

Department of Commerce  
United States Patent and Trademark Office  
National Telecommunications and Information Administration

**Request for Comments on Department of Commerce Green Paper  
“Copyright Policy, Creativity, and Innovation in the Digital Economy”**

**Docket No. 130927852-3852-01**

**Comments of the Recording Industry Association of America, Inc.  
November 13, 2013**

The Recording Industry Association of America, Inc. (the “RIAA”) welcomes the opportunity to submit these comments in response to the above-referenced request for comments (the “Request for Comments”) concerning the Green Paper, “Copyright Policy, Creativity, and Innovation in the Digital Economy” (“Green Paper”).

The RIAA is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of this mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies.

The U.S. music industry has been at the forefront in crossing the digital divide. In 1998, virtually all of our industry’s revenues came from physical product sales. As of 2012, digital revenues accounted for approximately 60% - over \$4 billion - of the industry’s revenues. And in 2013, the proportion of our industry’s revenues that are derived from digital sources continues to increase.

With that growth in digital revenues has come a massive transformation in the economics of the business. Today, fans have more choices than ever to access music digitally. There are literally hundreds of authorized services worldwide offering tens of millions of recordings. From downloads, webcasting, mobile packages, and all-you-can eat subscriptions to ad-supported on-demand streaming, innovative platforms are being developed at a record pace.

Digital is not just our future. It is our present. Given this, we are a key stakeholder in the issues raised by the Request for Comments.

**1. Introduction**

RIAA commends the Department of Commerce for a thoughtful and balanced Green Paper that recognizes the importance of copyright to the U.S. economy and culture, and its role in driving

innovation. We appreciate the Department's proper acknowledgement that copyright "has been a vital contributor to U.S. cultural and economic development for more than two hundred years."<sup>1</sup>

The Department rightfully recognizes that protecting the creation of, and investment in, copyrighted works serves to further the Constitution's mandate of promoting the progress of science and useful arts and our shared goals of fostering an efficient, legitimate, digital marketplace. This should act as the guiding principle as the Government continues this inquiry and further develops its policies.

The demand for U.S. cultural works, and particularly music, has directly impacted the innovation and evolution of various products and services to disseminate, consume, or share information about those works. For example:

- Music is driving business at major technology companies: In the past few years, technology companies from Google to Apple to Amazon, as well as a variety of startups have announced and funded the development of new music delivery services.
- Music has driven adoption of smartphones and tablets: Virtually every smartphone or tablet manufacturer includes music player capability within the device, and has marketed at least one of its devices by, among other things, touting the device's music capabilities.<sup>2</sup>
- Music has played a significant role in Apple's growth: Apple's rise from its falter in the 1990s has been credited to Apple's move into digital music, with the development and rapid public adoption of the iPod in 2001 and its extension to the iPhone line, as well as the launch of iTunes in 2003.<sup>3</sup>
- In-car music enhancements have driven the sale of cars: Luxury cars are marketing themselves based on the enhanced digital music experience in the car,<sup>4</sup> and now more than 100 vehicle models have digital radio in the dashboard.<sup>5</sup>

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<sup>1</sup> "U.S. Department of Commerce Produced Comprehensive Analysis Addressing Copyright Policy, Creativity, and Innovation in the Digital Economy," Press Release No. 13-22, July 31, 2013, available at <http://www.uspto.gov/news/pr/2013/13-22.jsp>. ("Press Release")

<sup>2</sup> See *infra*, footnote 3. See also, ad for Samsung Galaxy S4, available at <http://www.youtube.com/watch?v=zDVI0r1vRFw>, marketing materials for HTC Rezound, available at <http://www.htc.com/us/smartphones/htc-rezound/>, etc.

<sup>3</sup> See Van Buskirk, Eric, "Without Music, Apple Would be Nothing," *Time*, September 14, 2012, available at <http://business.time.com/2012/09/14/without-music-apple-would-be-nothing/> ("If Apple had never delved into the world of music, it may never have made that transition; at the very least, it would have taken much longer. During that time, the world would have moved on. It might have been too late. Apple would not be the company it is today and may have faded into irrelevance or even worse."). See also Raboch, Henrique et al., "Fall and Rise of Apple, Inc.: Different Factors Influencing the Company's Growth," *IV Encontro de Estudos em Estrategia*, June 21-23, 2009, available at [http://www.anpad.org.br/diversos/trabalhos/3Es/3es\\_2009/2009\\_3ES493.pdf](http://www.anpad.org.br/diversos/trabalhos/3Es/3es_2009/2009_3ES493.pdf) ("The firm's greatest move for growing at a high level is foreseeing the opportunity at the digital music sector."), and Solsman, Joan et al., "As iPods fade out, Apple's iTunes turns up the volume," *CNET*, October 29, 2013, available at [http://news.cnet.com/8301-13579\\_3-57609845-37/as-ipods-fade-out-apples-itunes-turns-up-the-volume/](http://news.cnet.com/8301-13579_3-57609845-37/as-ipods-fade-out-apples-itunes-turns-up-the-volume/), noting that the iPod "helped pave the way to the company's current riches" and that nearly all of the key functions of the iPod could be found in the iPhone.

<sup>4</sup> See, e.g., the Cadillac commercial at <http://www.youtube.com/watch?v=00eY-Ub53f4>, and BMW marketing materials for its connected music experience at [http://www.bmw.com/com/en/insights/technology/connecteddrive/2013/services\\_apps/online\\_entertainment.html](http://www.bmw.com/com/en/insights/technology/connecteddrive/2013/services_apps/online_entertainment.html).

<sup>5</sup> See, e.g., Pandora Press Release, June 25, 2013, available at <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&id=1832680> ("The company now

- Music is driving user engagement with social media:
  - Facebook: 37 of the top 50 pages (74%) on Facebook are for creative content (music, books, movies/TV) or creators of creative content<sup>6</sup> and 9 of the top 10 celebrities on Facebook are sound recording artists.<sup>7</sup> Music is also driving the creation of new apps and digital advertising methodologies on Facebook.<sup>8</sup>
  - Twitter: 39 of the top 50 profiles (78%) on Twitter are for actors or sound recording artists<sup>9</sup> and 9 of the top 10 celebrities on Twitter are sound recording artists.<sup>10</sup>
  - YouTube: 28 of the top 30 most viewed videos (93%) on YouTube are official videos for sound recordings owned or distributed by the major record labels.<sup>11</sup>

In light of this, there is and should continue to be an increasingly symbiotic relationship among digital technology, the Internet, and the creative industries. As Assistant Secretary of Commerce for Communications and Information and NTIA Administrator Lawrence E. Strickling correctly points out, “In this digital future, the rights of creators and copyright owners are appropriately protected; creative industries continue to make their substantial contributions to the nation’s economic competitiveness; digital service providers continue to expand the variety and quality of their offerings; technological innovation continues to thrive; and consumers have access to the broadest possible range of creative content.”<sup>12</sup>

In short, the music industry, like others in the creative communities, is working very hard to grow this digital marketplace, driving new technologies and services, and entering into new digital content agreements and partnerships. The difference in the music landscape between now and just five years ago is astounding. With faster mobile speeds and the rapid transition from online to mobile, even more innovative ways of delivering music through different models and structures will evolve.

But in order to make this digital marketplace truly work, we must ensure that these vibrant new legitimate and authorized technologies are not undermined by those engaged in illegal activity. And because the digital environment changes so quickly, solutions to illegal activity should be flexible enough to address the adapting market, while at the same time faithful to the core principles founded in the Constitution derived from property rights. Thus, we agree that solutions to the issues raised in the Green Paper may require a combination of private sector cooperation, legal remedies, technology, and public outreach and education, along with continued development of options to access copyrighted works legally.

In light of this background, we offer the following observations on the five areas highlighted in the Request for Comments.

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estimates that fully one-third of all new cars sold in 2013 in the US will have Pandora installed, including over 100 vehicle models made available from Acura, BMW, Buick, Cadillac, Chevrolet, Ford, GMC, Honda, Hyundai, Lexus, Lincoln, Mazda, Mercedes-Benz, MINI, Nissan, Scion, Suzuki and Toyota. Pandora listeners can also look forward to future integrations in Dodge, Infiniti, Jeep, Kia and Ram vehicles.”).

<sup>6</sup> See <http://www.socialbakers.com/facebook-pages/>, checked October 29, 2013.

<sup>7</sup> See <http://www.socialbakers.com/facebook-pages/celebrities/>, checked October 29, 2013.

<sup>8</sup> See “Facebook Music App gets Jack-in-the-box Jumping,” AdWeek, October 16, 2013, <http://www.adweek.com/news/technology/facebook-music-app-gets-jack-box-jumping-153170>.

<sup>9</sup> See <http://www.socialbakers.com/twitter/>, checked October 29, 2013.

<sup>10</sup> See <http://www.socialbakers.com/twitter/group/celebrities/>, checked October 29, 2013.

<sup>11</sup> See <http://en.videotraine.com/all/youtube/all-time>, checked October 29, 2013

<sup>12</sup> Press Release

## 2. On the Operation of DMCA Notice and Takedown

The principles behind the DMCA – to incentivize cooperation among legitimate, law abiding, passive intermediaries and content owners by providing safe harbors and a mechanism for the efficient removal of unauthorized content<sup>13</sup> – are sound. We agree that it is appropriate to have proper incentives among law abiding companies in the digital ecosystem to encourage a legal marketplace and the free flow of information while discouraging infringing activity, with due consideration for the legitimate rights of all stakeholders.

However, the DMCA was written in 1998 for a World Wide Web that was only a few years old and access to it for most Americans was via low-speed, dial-up connections. It was negotiated before Google was founded, and before Napster was released. Congress did not anticipate today's Internet where most Americans have access via broadband connections, server capacity is inexpensive, there is widespread awareness and use of peer-to-peer technologies and lockers, and there are a variety of tools readily available to circumvent the notice and takedown system. Moreover, judicial interpretations of the law have weakened the DMCA in ways that were not anticipated during discussions leading to the DMCA.<sup>14</sup> The instant and widespread repopulation of files that have been "taken down" on hosted sites is a good example of a problem that, unless effectively addressed, undermines the careful balance Congress intended to strike.

We agree with the Department that the time is ripe to address some of the deficiencies in the way the DMCA notice and takedown system operates today. Although the immunity available to qualified intermediaries is broad and remains constant, the protection from infringement offered by the notice and takedown system simply is not achieving its intended goals in the current Internet ecosystem and is inefficient. For example, we continue to find Katy Perry's "Roar" on mp3skull.com among the first Google search results for "Katy Perry Roar Mp3" after we have sent well over 300 notices about the recording to mp3skull.com and to Google.<sup>15</sup> In fact, we have sent over 35 million copyright removal

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<sup>13</sup> See, e.g. Report of House Commerce Committee on H.R. 2281, the Digital Millennium Copyright Act, H.R. Rep. No. 105-551, pt. 2, 49 (1998) (stating that the DMCA "preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment"); Conference Report on H.R. 2281, the Digital Millennium Copyright Act, H.R. Rep. No. 105-796, 73 (1998) ("[T]his legislation is not intended to discourage the service provider from monitoring its service for infringing material.").

<sup>14</sup> See, e.g., *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099 (CD. Cal. 2009), *aff'd*, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011); *Capitol Records, Inc. v. MP3Tunes, LLC*, 611 F. Supp. 2d 342 (S.D.N.Y. 2009). The district court decision in *Viacom, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *aff'd in part, rev'd in part, and remanded*, 676 F.3d 19 (2d Cir. 2012), reaffirmed, 107 USPQ 2d BNA 1157 (S.D.N.Y. 2013), currently on appeal to the Second Circuit, is another example of misinterpretation of the statute, although that decision was reversed in part on appeal. See also RIAA's joint filing with several other creative content organizations dated December 10, 2010 in response to the Department of Commerce Notice of Inquiry on Copyright Policy, Innovation and the Internet Economy in 75 Fed. Reg. 61419 (October 5, 2010). The joint filing is available at [http://www.ntia.doc.gov/files/ntia/comments/100910448-0448-01/attachments/Copyright%20NOI%20\(revised\)%20-%20121310%20\(3334319\).pdf](http://www.ntia.doc.gov/files/ntia/comments/100910448-0448-01/attachments/Copyright%20NOI%20(revised)%20-%20121310%20(3334319).pdf) ("Joint DOC Submission").

<sup>15</sup> See also RIAA's joint filing with The Motion Picture Association of America (MPAA) and the National Music Publishers' Association (NMPA) dated August 10, 2012, in response to the request for written submissions issued by the office of the Intellectual Property Enforcement Coordinator (IPEC) in 77 Fed. Reg. 38,088 (June 26, 2012). The joint submission is available at <http://www.mpa.org/Resources/7960e748-c27e-4745-afe9-1012c85a4755.pdf> ("Joint IPEC Submission").

requests to Google concerning roughly 200 rogue sites, and yet some of the top noticed sites continue to show up on the first page of search results. Locking both creators and intermediaries into an old, ineffective system squelches innovation and stunts the growth of new Internet services that consumers demand, while also limiting the ability to properly address the potential abuse that the current system may inadvertently incentivize.

We further agree with the Department's recommendation that relevant parties should develop and implement voluntary best practices to address these concerns, and appreciate the Department's announced plans to hold roundtable discussions on this topic. In addition to the other issues noted in the Request for Comments, issues that should be addressed in any voluntary practice discussions include the following:

- (i) ensuring "take down means keep down" by preventing repopulation of the work taken down under the notice and takedown system – whether at a hosting provider or in a search index of the same work at the same website;
- (ii) applying disclosure/identification and promotion of authorized sites and services to consumers in search rankings;
- (iii) ensuring demotion of rogue sites in search rankings through objective criteria such as number of legitimate notices sent about the site;
- (iv) ensuring that any auto-complete or similar function in search activity does not recommend sites, videos, apps or similar items that have been identified as persistently engaging in or facilitating infringement;
- (v) including common-sense checks to avoid wide-scale infringement via hosting sites, such as checks on content widely disseminated from the site, or removing financial incentives for uploaders to load copyrighted content to the site;
- (vi) assuring clarity and efficacy of repeat infringer termination policies; and
- (vii) establishing commitments to work together to develop and implement effective technical measures to help identify copyrighted works and the rights or permissions associated with those works in order to ensure those rights or permissions are fairly respected, in compliance with other legal principles.

Although best practices are not a silver bullet, they offer a mechanism to address the rapidly changing digital environment we face today, while holding to core principles. They provide flexibility to permit stakeholders to address abuses, and to implement a practical system that encourages legal alternatives and discourages infringing uses in a fair and balanced manner.

The music industry stands ready to work on these issues with search engines, remote storage services, locker services, domain name registrars/registries, and others, just as we have with payment processors, ISPs, and advertising intermediaries. Internet intermediaries are our partners. Music drives their products and services and makes them desirable to consumers. As described above, technology services make our members' music available to global audiences. This interdependence provides long-term growth opportunities for both creators and technology companies.

We have confidence that, working together with these partners, and with encouragement from the Government, we can take steps to accomplish the original goals of the DMCA, and to update the notice and takedown system to adapt it to 2014 and beyond.

### 3. On Legal Framework for Remixes

Before turning to the question of whether the legal framework for remixes is sufficient, the Task Force should first identify what it means by a remix when framing the question. The term “remix” has been used to describe a whole range of different works, including:

- alternative versions of a sound recording, with or without new material (*e.g.*, fitness, dance, club and other multi-genre versions);
- mashups of recorded material such as the Grey Album, made by combining the Beatles’ White Album and Jay Z’s Black Album;
- digital sampling, using snippets of existing recordings within new ones; and
- mixtape-type products, such as unauthorized compilations of recordings by different artists, unauthorized compilations of recordings by the same artist from several albums, or simply compilations of unauthorized material.

And like these works themselves, each case is unique, necessitating a consideration of specific fact patterns, situations, and uses. Some works and uses may suitably fall within the proper parameters of the fair use doctrine; others do not. The Task Force should keep this in mind in reviewing the current legal framework. In particular, a nuanced, flexible approach to deal with the various uses that can be made of copyrighted material may be a better approach than a one-size-fits-all policy.

In addition, the Task Force should keep in mind other values that encourage artists to continue to create. One such value is protecting the artist’s integrity and artistic vision for his work. We believe this means that rights holders have an obligation to consider carefully whether to prohibit the use of their intellectual property to deliver messages that are likely to tarnish the artist’s reputation or that unacceptably dilute the value or meaning of the original recording. To be clear, we believe in a balanced fair use doctrine and that certain criticism, scholarship, etc., should not require licenses, but we also want to caution that these issues need to be considered as well in evaluating when it is appropriate to permit remixes absent authorization from the rights holder.

Finally, the Task Force should be mindful of the various licensing models available today to address at least some forms of what might be considered remixes, including:

- the YouTube Content ID system and other content identification systems, such as Audible Magic;
- robust B2B sample licensing within the music industry;<sup>16</sup> and
- efforts to develop a comprehensive micro-licensing platform.<sup>17</sup>

Several of the types of remixes noted above may be adequately addressed via the marketplace. For example, sound recording licenses with YouTube permit users to post certain types of remixes of our members’ works on YouTube. YouTube pays the rights holders for the use of their creations in the subsequent user generated content (UGC), and permits rights holders to exercise further control over

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<sup>16</sup> Several companies exist to clear and license digital music samples, including Diamond Time.

<sup>17</sup> See Christman, Ed, “RIAA & NMPA Eyeing Simplified Music Licensing System, could Unlock “Millions” in New Revenue,” *Billboard*, June 13, 2013, available at <http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could>. We and NMPA are actively continuing our efforts to develop such a platform.

their works when needed. Under this system, users can include their UGC works on other websites via embedding the YouTube link to the work on the third-party site, or share the YouTube link to the work with others.

Is the system perfect? No, but because this system is based on contractual licenses, it is flexible and rights holders and platforms can more easily adapt to changes in the market and to address abuses if/when they arise.

In short, it appears that through the continuing growth of the marketplace, coupled with the appropriate application of the fair use doctrine and continued dialogue among stakeholders, that stakeholders have the tools necessary to further promote progress in this arena. As we represent both original creators and those that use sampling in their work, we are committed to ensuring that an appropriate balance is reached.

#### **4. On First Sale in the Digital Environment**

As the Task Force evaluates first sale in the digital environment, it should inquire into the foundation behind this physical world doctrine and evaluate whether that foundation applies in today's digital world. Although often portrayed as a simple extension of Section 109, applying the first sale concept to the digital environment involves several complexities regarding application, practicality, and enforcement, and doesn't adequately take into account the real, but different, benefits users enjoy in the digital environment.

As former Register of Copyrights Marybeth Peters stated, "Digital transmissions can adversely affect the market for the original to a much greater degree than transfers of physical copies." In particular, "[p]hysical copies degrade with time and use; digital information does not. Works in digital format can be reproduced flawlessly, and disseminated to nearly any point on the globe instantly and at negligible cost."<sup>18</sup> These differences still exist today, and must be kept in mind in addressing this issue.

Importantly, unlike distribution in the physical world, digital distribution necessitates making an exact copy of the work. First sale is based on a limitation to the right of distribution, not a limitation to the right of reproduction as well. In the physical world, the creation of a copy of the work to be sold is not permitted under the first sale doctrine.

In addition, as Ms. Peters noted, in the physical world, the further distribution of the copy subject to the first sale doctrine is inextricably linked with abandonment of possession of the copy by the distributor. Conversely, the necessity of reproduction to pass on a good within the digital realm precludes the assurance that the original owner has abandoned (disposed of) the good (or, of course, distributed only one copy). Ensuring such complete abandonment raises privacy, evidentiary, and enforcement issues. Any discussion about applying the first sale doctrine to the digital world needs to consider these costs as well.

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<sup>18</sup> Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary, United States House of Representatives, December 12-13, 2001 <http://www.copyright.gov/docs/regstat121201.html>.

Digital consumers today have unique benefits attributable to the digital space that were simply not available in the physical world. For example:

- Lower pricing: The legal digital marketplace presents consumers with a myriad of options for acquiring copies of music and other cultural works – typically at a price point far below what would be spent for a physical equivalent.
- Simultaneous usage: The legal digital marketplace for creative content today often permits multiple copies of the work to be made, permitting simultaneous sharing of those works within the household or simultaneous multiple copies on different devices.<sup>19</sup>
- Lending with secure return: Some digital business models also permit the user to lend the user’s work to another, and ensure return of that work to the user.<sup>20</sup>
- Sharing for discovery: In the music space, users have the option of sharing YouTube links to their favorite videos with a wide variety of acquaintances and the public generally.
- Trend towards access models: The clear trend towards subscription streaming services and other cloud-based business models enables consumption of copyrighted materials in ways that make possession of the copy by the consumer far less significant, or even irrelevant.

These benefits do not exist in the same manner in the physical world, and mandating that all digital models come bundled with a resale right would distort the marketplace. The Task Force should keep these existing benefits in mind in addressing whether any further benefits from a digital first sale doctrine are necessary or advisable.<sup>21</sup>

## 5. On Statutory Damages

“Congress’s protection of copyrights is not a ‘special private benefit,’ but is meant to achieve an important public interest: ‘to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.’”<sup>22</sup> Proper consequences are a large part of adequate protection of these works. In examining statutory damages, the Task Force should keep this in mind and take into account the current need and purposes of statutory damages.

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<sup>19</sup> For example, under the iTunes system, users can have and enjoy a purchased recording on 10 devices simultaneously. See <http://support.apple.com/kb/ht4627>.

<sup>20</sup> For example, a Kindle user can lend some of their books for up to 14 days. See <http://www.amazon.com/gp/help/customer/display.html?nodeId=200549320>. Amazon also has a program with public libraries to make ebooks available for lending. See, e.g., <http://www.amazon.com/gp/feature.html?docId=1000718231>.

<sup>21</sup> Also, we’d like to clarify that not expanding first sale to digital goods should in no way affect the market for products that may incidentally contain copyrighted works. In our view, first sale applies to distribution of physical goods composed entirely of the copyrighted work – or, in other words, goods whose value is fundamentally defined by the copyrighted work, such as books, DVDs of movies, CDs of music, etc. Thus, just because a car contains copyrighted material such as diagnostic or GPS programs, the unavailability of digital first sale should not preclude resale of the car. The same is true for printers, refrigerators, TVs, or any other products that incorporate copyrighted software as a minor component of the product as opposed to creative works.

<sup>22</sup> *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 908 (8<sup>th</sup> Cir. 2012), quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).



### Purpose and Intent Behind Statutory Damages

As Congress has noted, the copyright statutory damages provisions are designed to ensure that “the cost of infringing substantially exceeds the costs of compliance, so that persons who use or distribute intellectual property have a strong incentive to abide by copyright laws.”<sup>23</sup> The Supreme Court has agreed, stating that “a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers ... [and] fall short of an effective sanction for enforcement of the copyright policy.”<sup>24</sup>

Thus, statutory damages must be meaningful, serving as a deterrent beyond mere restitution (as is true for most penalties). And the law recognizes the need for flexibility within this statutory damages construct, and provides juries with wide discretion to determine the appropriate award.<sup>25</sup> Consider two recent cases, *Thomas* and *Tenenbaum*, where the appellate courts held that the damage awards were entirely appropriate, based on the facts of each case.<sup>26</sup> As the First Circuit noted in *Tenenbaum*, the “evidence of Tenenbaum’s copyright infringement easily justifies the conclusion that his conduct was egregious. Tenenbaum carried on his activities for years in spite of numerous warnings, he made thousands of songs available illegally, and he denied responsibility during discovery. Much of this behavior was exactly what Congress was trying to deter when it amended the Copyright Act.”<sup>27</sup> Similarly, the Eighth Circuit stated that “Thomas-Rasset’s willful infringement and subsequent efforts to conceal her actions certainly show ‘a proclivity for unlawful conduct.’”<sup>28</sup> (In fact, Ms. Thomas-Rasset’s conduct was so egregious that *three separate* juries awarded plaintiffs significant damages.) In both cases, the courts gave deference to Congress’ determination regarding how best to further the public interest in the promotion of science and the useful arts, noting in both cases the egregious behavior of the defendants.

Of course, while the higher end of the statutory award limit – \$150,000 per work in exceptional cases – is often discussed, the same isn’t true of the lower end – \$750 per work. (Under the law, most statutory awards should be in the range of \$750-\$30,000 per work, but can be awarded as high as \$150,000 for work if the infringement was committed willfully. In some cases, where the work does not bear any evidence of copyrighted status and the user had no reason to believe his acts constituted infringement, the award may be reduced to as little as \$200 per work.)<sup>29</sup> This gives juries the ability to assess the facts of any given case, and impose statutory damages within these limits that they feel are appropriate given the conduct at issue. The Task Force should consider whether the availability of this lower range and the discretion granted to juries adequately address fears of large awards against individual infringers while at the same time not unduly restricting the triers of fact from making an appropriate award.<sup>30</sup>

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<sup>23</sup> H.R. Rep. 106-216, at 6.

<sup>24</sup> *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).

<sup>25</sup> See, e.g. *Columbia Pictures Indus. V. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186 (9<sup>th</sup> Cir. 2001).

<sup>26</sup> *Thomas*, 692 F.3d 899; *Sony BMG Music Entm’t v. Tenenbaum*, 719 F.3d 67 (1<sup>st</sup> Cir. 2013).

<sup>27</sup> *Tenenbaum*, 719 F.3d at 71.

<sup>28</sup> *Thomas* at 906.

<sup>29</sup> 17 U.S.C. § 504(c)(1)-(2). The statute further protects certain non-profits from paying any statutory damages if they believed and had reasonable grounds for believing their use was fair use under 17 USC § 107.

<sup>30</sup> Note that, while some portray the \$150,000 high end of the statutory damages spectrum as unsupportable, even the *Tenenbaum* and *Thomas* juries – who found both defendants’ actions willful and egregious – awarded significantly below this maximum, further highlighting the discretion within individual cases. In addition, we note that when considering the statutory range amount on an inflation-adjusted basis, they are in fact at historically low levels, substantially lower than the amounts in 1909.

### Impact of Statutory Damages on Development of New Services

While the threat of statutory damages has deterred some models based on infringing activity, it has not compromised development of the legitimate digital content services industry. In fact, in recent years we have seen a robust development of new digital content services in the marketplace.<sup>31</sup>

Consider the following: In May, 2011, the LimeWire case was settled for \$105 million under a finding of willful infringement and during an ongoing trial to determine statutory damages.<sup>32</sup> In 2012, there was a 34% increase in investment in music services over the previous year.<sup>33</sup> In 2013, we have seen the introduction or announcement of at least the following new digital music services: iTunes Radio,<sup>34</sup> a YouTube subscription service,<sup>35</sup> Pono,<sup>36</sup> and Beats streaming music service.<sup>37</sup> As noted previously, there are now hundreds of legitimate services offering music in a variety of ways at a variety of price points.<sup>38</sup> This remarkable proliferation of innovative legitimate services would not have occurred if the imposition of statutory damages on services based on infringement truly discouraged innovation.

### Recalibration of Statutory Damages

Given the notes above, we do not believe that recalibration of statutory damages is appropriate. Nonetheless, it may be appropriate at this juncture to consider some alternatives. In so doing, the Task Force should consider whether such alternatives would meet the underlying principle of deterrence. For example, would applying the traditional tort doctrine of foreseeable harm in the digital copyright arena help diminish the need for statutory damages at their current levels against some infringers?<sup>39</sup> Should

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<sup>31</sup> For a general discussion of these issues, see Marks, Steven, "Debunking the 'Stifling Innovation Myth: The Music Business's Successful Transition to Digital,'" 2013 *Wis. L. Rev. Online* 21, available at [wisconsinlawreview.org/wp-content/files/4-Marks.pdf](http://wisconsinlawreview.org/wp-content/files/4-Marks.pdf). See also Menell, Peter S., Indirect Copyright Liability and Technological Innovation. UC Berkeley Public Law Research Paper No. 1415804. Available at SSRN: <http://ssrn.com/abstract=1415804> or <http://dx.doi.org/10.2139/ssrn.1415804>.

<sup>32</sup> Sandoval, Greg, "[Lime Wire settles with RIAA for \\$105 million](http://news.cnet.com/8301-31001_3-20062418-261.html)," CNET. May 12, 2011, available at [http://news.cnet.com/8301-31001\\_3-20062418-261.html](http://news.cnet.com/8301-31001_3-20062418-261.html).

<sup>33</sup> See Alper, Eric, "Music Investment Tops \$600 million in 2012, up 34%," December 17, 2012, available at <http://www.thatericalper.com/2012/12/17/music-investment-tops-600-million-in-2012-up-34/>.

<sup>34</sup> Pham, Alex, "Apple iTunes Radio Launching Sept. 18, Called 'Pure Dose of Awesomeness,'" *Billboard*, September 10, 2013, available at <http://www.billboard.com/biz/articles/news/5687327/apple-itunes-radio-launching-sept-18-called-pure-dose-of-awesomeness>.

<sup>35</sup> Sisario, Ben, "YouTube Said to Introduce Paid Service for Music," *New York Times*, October 24, 2013, available at <http://www.nytimes.com/2013/10/25/business/media/youtube-said-to-introduce-paid-music-service.html>.

<sup>36</sup> See Pelly, Jenn, "Neil Young's Digital Music Service to Launch in 2014," *PitchFork*, September 5, 2013, available at <http://pitchfork.com/news/52163-neil-youngs-digital-music-service-to-launch-in-2014/>.

<sup>37</sup> Bookwalter, J., "Beats Confirms Steaming Music Service on the Way," *MacLife*, October 10, 2013, available at [http://www.maclife.com/article/news/beats\\_confirms\\_streaming\\_music\\_service\\_way](http://www.maclife.com/article/news/beats_confirms_streaming_music_service_way).

<sup>38</sup> See [www.whymusicmatters.com](http://www.whymusicmatters.com) for a [non-exhaustive] list of authorized digital music services in the United States.

<sup>39</sup> At least one commentator has suggested that the proper analysis for copyright infringement should be one based on traditional tort principles, stating that "until Congress itself is prepared to surmount the challenges of the digital age by legislating direct solutions geared to its challenges, we believe the traditional tort framework offers a balanced and dynamic mechanism for addressing the many challenges of adapting copyright law to new technology." Menell, Peter S. and Nimmer, David, *Legal Realism in Action: Indirect Copyright Liability's Continuing*

those who can reasonably foresee that their digital services are likely to be used for infringing activity have an obligation to mitigate against that risk? Or, put more practically, would proactive, preventive measures to prevent digital infringement by intermediary service providers permit legitimate services to thrive and thereby lessen the need for statutory damages in certain contexts at their current levels? Any discussion of reducing statutory damages must be coupled with a discussion of alternative methods to reduce the need for their deterrent value – such as further intermediary responsibility.

Another option might be to provide guidance on additional factors that a jury may take into account in determining statutory damages in any given case. This would remind juries of the issues they should keep in mind, while granting them the flexibility they need to determine the appropriate award that meets the statutory damage objectives of deterrence, encouraging compliance with the law and restitution for the wrongdoing.

## **6. On the Government's Role in Improving the Digital Deal-Making Environment**

We appreciate the Department's discussion on creating a more robust digital deal-making environment. As we have noted, the recording industry has worked hard to build a successful digital marketplace. By the end of 2013, digital sales are expected to comprise nearly two-thirds of industry revenues. That is largely based on the phenomenal growth of resources that enable digital deal making, including comprehensive content identification and rights ownership mechanisms. Digital databases provide businesses and users with direct access to works and their owners, and standards such as the ISRC (International Standard Recording Code), the ISWC (International Standard Work Code), and DDEX (Digital Data Exchange) help to accurately identify the works, the parties involved in the creation of the works, their owners, and communications to simplify the digital supply chain for music.

Along with our music publishing counterparts (National Music Publishers' Association or NMPA), we are working to facilitate a marketplace for "micro-licensing." The fact that so many businesses and individuals use music to enhance their products, their services and their events further illustrates the fundamental value of music. What kinds of ancillary uses are possibly under consideration? For example, the wedding videographer who wants to include music in his videos or the company that wants to use music in presentations at corporate retreats. Many of these businesses want licenses, but it is not always practical or simple to secure them. Technology now makes it more feasible develop platforms to secure licenses. We and NMPA recently issued a formal Request for Information (RFI) to companies who can help us develop and offer such a micro-licensing platform.

All of these initiatives reflect the recognition of our role in building a digital marketplace that reaches its full potential. Various music industry leaders can only do so much on their own, however, and we welcome the Task Force's inquiry into whether the Government has a role in building on these offerings. For example, the Government is in a unique position to encourage and promote the adoption of standards to identify and act on information concerning identity of the work, permissions granted with the work, and limitations expressed with the work. Practically, the Government could collect ISWC and ISRC numbers for sound recordings as part of copyright registrations to help build awareness and adoption of these standards. The Government could also possibly assist with funding the widespread awareness, adoption, use and maintenance of ISRC and other industry-developed standard identifiers; with the development of other technological standards to express permissions granted and limitations

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Tort Framework and Sony's De Facto Demise (February 28, 2007). UCLA Law Review, Vol. 55, p. 143, 2007. Available at SSRN: <http://ssrn.com/abstract=966380>.

reserved with respect to a given work; and with enforcement of rights, with due regard for applicable law.

Finally, while the opportunities for consumers to access music digitally have grown exponentially, there are certainly impediments to a smooth transition to the various consumer demands for innovative, digital engagement with music. The Task Force may want to explore whether limited antitrust exemptions would further facilitate and encourage deal making for digital music services in a manner that promotes innovation and preserves competition, especially for services that require use of most or all of the music repertoire to be successful and for further technical standards to help the flow across the digital supply chain. Congress has made such accommodations in other industries critical to our economy and culture, and it may be useful to consider such an exception here.<sup>40</sup> Facilitating such collaboration among music companies and their distribution partners would permit digital music services to become more nimble in adapting to changes in piracy, consumer demand and new technologies, and to provide for more legal innovation in this space.

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<sup>40</sup>Consider the following examples:

- Congress has repeatedly stepped in to recognize the special conditions facing those involved in feeding America and the importance of preserving the family farm, as reflected in the exemptions for agricultural cooperatives ( 7 U.S.C. § 291- 292 and 15 U.S.C. § 17) and for Agricultural marketing agreements (7 U.S.C. §§ 608b–608c). See also 7 U.S.C. § 852 and 15 U.S.C. §§ 521–22 (Fisherman’s Collective Marketing Act). These laws generally permit producers of agricultural or aquatic products to cooperatively market their products without violating the antitrust laws.
- The Newspaper Preservation Act, 15 U.S.C. §§ 1801–04 (“NPA”), helped publishers deal with changing economic conditions that threaten the continued viability of daily papers. The NPA permits two competing newspapers to petition the federal government to form a joint-operating agreement to permit the companies to essentially unify all aspects of their operations except editorial functions, if one of the two newspapers can show that it is a newspaper. The goal of the NPA is to safeguard independent voices in markets that are can no longer support dueling daily newspapers.
- The Department of Justice (DOJ) expressed support for the Associated Press (AP) proposal to develop and operate a voluntary news registry to facilitate licensing and online distribution of news content. The DOJ noted that this registry would not likely reduce completion among news content owners and could bring pro-competitive benefits to the content owners and content users. See [http://www.justice.gov/atr/public/press\\_releases/2010/257316.htm](http://www.justice.gov/atr/public/press_releases/2010/257316.htm) and <http://www.justice.gov/atr/public/busreview/257318.htm>.
- The Supreme Court recognized an exemption from the antitrust laws for baseball because of its special role in the country’s culture, noting baseball was an “amusement” and organizing games among independent clubs and related activities were not “interstate commerce.” See *Federal Baseball Club v. National League* (259 U.S. 200, 1922). In a similar vein, Congress passed the Sports Broadcasting Act of 1961, as amended, (15 U.S.C. §§ 1291–95), which provides that federal antitrust laws do not apply to either (i) any agreements transferring broadcasting rights made by professional football, baseball, basketball or hockey leagues nor (ii) to the merger of two professional football leagues.

## **7. Conclusion**

We would like to thank the Department again for a thoughtfully drafted Green Paper. We appreciate the Department's recommendations, including its recommendation that the performance right in sound recordings should be extended to terrestrial broadcasting, and its leadership in exploring the issues noted above.

Recording Industry Association of America, Inc.

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