleague 7:21	consensus 13:17 41:11	crack 30:13	differences 13:14	
comfortable 31:16,19	considerations 21:21	craft 31:17	difficult 37:13	
comment 29:22 30:2,4 32:7 34:6 37:7 40:1 44:21 46:13,16,19	considered 30:9	create 16:16	difficult-to-act- on 18:19	
comments 25:10,17 34:9,19 37:14,17,19 38:16 39:9,13 41:19 42:7, 43:8,13 44:4,6,8,13,15,19 45:9,10 46:7 47:5	consistent 16:3	creating 20:13	difficulties 36:15	
Commerce 24:19	constituents 33:1	creators 10:14	directed 19:2	
Commerce's 40:11	constructive 6:17 37:7	criticized 12:13	Director 7:22	
commitment 5:4	construed 29:14	culled 20:11	discuss 11:8 42:17 47:19	eager 33:8
commitments 6:4	consultations 19:12	current 32:14 34:7 35:6 40:5	discussed 10:20 11:21 19:22 20:17 21:4,10 29:3, 40:7	earlier 16:18 24:20 31:22
committee 9:1 31:11 37:19	contemplating 19:19	database 18:11	discusses 24:8	early 23:1 42:9
commonly 21:5	content 11:12 16:19 23:10	date 47:20	discussing 14:7 20:21 41:13	easier 20:4
communication s 23:11	context 22:16 30:21 31:18	day 6:16 44:19	discussion 7:10, 12,16 8:21 9:11 11:7 18:9 22:4 24:7 27:10 34:3	easy 7:2
company 9:21	continue 18:8 33:22 40:6	day-to-day 6:20	discussions 6:10 7:4 10:22 18:8 23:1 25:15	edited 12:2
compilation 39:6	continued 23:1	de 11:11	disposal 27:12	EFF 10:6
complained 15:6	continuing 47:18	deal 11:19 40:2,6	distributed 28:15	effective 46:1
comply 31:11	conversation 6:16	deceptive 18:19	DMCA 4:11 16:16,17 22:9,13	Effects 11:8 18:10
compromise 13:21	conversations 6:21 11:17 24:14	decide 38:18	document 7:13 8:21 11:3,7,22 12:1,13 13:6,18	efficiency 10:12 19:13,22 20:3,15 21:22 22:15 24:6, 10
	conversely 20:5	deck 8:18		efficient 23:3,18
		deeply 26:17		efficiently 44:1
		defer 28:8 38:19		effort 6:5 10:7
		Department 40:11		efforts 6:3
		Department's 24:19		

elements 20:13 22:9,13	extremely 5:7,16 6:17	focusing 44:8,18	Gimbel 9:19	
Ellen 9:10		folks 11:8 27:16	give 10:15 14:11 45:13,20 46:7	<hr/> H <hr/>
email 11:6 23:13 44:19	<hr/> F <hr/>	form 23:12 34:7 47:10	giving 14:7 46:6	hacked 41:22
embraced 28:13	facilitate 23:10	forma 18:18	glad 25:1	Halpert 6:6 9:12 12:1 15:9 16:7 17:10 18:5,12 19:21 21:17 23:15 27:3 40:21 43:10 45:13,18
encourage 32:22	facilitating 33:5	formal 29:15	goal 5:17	hand 23:22 34:17
encouraging 15:3 28:19 35:1	fact 13:15 21:4 31:8 33:1	formats 11:6	good 7:3 8:14 10:18 12:4,8 14:17 15:12 17:6 19:13 21:8 22:15 24:5,9 30:13 37:8 40:4	handle 44:1
end 8:11 9:10 10:9	facto 11:11	formed 4:22 5:14	gosh 36:17	happen 17:18 34:21 41:1 45:12
endorsement 29:13	fair 25:3	forms 12:20	gov 29:16	happened 8:15
engage 5:5 7:6	fashion 21:2	forum 4:10, 47:16	government 28:6 30:19 31:7,9, 20 37:14 45:11	happy 25:14
engaged 31:6	fax 19:1	forward 5:8 6:16 7:7,8 43:17	Great 8:2	hard 5:7,16 8:4 9:18 32:17
engagements 8:7	Federal 30:3 31:11 32:18 39:22	forwarded 44:17	greater 20:3	header 32:15
ensure 16:3	feedback 34:14, 16,18 35:4,14 40:22 41:5 43:4 44:1	frame 30:5	Green 39:8	heads 26:7
enthusiastic 36:10	Feingold 9:20	frankly 31:21	ground 38:3	heard 16:18 40:10,12
entities 12:20	felt 19:17	Fred 9:12	group 5:1,4,6,12, 14,16,17 6:8,14, 19,22 7:19 8:17 10:7,17,21 11:2, 19 13:7,8 14:7 16:12 19:6 20:1 23:2 25:4 27:20 28:1,8,9 32:16 33:11,16,17 34:3 37:20 38:9,13,14, 17 41:22 42:10, 17,20 43:9 44:7, 45:11 46:16 47:13,16	hearing 7:8
essentially 31:3	figure 26:22 37:6 44:16 45:12	fresh 35:7	group's 6:5,9 37:3	heavily 13:5 15:10 41:12
established 4:16	figuring 45:4	fruit 7:2	groups 4:21 11:16 29:8 44:5	held 12:9
Etsy 9:21	file 16:15,17	fruitful 36:20	guaranteed 8:8	helpful 9:11 23:14 42:8 43:11, 14 46:18
eve 18:20	filing 18:20	frustrate 16:17 17:1 21:3,12	guess 11:18 12:12 36:21 42:10 44:2	herculean 6:2
everyone's 7:6	final 11:3 23:15 28:2,22 30:19,21 31:1 33:2	frustrating 16:20	guidelines 16:1 20:12	hey 15:16 42:11
evolved 5:20	finalize 11:4 26:21 32:17 47:10	frustration 6:15	guys 31:6 46:2	high 6:10
examples 11:4	find 15:20	full 10:20 30:1		high-quality 20:7
expect 27:5	finished 46:22	full-group 19:5		higher 8:8
explain 12:14 21:8	fit 39:11 41:16	fully 10:20		highlights 14:12
explaining 20:14	fits 39:14	function 22:5		holiday 44:17
explains 19:20 21:14	Flaherty 9:19	fundamental 42:17		holidays 45:15, 21 46:8
explanation 19:15	floor 25:10,16,20 27:9	funnel 41:3		Hollis 46:10
express 8:16	focus 32:12	funneling 44:12		home 45:16
expressed 16:8 17:11 19:4 22:3	focused 20:1	future 42:19		honest 33:4
extent 29:8,13 44:6	focuses 19:7	<hr/> G <hr/>		
		gather 33:18		
		general 8:10 30:4 35:14		
		generated 30:21 31:1		

proceeding 30:2 43:4	publicized 28:13 32:9	14:18 38:22	report 11:17 24:12 25:9	run 33:13
process 4:15 5:5, 19 8:6,14 10:2,8, 13,14 14:6 16:9, 18 21:11 22:19 23:3 26:4 27:11 31:5 32:2,7,9,19 33:5,12 34:3 35:9, 16,21 36:20 40:8, 13,15 41:2,5,12	pure 21:5	reasons 34:12	reporting 14:5 22:2,7,11,22	running 33:5
processes 13:8 39:7	purposes 21:6	receive 14:3 28:17	represented 43:17 44:5	rush 10:4
processing 23:17	pursuant 39:8	received 25:7 39:9,12 46:17	represents 44:10	<hr/> S <hr/>
produce 25:5	pushed 9:15	receives 15:19	requesting 23:16 24:2	sake 35:1
produced 7:15, 18 10:10,18 25:2 40:14	put 9:21 30:3 32:21 35:5,13,17 47:12	recent 7:4 35:10, 20	research 11:10	Sandra 6:6,7 7:9 8:5,18 24:22 26:4, 10,21 38:20 41:7, 14 43:12,22
product 40:3	<hr/> Q <hr/>	recipient 23:4	reside 29:10	Sarah 9:20
productive 43:1	question 26:19 27:17,19 37:4,9 39:2 40:5 46:12 47:8,11	recognize 6:4 11:2	resides 15:3	scale 20:11
program 20:6	questioning 39:4	recognized 17:21	resolve 13:13	schedule 18:9 27:22
programs 20:2	questions 14:9 25:11,17 47:5	recommended 14:17	resources 43:12	scheduled 4:13, 15 27:19
progress 14:13, 16 16:13	<hr/> R <hr/>	recommending 10:18	respect 15:13 34:22	scheduling 11:7
promote 21:21 22:14,18	raise 47:7	reference 15:15 18:21	responding 19:4 30:13	scholarly 11:10
promotes 24:6, 10	raised 30:17 32:6 43:3	references 16:11 18:22	response 17:8 23:11,20 38:18 39:4	Schruers 29:2,6 34:10 37:21
protecting 10:13	raising 37:4,9	referring 15:18	responsible 44:20 45:4	scope 11:21 13:22 14:14 42:13
provide 18:18 22:6 23:5	range 4:17	reflected 23:2	result 33:4 41:21	screen 46:3
provided 10:1 13:6 17:16	re-litigating 43:2	reflects 34:2	resulted 24:13	security 20:19,20 21:5,20 22:18
provider 12:21 15:18 16:22 22:10 23:18	re-post 17:4	Register 30:3 32:18 39:22	results 6:9	Seidler 9:10
providers 14:3 16:14	re-posting 17:8	reiterate 8:3	rethinking 41:21	self-selecting 45:2
providing 20:6 22:11	reaching 8:12	relate 19:21	RIAA 26:2	send 17:6 21:12 22:8 34:9 43:8,15 44:7,9
provisions 24:17	reaction 36:5	relates 20:18 42:13	Rights 46:15	sender 20:2 23:4, 6
PTO 27:6 29:11	read 37:3 43:12	relevant 13:12 29:17	rightsholder 44:7	senders 14:2 15:4 16:2
public 4:9,20 5:11 6:7 10:1 29:22 35:15 36:2	readers 19:18	remains 12:7	rigmarole 31:13, 14,15	sending 15:13 18:4,22 23:8 44:3
	reading 45:4	remove 12:22	road 39:10 42:21	sense 10:16 12:17 35:12,17 41:18 43:6
	ready 10:4	removed 11:12	roll 5:3	sensitive 7:5
	real 22:3	reorganized 13:4,5	room 9:3 25:6 26:1,16 36:12 47:1	separate 12:21 40:13,17
	realize 35:15	repeated 17:8	rooms 6:14	
	reason 35:10	replacing 24:20	round 9:4 26:9	
	reasonable	repopulating 16:10,19	roundtables 39:13 40:7	

separately 45:8	23:22 24:8	stand 9:3	Sunday 9:14	third-party 16:2
series 10:10 12:7 18:15 43:2	sixth 4:9	standardization 5:18 7:1	supplement 18:2	thought 31:13 40:5 43:20
service 14:3 15:18 16:14,22 23:18	Siy 9:22	stands 35:12	supported 28:13	thoughts 40:11
services 19:19	sleeves 5:3	start 8:22 36:20	suppose 26:19 27:17 39:3,10	thousand 36:6 43:13
set 13:1 14:14	slightly 13:4 42:15	state 35:6	System 4:12 5:10	threatening 17:17
sets 41:19	small 5:1 9:21	statement 27:2 31:17	T	Thursday 27:14
setting 16:21 22:19	smaller 4:22 11:16 33:10	status 8:21 10:16 22:2,7,11,22 24:12 28:3	table 8:13 43:17	tie 26:22
share 6:15 7:9	so-called 16:9	stay 25:14 36:3	tackle 5:18	time 5:22 6:5 7:11,20 9:21,22 20:21 26:15 30:4 32:11 37:2,3 38:13 41:1 47:10, 21
shared 6:8	solicit 34:14	steps 18:10	tactics 18:15	times 41:8
SHECKLER 26:2	solicited 30:4 35:5 40:1	stigmatizing 17:15 18:3	take-down 20:4	timing 9:15 10:21 27:10
shedding 6:18	soliciting 34:19	stop 7:20	takedown 4:11 5:10,19 10:13 16:18 17:1,5,14, 16,21 18:17	title 12:3 13:4
sheet 19:1	sort 10:3 18:18, 22 22:7,10 28:6 29:21 30:18 34:14,15,18,19 35:3,8,12,15 36:1 38:10 44:12	streamline 12:17	taking 16:4	TLD 29:16
Sherwin 9:22	sorts 17:19 22:5	structured 11:6	talk 7:17 26:18 36:4 45:7	today 7:9,11 9:17 10:1 11:18 27:15
Shira 4:5 8:2 27:13	sound 38:21	study 24:15	talked 11:1,5	tools 14:17,18 21:12
Shira's 45:20	sounds 8:14 35:15	stuff 32:18	talking 25:19 41:16 46:5,6 47:14	topic 7:1
shorter 25:13	speak 11:19	subject 5:18 39:21	talks 22:16	topics 7:5
shy 9:6	speaking 32:8	subjects 6:21	technical 30:14	touched 7:5
SIA 38:2	special 30:18	submission 21:3,11 22:20	technically 45:8	track 23:6
side 13:19 41:4	specific 23:22 25:17	submit 22:10 28:16 37:6 41:20	ten 41:9	trade 4:20
sides 32:2	specifically 18:9	submitted 23:12, 13 42:7	Teri 46:13,14	Trademark 4:6
sift 42:11 44:15	spelled 17:2	submitting 17:14,20 22:12	term 30:15	transparency 33:7 34:12
significance 30:18	spells 16:21	sufficient 41:11	termination 17:7	traveled 9:16
significant 14:1, 13 20:15	spent 20:20	suggest 29:11 30:6 34:11 44:2, 22	technical 30:14	tremendous 8:15
Similarly 17:3	stage 33:2	Suggested 15:12	technically 45:8	tremendously 9:18
simply 41:22	stakeholder 12:10 43:16 44:5, 11	suggesting 30:1	ten 41:9	tricky 18:22
single 21:11 36:12	stakeholders 4:18 6:20 12:17 13:9,20 19:5 32:22 40:14 42:4 43:18 47:14	suggestion 27:14	Teri 46:13,14	trip 9:13
sit 36:4		suggestions 30:13	term 30:15	trusted 20:1
site 11:9 14:20,22 15:21 17:9		suggests 21:20	terms 8:3,4 10:11 17:3 24:11	turn 7:21 8:17
situational 10:19 12:4,5,14 19:10 20:9,16 23:15			termination 17:7	
situations 21:9			text 28:22 41:18 45:14	
			thank 8:22	
			thing 8:10 18:12	
			things 14:20 17:17 18:22 35:3 36:16	
			thinking 39:3,6, 10 40:2 47:20	

25:13		45:11 46:16
turned 5:1	<hr/> W <hr/>	47:13,15
tweak 42:14	wanted 21:8 26:3	workstream
types 4:19 42:3	33:17,18	42:19
typically 20:13	warning 17:7	worry 44:14
42:4	Washington	worse 31:14
<hr/> U <hr/>	9:13	worth 21:16
ultimately 28:14	watched 35:9	47:18
36:21	watching 6:13	worthy 29:20
unanticipated	ways 11:8,11	wrong 22:10
11:11	19:16	<hr/> Y <hr/>
underlie 13:12	web 12:20 23:12	Yahoo 9:19
understand 9:14	webcast 4:8	year 4:14 9:22
understanding	33:19 38:8	yesterday 7:14
6:19 8:9	website 24:19	10:3
unique 13:1	27:6,7 29:11	
Usenet 12:20,21	30:19 31:2,20	
13:1	32:5	
user 44:9	week 15:11 27:15	
users 10:13	weeks 7:4,10	
<hr/> V <hr/>	weigh 14:8 30:5	
valid 16:16 17:14,	West 10:5	
16,21 18:4 22:20	wide 4:17 47:13	
37:4,9	wider 6:19 28:1	
valuable 6:17	willingness 5:2	
vehemently 42:5	7:6	
vehicle 35:18	win-win 20:8	
Verizon 9:20	wondering 30:8	
version 28:2	word 6:2 36:7,9	
30:19 35:14 37:18	41:15	
versions 30:21	work 5:20 6:10	
31:1	8:4 11:3,13 13:22	
Vicky 25:20 26:2	14:14 20:10 25:3	
virtual 6:13	26:6 27:20 31:18	
visible 14:21	35:3	
volume 14:22	worked 5:6,16	
von 9:12	9:18 12:6 13:5	
	15:10 18:14 19:9	
	working 4:22 5:4,	
	12,17 6:5,8,14	
	7:19 10:20 13:7	
	16:12 27:20 29:8	
	33:16 37:20 38:9,	
	13,14,16 39:5	