

The National Music Publishers' Association ("NMPA"), the Nashville Songwriters Association International ("NSAI"), SESAC, Inc. ("SESAC"), and the Church Music Publishers Association ("CMPA") respectfully submit these comments in response to the United States Patent and Trademark Office's Request for Comments ("Request for Comments") on the Department of Commerce's Internet Policy Task Force ("Task Force") Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy ("Green Paper"). 78 Fed. Reg. 61337.

Introduction

NMPA, founded in 1917, is the principal trade association representing music publishers and songwriters in the United States. As such, NMPA works to protect the interests of the music publishers and songwriters and has served as the leading voice of the American publishing industry in Congress and the courts. With over 3,000 members, NMPA represents both large and small music publishers throughout the United States.

NSAI, founded in 1967, is a trade organization dedicated to serving songwriters of all genres. With approximately 5,000 members, NSAI seeks to advance and protect the legal and economic interests of the creators of musical works. NSAI also helps to educate, develop, and promote songwriting talent through its more than 150 chapters and through a variety of educational programs, services and resources.

SESAC is a performing rights organization ("PRO") that services both the creators and the users of musical compositions. SESAC grants licenses for the public performance of more than 300,000 songs to a wide variety of music users. In turn, SESAC collects and distributes royalties to its many thousands of affiliated songwriters, composers, and music publishers.

Comments of National Music Publishers' Association,
Nashville Songwriters Association International
SESAC, Inc.
Church Music Publishers Association

SESAC is one of three domestic PROs recognized under the Copyright Act. Established in 1930, SESAC is the second oldest and the fastest growing PRO in the United States.

Founded in 1926, CMPA is an organization of Christian and religious music publishers representing songwriters of that musical genre. Included among the 62 member companies are non-denominational independent publishers, as well as representatives from every major denominational publishing house, including the United Methodist Church, Southern Baptists, Roman Catholic Church, Nazarene Church, Seventh Day Adventists, Church of God, the Lutheran Church Missouri Synod and the Evangelical Lutheran Church of America. The wide range of sacred, gospel and contemporary Christian music products created by CMPA companies include hymnals and praise songs, plus choral, instrumental, handbell, keyboard and children's music. The CMPA members share a strong spiritual dimension and work together to support and promote worldwide copyright protection and education.

As interested stakeholders, NMPA, NSAI, SESAC, and CMPA appreciate the opportunity to participate in the comment process. NMPA, NSAI, SESAC, and CMPA believe that the Green Paper represents an important step in the Department of Commerce's examination into the state of copyright today and look forward to working with the Department of Commerce as it continues to revise and add to this study. In many ways, the Green Paper discusses a broad range of topics that impact music publishers and songwriters more than nearly any other stakeholder. As such, we hope to offer a unique perspective and a helping hand as the Task Force develops final policy recommendations regarding copyright law.

We start by providing comments on the issues identified in the Request for Comments. We then follow with brief comments on other important issues raised in the Green Paper. Last,

we conclude with a general concern that the Green Paper reflects an unstated and unexamined assumption: that copyright policy is and should be driven almost exclusively by economic concerns rather than reflecting concerns about the constitutional property right of the authors or, perhaps, even an inherent human right or moral right of the author.

Music Publishing Perspective on Issues Identified in the Request for Comments

Legal Framework for Remixes

The Green Paper defines remixes as “works created through changing and combining existing works to produce something new and creative” and discusses the growing trend of “user-generated content” on platforms like YouTube.¹ This is a broad and somewhat imprecise definition that is particularly confusing when applied to music where a “remix” is generally considered a version of an original sound recording (embodying a musical composition) made by rearranging or adding to the original, such as a dance remix of a popular rock recording. The legal nature of such remixes is that of the creation of a “derivative work.” In other words, “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. §101.

NMPA, NSAI, SESAC, and CMPA take the position that the authors of all “derivative works” – including mash-ups, remixes, and those works incorporating digital samples – must

¹ Green Paper at 38, citing “Kembrew McCloed & Peter Dicola, Creative License: The Law and Culture of Digital Sampling (2011).

always license the pre-existing material (both sound recordings and underlying musical compositions) because there is a viable commercial marketplace in existence for the licensing of these works, and there is no compelling reason to grant an exception – whether as an expanded category of fair use or as part of a new compulsory licensing system – to the user of these pre-existing works. Any changes to the law that would allow users to make derivative works from musical compositions without a license would have a significant impact on songwriters and music publishers because songwriters and music publishers make the vast majority of their living from licensing derivative works, not from the sale of copies of the original, underlying composition. Indeed, the music publishing business today generates significantly more revenue from the licensing of CDs, digital downloads, interactive streams, non-interactive streams, synchronized audio-visual uses and public performances of musical compositions than from the sale of the sheet music and tablature itself. Songwriters and those who invest in their work have a longstanding expectation that derivative works can be monetized, and no compelling reason to redistribute income from the original songwriters and publishers to secondary users exists.

Of course, a derivative work, such as a parody, that is a “fair use” under Section 107 of the Copyright Act is not an infringement. However, our members’ experience suggests the vast majority of unauthorized “remixes” are not entitled to such protection. These “remixes” simply use pre-existing works without the authorization of the author or owner. This doctrine should not be expanded to allow for further stripping away of the rights and livelihoods of creators. The Copyright Act should only permit unlicensed uses in the rarest of circumstances in which use of the original work is necessary to communicate a message, e.g. for parodies. Otherwise, the law should encourage independent creation or require licensing.

In addition, for secondary users who believe their “remix” use of a copyright work is not sufficiently consequential to warrant liability, an argument heard frequently in the context of mash-ups, copyright law provides an appropriate limitation on liability. Only a secondary use that is either quantitatively substantial or qualitatively substantial to the original copyright work will support liability for infringement. Although it is relatively easy to understand why taking a substantial quantity of a copyrighted work should lead to liability for infringement, the qualitative component of the substantial similarity test is of particular importance to music. The taking of the “hook” of a song, even if just a few seconds of music, is akin to ripping out the "heart" of the work. A “remix” that uses the hook of a song, therefore, is trading on its most recognizable and commercially valuable element.

NMPA, NSAI, SESAC, and CMPA believe that the vibrant marketplace for remixes, whether for more traditional artist derived remixes and works incorporating digital samples, or the newer forms of “mash-ups” and user-generated content, is not in need of fixing or reform. The original marketplace for remixes developed decades ago as a response to digital sampling in the hip-hop industry and has allowed for efficient and reasonable licensing of digital samples. A number of companies have been created solely for the purpose of facilitating the licensing of digital samples, and the marketplace works.

Although user-generated content seems like a new and unaddressed market, it is simply a broadening of the synchronization market in which songwriters and music publishers have been active for decades. Moreover, the marketplace works. Recently, over 3,000 music publishers entered into an unprecedented agreement with YouTube, which allows the use of publisher compositions in user-generated content on YouTube, in exchange for ongoing licensing

payments.² Marketplace agreements like this allow for a sustainable arrangement that ensures creators receive fair compensation for these uses while permitting users to produce new creative works. In this context, there is no need for a government “fix” for user-generated content – existing copyright law and the marketplace created the “fix.”

In light of the functioning markets that exist for remix uses, the implementation of any statutory licensing scheme for these types of uses would impinge upon the rights of the original creators. A compulsory license necessarily means that songwriters and music publishers would be barred from receiving fair market value for their songs, as they currently do in this instance, and limit both the returns and investments in music. Such a system must not be considered as an alternative to the free-market licensing structure that is already in place.

As a final point, copyright law is not solely about the commerce it generates. It encourages imagination, creativity and diversity of expression by providing creators with the opportunity to support themselves. The distinctive and personal nature of the work that is a songwriter's livelihood is often on those who argue that copyright law is a threat to innovation and the internet. Requiring secondary users and distributors of copyrighted works to seek a license and pay for their use no more hinders innovation than the requirements that an internet start-up pay for electricity, office space and computers. Songwriters and artists will only create works of quality if they have faith that the market, based on a solid legal foundation, will support their work. Perhaps more discouraging, however, would be society's demonstration that it values imagination, creativity and individual expression so little that it is willing to restrict authors' ability to protect works that are often the most intimate reflections of themselves. It is

²Ben Sisario, YouTube and Music Publishers Reach Ad Accord. N.Y. Times (August 17, 2011), *available at* http://mediadecoder.blogs.nytimes.com/2011/08/17/youtube-and-music-publishers-reach-ad-accord/?_r=0.

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bad and misleading public policy to enact laws diminishing the property interests of songwriters and artists in the name of removing barriers to innovation.

First Sale in the Digital Environment

As referenced in the Green Paper, the Copyright Office has recommended that the first sale doctrine not be extended to digital transmissions where copies are necessarily created. This recommendation was made based on the understanding that such an extension would implicate the reproduction right and after extensive consideration of how such an extension would negatively affect the development of a legitimate digital marketplace and encourage piracy.³ The Copyright Office has thoroughly considered this issue, and NMPA, NSAI, SESAC, and CMPA are unaware of any significant digital marketplace developments that would necessitate a reexamination.

Indeed, the development of licensed digital music services, such as Spotify, that allow consumers to share entire playlists for free indicates that the “traditional benefits of users sharing works with friends and family”⁴ is being addressed by the marketplace. Similarly, businesses have developed to provide libraries with the ability to stream music to their users with prices adjusted to reflect different library budgets. For example, Library Ideas offers Freegal Music⁵ and Midwest Tapes is testing its Hoopla music service.⁶ Considering how often technology companies suggest copyright owners are to blame for piracy because of their “outdated business models,” it is somewhat ironic that proponents of a digital first sale exception seek to impose a 100-year-old legal doctrine and related distribution model on the Internet. The Copyright Office

³Green Paper at 35-36 (citing U.S. Copyright Office, A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act, 78-79 (2001), *available at* <http://www.copyright.gov/reportsstudies/dmca/sec-104-report-vol-1.pdf>).

⁴ Request for Comments at 8.

⁵ <http://www.libraryideas.com/freegal.html>

⁶ <http://www.thedigitalshift.com/2013/03/media/midwest-tape-launches-hoopla-pilot-for-pay-per-circ-streaming-media/>

was prescient in 2001: “[d]igital communications technology enables authors and publishers to develop new business models, with a more flexible array of products that can be tailored and priced to meet the needs of different consumers. We are concerned that these proposals for a digital first sale doctrine endeavor to fit the exploitation of works online into a distribution model - the sale of copies - that was developed within the confines of pre-digital technology. If the sale model is to continue as the dominant method of distribution, it should be the choice of the market, not due to legislative fiat.”⁷

In addition, the concerns underlying the Copyright Office’s 2001 recommendation against a digital first sale exception still apply in the music industry. Digital copies are perfect replicas of the original that can be distributed around the world for almost nothing. On the other hand, physical copies degrade over time and are more costly to distribute outside a limited geographic area. Digital transmissions, therefore, are perfect substitutes for the original, can travel around the world and never need to be replaced. The absence of similar limitations in the digital world would adversely affect the market for the original to a much greater degree than the resale of physical copies. Moreover, a person's claim to have transmitted only a single copy and not retained a back up is extremely difficult to prove or disprove, making piracy undetectable. As a result, a digital first sale exception would allow users to create perfect replicas of the original work and distribute these replicas to others without the creator receiving any compensation, while obscuring piracy and stifling the thriving online music marketplace on which many stakeholders have worked tirelessly.

⁷ United States Copyright Office, A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act, Executive Summary (2001).

To the extent proponents of a digital first sale exception are attempting to “correct” for some perceived loss in comparative value between recordings distributed in a physical medium and those distributed digitally, they have to be operating from an assumption that the market has not properly accounted for the inability to “share” or “resell.” NMPA, NSAI, SESAC, and CMPA are unaware of any support for this assumption. The ability to buy a download for 99 cents on average, the ability to subscribe to a portable music service for \$10 per month, the ability to stream music over computers and portable devices for free, and the availability of music services designed specifically for public libraries suggests the opposite; the market is clearly providing a range of products and services at a reasonable cost that allow wide access to and the sharing of music.

Finally, NMPA, NSAI, SESAC, and CMPA also believe the Supreme Court’s decision in Kirtsaeng v. John Wiley & Sons, Inc., 133 S.Ct. 1351 (2013), was wrongly decided and could potentially have negative impacts on music publishers. The most obvious impact under Kirtsaeng, is that copies of recordings created and made available abroad at lower prices due to local market conditions could then be distributed in the United States at significantly lower prices than copies of works created in the United States, preventing right holders from effectively offering their works at different prices in different markets. Under such circumstances, the availability and influence of U.S. works abroad could diminish as U.S. publishers are driven to increase royalty rates outside the U.S.

In addition, songwriters often sell the right to exploit their compositions in the U.S. to one publisher and the right to exploit the same compositions outside the U.S. to another publisher. Phonorecords made outside the U.S. under the authority of an ex-U.S. publisher

would not seem to qualify as lawfully made under The United States Copyright Act. If the Kirtsaeng decision were interpreted to apply in such circumstances, however, it could result in the diversion of income from U.S. publishers to ex-U.S. publishers. In such a case, the importation of recordings made outside the U.S. and authorized by the ex-U.S. publisher would result in a direct reduction in income to the U.S. publisher and income for U.S. sales being paid to the ex-U.S. publisher. Congress could not have intended such a result.

We also believe there is a practical problem in addressing importation under Kirtsaeng that could result in increased piracy. Kirtsaeng requires that recordings purchased outside the U.S. have been lawfully made, meaning the manufacturer must have obtained proper license authority. However, determining whether an imported recording was properly licensed is extremely difficult. In many cases, perhaps most, the licensed manufacturer will not be the importer. A legitimate importer will have simply purchased records from a wholesaler or maybe a record label directly, but the U.S. publisher will have no way of connecting the importer to the license. Pirates and legitimate importers will look the same. Requiring an import license under Section 602 makes the distinction clear. Under the Kirtsaeng decision, parties not privy to the licensing transaction, the U.S. publisher and the importer, will have to obtain and verify proof of licensing without being in control of the licenses. To make matters more confusing, such licenses are often administered by third-party societies outside the U.S. Again, such an inefficient practice could not have been intended by Congress.

Statutory Damages

NMPA, NSAI, SESAC, and CMPA agree with the Task Force that the availability of statutory damages has become increasingly important in the online environment. Particularly

with respect to secondary liability, the availability of statutory damages is imperative to sufficiently deter online services providers from creating platforms that encourage or even induce copyright-infringing activity. Further, as illustrated by the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, statutory damages are necessary in the Internet era to deter the direct infringement by individual file sharers.⁸ The legislative history of this Act provides the reasoning for the most recent essential increases in statutory damages, declaring

[m]any infringers do not consider the current copyright infringement penalties a real threat and continue infringing, even after a copyright owner puts them on notice that their actions constitute infringement and that they should stop the activity or face legal action. In light of this disturbing trend, it is manifest that Congress respond appropriately with updated penalties to dissuade such conduct. [. . .] Courts and juries must be able to render awards that deter others from infringing intellectual property rights. It is important that the cost of infringement substantially exceed the costs of compliance, so that persons who use or distribute intellectual property have a strong incentive to abide by the copyright laws.⁹

It is the position of NMPA, NSAI, SESAC, and CMPA that the most recent increase in statutory damages reflects Congress' well-reasoned response to the threat of online piracy and does not require a re-examination at this time.

Government Role in Improving the Online Licensing Environment

The Request for Comments cites the “need for more comprehensive and reliable ownership data, interoperable standards enabling communication among databases, and more streamlined licensing mechanisms” and inquires into whether there is a potential role for

⁸Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774 (1999).

⁹H. REP.NO. 106-216, at 3, 6 (1999).

government in facilitating the creation of these.¹⁰ Specifically, the Task Force suggests the possibility of government involvement in standardizing rights ownership information for the creation of a reliable database.

NMPA, NSAI, SESAC, and CMPA agree with the Task Force that this type of effort is best addressed in the private sector, specifically with regard to musical works. While the creation of standardized, comprehensive, and reliable rights information is vital, the development of a Global Repertoire Database (GRD), which will provide a “central, authoritative, multi-territorial source of the global repertoire of musical works copyright metadata,” is already substantially underway as the result of global private industry participation.¹¹ The GRD is currently in the Requirements and Design Phase and is projected to be operational in 2015 or soon thereafter.¹² The database will provide information to users that will allow for a more streamlined online licensing environment, so the participation of the United States government in the development of international initiatives such as the World Intellectual Property Organization’s International Music Registry would most likely be redundant and create uncertainty and discord among participants over extraneous issues.

Operation of the DMCA Notice and Takedown System

NMPA, NSAI, SESAC, and CMPA are very supportive of a re-examination of the existing DMCA Notice and Takedown System and believe that the DMCA System must undergo significant modifications in order to effectively protect the rights of creators and copyright

¹⁰DEP’T OF COMMERCE, USPTO, NTIA, Request for Comments on Dep’t of Commerce Green Paper, *Copyright Policy, Creativity, and Innovation in the Digital Economy*, Docket No. 130927852-3852-01, at 11.

¹¹ Global Repertoire Database, FAQ, <http://www.globalrepertoiredatabase.com/index.php/faq>.

¹² Tom Pakinkis, *Global Repertoire Database 'First Release' Now Scheduled for 2015* (Jan. 24, 2013, 3:22 PM), <http://www.musicweek.com/news/read/grd-first-release-now-scheduled-for-2015/053308>.

owners. The Request for Comments accurately describes right holders' frustrations regarding the numerous unwieldy steps required of copyright owners under the DMCA.¹³ The DMCA places the burden of policing for infringing activity on copyright holders, many of whom lack the resources to ensure that their rights are not being infringed upon on the countless platforms online. As referenced in the Green Paper, copyright owners are forced to play a game of "whack-a-mole" that requires sending repeated notices about infringing content that is often put back nearly immediately after it is taken down.¹⁴

For example, services like YouTube have changed the digital landscape, facilitating and monetizing the distribution of millions of videos containing various types of copyrighted content. Placing the responsibility for policing this content squarely on copyright owners creates a significant burden, particularly for many small copyright owners that simply do not have the means to scour content on YouTube and other similar online services. As interpreted by the courts so far, the DMCA has turned one of the fundamental tenets of efficient allocation of legal responsibility on its head. Digital services that monetize the distribution of copyright content are the least cost avoiders when it comes to identifying infringing distribution of copyrighted works. Yet they have generally found little incentive to implement the systems and processes necessary to evaluate the legality of what they are monetizing, even when the business founders know they are making money by encouraging infringement.

The DMCA system was initially designed as an attempt to provide a safe harbor for service providers and a tool for copyright owners to protect and enforce their rights in the context

¹³DEP'T OF COMMERCE, USPTO, NTIA, Request for Comments on Dep't of Commerce Green Paper ,*Copyright Policy, Creativity, and Innovation in the Digital Economy*, Docket No. 130927852-3852-01, at 13.

¹⁴ Green Paper at 56 (citing MPAA, RIAA, & NMPA IPEC Submission at 19-20, *available at* <http://www.mpaa.org/Resources/7960e748-c27e-4745-afe9-1012c85a4755.pdf>).

of those safe harbors. However, the placement by courts of the burden of policing entirely on copyright owners “has provided incentives for internet businesses to turn a blind eye to infringement, or even to build it into their business models.”¹⁵ It has become business as usual to hide behind the DMCA and grow a new business on the back of the copyright owners by distributing unlicensed copyrighted works through the Internet. Although we do not begrudge those who invest in such business a fair return, they do not provide the same respect to our constituents who invest their lives and money in music.

NMPA, NSAI, SESAC, and CMPA firmly believe that fundamental changes must be made in the existing DMCA in order to provide copyright owners with an effective mechanism for protecting their rights, and we look forward to participating in any multi-stakeholder dialogue regarding the improvement of the operation of the DMCA system. Any dialogue should address methods that would allow copyright owners, especially individuals or small and medium-sized enterprises, to more easily and effectively use the DMCA system without putting a significant strain on their resources. While most music stakeholders are not supportive of a general small claims court for copyright, NMPA would consider a system that, rather than address a broad range of claims, created an alternative resource for notice and takedown procedures for those users who cannot afford to undertake this process on their own under the existing DMCA notice and takedown system.¹⁶

¹⁵MPAA, RIAA, & NMPA IPEC Submission at 19-20, *available at* <http://www.mpaa.org/Resources/7960e748-c27e-4745-afe9-1012c85a4755.pdf>.

¹⁶ The Nashville Songwriters Association International filed initial comments regarding the creation of a small claims court. NSAI has yet to conclude its final position on the creation of a small claims court but does agree that such a court should address facilitating takedown notices.

At its core, however, any discussion regarding the DMCA must consider a return to a system whereby and the copyright distributor “polices” its own business and the copyright owner is not forced to “police” the entire Internet.

Issues Identified in Green Paper

The Green Paper also identifies a number of other areas of copyright law that directly affect creators and owners of musical compositions. It is worth commenting on some of these issues, and to also point out that songwriters and copyright owners must be consulted in any future dialogues on these issues as they are directly impacted, in a fundamental way, by the outcome of any policy reforms.

For example, the Green Paper addresses rate setting standards and the complexities of music licensing in the realm of the digital transmission of sound recordings, specifically focusing on an apparent disparity between the Section 114 rate setting standard and the licensing rates set in direct license agreement. While these are important issues, the fact that songwriters and music publishers are forced, under Sections 115 and 801(b) of the copyright Act, to work in a market in which one-third of their revenue is subject to governmental price controls is unacceptable in the American system of free-enterprise. The Section 114 statutory license that spurred the creation of a flourishing marketplace for non-interactive streaming services¹⁷ is governed by the “willing buyer, willing seller” rate setting standard, which allows the Copyright Royalty Judges to set a royalty rate that approximates the fair market value of the use.¹⁸ The statutory license used for the reproduction of music compositions, however, is still governed by the standard created in

¹⁷ Green Paper at 94.

¹⁸ 17 U.S.C. § 114(f)(2)(B).

Section 801(b) of the Copyright Act¹⁹, resulting in significantly lower royalty rates and in the devaluation of musical compositions.²⁰ Any meaningful dialogue regarding rate-setting standards must consider not only the standards used for the digital transmission of sound recordings but also the standard for the mechanical reproduction of musical compositions.

The Green Paper discusses the development of a small claims court system as an alternative framework for pursuing infringement claims, citing the Copyright Office's suggestion that such a system might lessen the need for copyright owners to rely on the DMCA notice and takedown process. The Copyright Office has issued its report and recommendation regarding this issue after an evidence gathering process which NMPA, NSAI, SESAC, and CMPA believes does not need to be repeated. However, we recommend the Task Force review the comments filed by NMPA, SESAC, and other music stakeholders, to the extent it feels further information is necessary. Essentially, we do not believe there is evidence that the current federal court system inadequately protects music industry copyrights.²¹ In the event the Task Force decides to address this issue further or considers the creation of a small claim court to facilitate the resolution of take down notices, we would appreciate the opportunity to participate in that discussion and believe we have much to contribute.

The Green Paper also examines the role of orphan works in copyright law. NMPA, NSAI, SESAC, and CMPA are supportive of allowing subsequent creators to make non-commercial uses of particular works only in situations in which the original creator cannot be

¹⁹ 17 U.S.C. § 801(b).

²⁰ *Id.*

²¹ Comments of the National Music Publishers' Assoc., the Harry Fox Agency, Inc., Church Music Publishers' Assoc., American Society of Composers, Authors, and Publishers, Broadcast Music, Inc., and SESAC, Inc., *In re Remedies for Small Copyright Claims*, Apr. 12, 2013, *available at* http://www.copyright.gov/docs/smallclaims/comments/noi_02263013/NMPA.pdf.

located after a search has been performed in accordance with a high level of due diligence. NMPA, NSAI, SESAC, and CMPA believe that the problem of orphan works in the music publishing arena is fairly minimal because Section 115 provides a compulsory license, even when the administrator of a composition cannot be identified, and the music industry has developed very sophisticated and thorough databases for identifying songwriters and publishers that are easily accessible to potential subsequent users of works.²² Further, NMPA, NSAI, SESAC, and CMPA believe that content owners, in their unique, creative industries, are best suited to design best practices that fulfill due diligent search requirements. Stakeholders in the music industry must be involved in the development of such best practices to ensure that workable standards are implemented within the framework of the music industry.²³

General Copyright Issues to Consider

NMPA, NSAI, SESAC, and CMPA support the USPTO's attempt to understand better the copyright eco-system so that it can offer constructive advice to the Administration on copyright reform matters. However, NMPA, NSAI, SESAC, and CMPA also believe that the Green Paper and the Task Force's present attempt to identify and seek interaction with stakeholders on vital copyright matters fails to address a very important fundamental question - "What is the philosophical underpinning of Copyright and what role does Copyright Law play in our society." The Green Paper seems to assume that the matter is closed, and that the United

²² Comments of the National Music Publishers' Assoc. and the Harry Fox Agency, *In re Orphan Works and Mass Digitization*, at 2, Mar. 7, 2013, available at http://www.copyright.gov/orphan/comments/noi_11302012/NMPA.pdf; Comments of SESAC, Inc., *In re: Orphan Works and Digitization*, at 2, February 4, 2013, available at http://copyright.gov/orphan/comments/noi_10222012/SESAC-Inc.pdf

²³Id. at 8.

States perspective is that copyright is an economic theory, supporting a system whereby a basket of economic rights must be filled or emptied as the newest service, gadget or application becomes trendy, thus "requiring" creators to relinquish more and more of their rights.

At a minimum, copyright is a constitutional property right and not just an economic theory. There is a solid historical and legal basis for authors and copyright owners to consider their copyright a property interest, even if their works are intangible. Furthermore, many authors, academics, and lawmakers believe copyright is an inherent human right or moral right based on principles of natural law and incorporated into the fabric of international human rights law norms.

Consistent with those principles and our heritage, copyright laws epitomize our culture's reverence for the individual and encourage diversity of expression. The ability to sell a creative work frees authors from dependence on patrons or government grants and provides them with the autonomy to create works of self-expression. Music places a spotlight on the contributions of such authors to our public discourse. For example, songs by Bob Dylan, such as "Only A Pawn In their Game", "Hurricane" and "North Country Blues" are about injustices and tragedies. Rap and hip hop artists have protested against violence, discrimination and poverty in songs such as "I Seen a Man Die" by Joseph Johnson and Scarface, "The Message" by Grandmaster Flash and the Furious Five, "Stop the Violence" by Boogie Down Productions and "Fight the Power" by Public Enemy. Numerous songs have been recorded in support of and in opposition to U.S. foreign policy. For example, Toby Keith, Bruce Springsteen and Green Day contributed their reactions to the attacks of 9/11 in, respectively, "Courtesy of the Red, White and Blue (The Angry American)", "The Rising" and "American Idiot."

Removing or limiting the incentive to create such songs will dilute public discussion. Authors may choose to avail themselves of the protections afforded by copyright law or not, or, as regularly happens, they may even authorize copying under a Creative Commons license. However, songwriters, regardless of the content of their message, are free to write and try their hand at making a living through song. Diluting copyright means diluting songwriters' opportunity and our culture.

This is not merely an academic debate. How copyright is viewed philosophically may well influence how Congress and the Courts structure and interpret copyright law. For example, viewing copyright more as a property interest could arguably compel the Courts to shift the responsibility to police the Internet under the DMCA paradigm from the copyright owner to the copyright user, as this view more accurately reflects a property interest in the copyright, rather than merely an economic incentive as part of an economic theory.

Too often, academics and policy makers in the United States deride this viewpoint as being too "romantic" or inconsequential. Quite to the contrary, we believe copyright is not just about authorship, but about authors and owners. As such, the Task Force, the Copyright Office, and Congress must consider and discuss the underlying philosophical and legal view of Copyright and not just assume away the value of copyright to our culture and public discourse.