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The Songwriters Guild of America, Inc. (“SGA”) respectfully submits 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

SGA is the nation’s oldest and largest organization run exclusively by and for songwriters with over 5,000 members throughout the United States. As a voluntary association comprised of music creators and the estates of deceased members, SGA provides contract advice, royalty collection and audit services, copyright renewal and termination filings, and numerous other benefits, including advocacy on behalf of creators in Congress, before the courts, and in administrative proceedings.

As an interested party, SGA appreciates the opportunity to comment. We commend the Department of Commerce in taking this important step in examining the current state of copyright law. We have provided our perspective on some general copyright issues, in addition to responding to issues named in the Green Paper. We hope that our comments will serve as a useful tool as the United States Patent and Trademark Office (“USPTO”) develops final policy recommendations regarding copyright law.

Songwriters’ Perspective on General Copyright Issues to Consider

A Small Claims Venue as an Effective Means of Adjudicating Copyright Disputes

One of the biggest issues for songwriters today is dealing with infringing material. The most common complaint is that music creators have no *effective* remedy for on-line infringement

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under the present system. Currently, songwriters have the option of either filing a lawsuit in federal court after engaging in the cumbersome process of using the DMCA Notice and Takedown system, or foregoing enforcement altogether. For many songwriters, the former option is so expensive and challenging, costing on average hundreds of thousands of dollars, that it does not really represent an option at all. Because of this, SGA strongly supports the concept of establishing a forum in which individual copyright owners could pursue infringement claims that individually have a relatively small economic value but together might mean the difference between economic survival and bankruptcy, and we are heartened that among the Task Force's recommendations is the support of the Copyright Office's examination of possible small claims procedures.

While SGA firmly believes that an alternative forum should be established to deal with copyright small claims, we understand that there are significant challenges surrounding its implementation. These include determining the proper forum, logistics, legal threshold, scope of causes and actions and remedies, and process for appeal. We hope to ease these challenges by offering our suggestions.

In regard to choosing a proper forum, SGA and the Copyright Office agree that Congress should consider developing a specialized administrative entity to which copyright small claims can be brought, rather than introducing a copyright small claims process into the existing federal or state court systems.¹ While a new forum within the federal court system may be more effective than the current system, it would still be too expensive for individual copyright owners. Regarding the state court system, we agree with the Copyright Office that state courts lack the

¹ U.S. Copyright Office, A Report of the Register of Copyrights on Copyright Small Claims (2013), at 4 *available at*: <http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

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requisite knowledge and resources necessary to adjudicate copyright cases.² Because such expertise is required, we believe that a venue affiliated with the Copyright Office would be most appropriate.

Determining the logistics of a copyright small claims venue poses the challenge of finding the most cost-effective and efficient way for both copyright owners to bring infringement claims and alleged infringers to defend against such claims. For this reason, SGA suggests allowing parties to appear via electronic means. Requiring personal appearances in effect requires parties to pay travel costs and spend time away from work. If parties may submit letters or conduct phone or video conferences, the time and money needed to bring or defend a case would be significantly lowered. In addition, copyright owners should be able to name multiple defendants in the same suit. When a copyrighted work is infringed, it is often infringed multiple times by more than one person. Bringing a separate suit against each alleged infringer can prove quite costly. Allowing creators to file one action with multiple defendants would significantly cut this cost.

In deciding what claims would be appropriate for a copyright small claims venue, the threshold claim amount must be determined – meaning one must answer the question “what is a small claim?” While SGA does not have an exact value, we believe it should be high enough to encourage individual creators to use the new system and not so high that defendants might be prejudiced by the more informal procedures. Also, as a method of protecting defendants, copyright owners should have to certify the veracity of their claim before defendants are required to appear. This procedure works well with small claims and would be easy for a copyright owner appearing *pro se* to understand.

² *Id.*, at 95-97.

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In addition to determining which claims are appropriate for the small claims venue, one must also determine which claims are not. SGA understands that cases involving the defense of fair use can be very complicated and fact-specific. For this reason, SGA believes that if a bona fide fair use defense is raised and it is credible and substantial, the case should be dismissed without prejudice with the option of removal to federal court. Some stakeholders believe that music copyright infringement claims should be excluded from any copyright small claims court. SGA strongly opposes this suggestion.

One significant concern for SGA is the effect that the establishment of a small claims venue will have on the remedies available to copyright owners. SGA believes that a small claims court should offer statutory damages. Moreover, SGA strongly feels that there must be some assurance that the level of damages awarded by small claims courts must not in any way be used to undercut currently available damages (whether statutory or otherwise) in federal court. SGA also believes that the small claims court should be authorized to issue injunctive relief, at least in some instances. Regarding the award of legal fees as a remedy, SGA believes that this should not be available as a remedy in the small claims venue. Awarding legal fees could counteract many of the benefits of a small claims venue. For example, a party would be less likely to bring a small claims action if there was the risk that the defendant hires an attorney, incurs expenses, and then prevails. It may also provide less of an incentive for parties to appear *pro se*.

As noted, the process of setting up such a small claims system to address the “lack of effective remedies for creators” will be complex, but SGA firmly believes that all of the objections so far raised by opponents of such a solution can be overcome through carefully crafted legislation.

An Emphasis on Copyright as a True Property Right

As stated, we commend the Task Force's efforts to gain a better understanding of copyright law and how it works in actuality, rather than theory. The Green Paper, however, seems to emphasize balancing the rights of the user with the rights of the copyright holder, treating copyright as an economic theory, rather than a property right. SGA believes that, in order to fully examine copyright law, the Task Force must open a dialogue considering additional philosophies of copyright, including the well seasoned notion of copyright law as a constitutional property right.

SGA understands that this may not be the most popular view of copyright, but we believe this can and should change. Authors invest time and money into their creations and deserve a return on their investments in the same way as do those who invest in tangible property. Promoting this view of copyright as a true property right will hopefully influence Congress and the courts, as well as curtail infringement. If more users of copyrighted materials understood that infringing an author's work is no different than stealing property from a store, users might be less likely to infringe. Moreover, emphasizing copyright's similarities to other property rights could induce Congress to consider shifting the burden of policing the Internet, at least in part, from the copyright owner—who in the case of the individual songwriter has neither the time nor the wherewithal to do so—to the copyright user. The result would be a greater incentive to invest in creative work.

Songwriters' Perspective on Issues Identified in the Green Paper

First Sale in the Digital Environment

The Green Paper sought comment on the “relevance and scope of the first sale doctrine in the digital environment.”³ On this issue, SGA agrees with the Copyright Office in its recommendation that the first sale doctrine should not be extended.⁴ The Copyright Office did a thorough investigation into the expansion of the doctrine and determined that “the risk that expansion of section 109 will lead to increased digital infringement weighs heavily against such an expansion.”⁵

When the user of a tangible work gives or sells the work to another user, in compliance with the first sale doctrine, he/she is no longer in possession of the work. This is not the case with digital works. If the first sale doctrine were applied to digital works, the original purchaser could continue using the work to its full extent while sharing an exact copy with another person. A suggested protective measure for this is the “forward and delete” method, which would require the original purchaser to delete the work immediately after sharing it. SGA believes that this is not an effective protection, as it would be utterly impossible to enforce, and if history is a guide, would be flagrantly ignored. Extending the first sale doctrine to digital works would legitimize sharing an exact copy of a digital work, in effect legitimizing piracy.

Statutory Damages

The Green Paper states that “in the online environment... the availability of statutory damages is increasingly important.”⁶ SGA agrees. In order to deter infringers, monetary damages must be the anticipated remedy in a copyright infringement action. The Copyright Act

³ Green Paper, at 38.

⁴ U.S. Copyright Office, A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act, at 97 (2004), *available at* <http://www.copyright.gov/reportsstudies/dmca/sec-104-report-vol-1.pdf>.

⁵ *Id.*, at 99.

⁶ Green Paper, at 51.

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permits statutory damages, allowing a copyright holder to seek damages within a statutory range, because it is difficult to prove actual damages. With online infringements, it is nearly impossible to determine the scope of infringement, making this difficulty even more prominent. As explained in the Green Paper, Congress recognized the importance of statutory damages as a deterrent when it passed the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, which increased the statutory level of damages.⁷ SGA agrees with the Green Paper and Congress and believes that statutory damages are necessary to effectively deter copyright infringement and are becoming more and more crucial in the Internet era.

Improving the DMCA Notice and Takedown System

The Green Paper outlines the frustrations of parties on all sides of the issue with the DMCA Notice and Takedown system. SGA agrees that this system needs to be improved. Currently, copyright holders with limited resources have the duty of policing infringing material on their own. Further, very soon after a copyright holder successfully uses the notice and takedown system, the infringing content may be back online. SGA would like to find a way to effectively take down infringing content without using the very limited resources of songwriters and other similar copyright holders.

The Green Paper and some commenters have proposed a small claims venue as an alternative to the DMCA notice and takedown system. While, as expressed above, SGA strongly supports the creation of a small claims venue as an alternative to federal court, we believe there are many issues that need to be resolved before it can serve as an alternative to the DMCA notice and takedown system. If Congress chooses to take on this challenge, it must resolve these issues in a way that does not burden the individual creator.

⁷ Green Paper citing Act, 51.

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Conclusion

SGA is truly pleased with the effort by the Department of Commerce to examine copyright law. We hope that our comments will be a valuable contribution to this examination and to the development of copyright policy. As an organization run exclusively by and for songwriters, SGA is pleased to help directly represent the voice and views of the American music creator community. While many of the larger business entities in our industry often claim to represent “creators,” “artists,” and “songwriters,” they can be constrained by conflicts of interest that motivate them to take positions actually adverse to creators. Songwriters and other creators are quite capable of speaking for ourselves, and we should be included in *any* discussion and adjudication of our rights.