

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

National Telecommunications and Information Association

Docket No.: 130927852-3852-01

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

COMMENTS OF THOMAS D. SYDNOR II*

November 13, 2013

Following the release of *Copyright Policy, Creativity, and Innovation in the Digital Economy*, (the “*Green Paper*”), The Department of Commerce Internet Policy Task Force has requested further comment on 25 questions relating to five topics, (1) “remixes,” (2) a “digital first sale doctrine,” (3) statutory damage awards against Internet intermediaries and users, (4) the operation of the DMCA notice-and-takedown system, and (5) whether the federal government should intervene in the market in order to improve online licensing. The following comments address the 19 questions related to the first four listed topics.

The following comments are attributable only to me, and they do not necessarily reflect the views of any other organization or person. Rather, they reflect only conclusions that I have derived from my 12 years of experience litigating copyright-and-IP-related cases in private practice and my 10 years of experience studying copyright-and-IP-related issues from a public-interest-focused perspective. From mid-2003 through mid-2005 I served the Chairman of the Senate Committee on the Judiciary as his Counsel for Intellectual Property and Technology. From mid-2005 through mid-2007, I served the Executive Branch as an attorney-advisor in the Copyright Group in the Office of International Relations at the United States Patent and Trademark Office. From mid-2007 to the present, I have served two Washington-based 501(c)(3) think-tanks as an Intellectual Property Fellow. During my time in public service, I have

* I am currently the Consulting Intellectual Property Fellow for the Innovators Network, a 501(c)(3) research organization that studies the role of smaller businesses in an innovation-focused economy. Nevertheless, the views expressed in these comments are solely my own, and they may not reflect the views of the Innovators Network, the Association for Competitive Technology, the Digital Citizens Alliance or any other person or association. Rather, they reflect only my own 22 years of practical experience litigating IP and copyright cases or studying IP and copyright issues from a public-interest perspective.

conducted cutting-edge research on a diverse array of IP-related topics, including inadvertent file-sharing, the U.S. implementation of the “making-available right” and—as discussed below—the broader implications of the 2011 *Non-Prosecution Agreement* between Google, Inc. and the federal government.

As to the four topics addressed in these comments, the Task Force has requested further comment on 19 questions. Almost all of these 19 questions focus mainly upon various ways that the exclusive rights of U.S. copyright owners, (or existing means of enforcing those rights), could be further limited, reduced, or restricted. I have no doubt that many academes, public-interest groups, content-distribution-related trade associations, and corporations have argued passionately and vigorously that the Task Force should call for existing copyrights and/or existing means of enforcing copyrights to be further limited, reduced or restricted. I thus commend the Task Force for taking such vigorously expressed concerns seriously enough to request further comment upon them.

Nevertheless, I must begin my response to the questions framed by the Task Force by noting the airs of self-interest or unreality that overhang all such demands for the Executive Branch to further narrow copyrights or copyright enforcement on the Internet. To hear some tell it, the real problem with the Internet of today is that there just is not enough unauthorized, uncompensated or compulsory copying, distribution and public performance of copyrighted works.

But that is just wrong. In fact, on the Internet today, U.S. copyright owners and policymakers confront levels of copyright infringement and mass piracy previously seen only in developing nations that have incrementally improved their own copyright-enforcement efforts only in response to U.S. pressure because rampant piracy long ago deprived them of domestic creative industries capable of raising any politically meaningful complaints. Indeed, Internet copyright piracy has now become so rampant that the Executive Branch initiated a complex, international effort to work with law-enforcement officials in New Zealand in order to apprehend Kim DotCom and extradite him to the United States so he, others, and Megaupload could be criminally prosecuted for intentionally inducing mass copyright piracy under the federal Racketeer Influenced and Corrupt Organizations, (“RICO”), Act—the first criminal RICO case that the federal government has ever brought against an alleged copyright infringer.

The Executive Branch deserves great credit for initiating that complex and difficult effort to bring criminal RICO charges against an alleged would-be Internet pirate king. Nevertheless, today, U.S. Attorneys at DOJ still continue their slow, uphill struggle to convince an ally as usually reliable as New Zealand to extradite to the United States an alleged criminal racketeer. So far, they have extracted from New Zealand only an apology from its Prime Minister to the alleged criminal racketeer Kim DotCom. Meanwhile, back here in the U.S., the Task Force was simultaneously besieged by so many domestic calls for more restraints on copyrights or their enforcement that it felt obliged to request further comment on four such proposals.

And yet, three of those four proposals are so absurd that they have compelled me to comment, at least briefly. My initial comments on these four proposals must be relatively brief for two reasons.

First, for reasons just noted, I regretfully suspect that the Task Force will be bombarded with misleading or nonsensical comments from many academes, “public-interest” groups, distribution-focused trade

associations and corporate producers of complementary goods, (like Internet content-distribution services). Consequently, I conclude that it will be more efficient for me to submit relatively brief comments that (1) address the major issues raised, (2) record my conclusion that none of these four proposals is supported by the sort of empirical evidence that the Task Force has requested, (3) briefly note the significance of some of my forthcoming research, and then (4) inform the Task Force that I am willing and able to discuss all five prescribed topics, (and if the Task Force wishes, the findings of my own relevant research), at the Task Force's proposed public meeting on December 12, 2013. After that meeting, I plan to submit detailed reply comments by the prescribed deadline of January 10, 2013.

Second, my initial comments will be brief because I am currently trying to complete and report upon the results of a highly relevant empirical-research project larger than any that I have ever undertaken, (and larger than any that I will ever again undertake from any position in the non-Google-funded public-interest sector). I expect that empirical research to be completed by the end of the month, and it should be highly relevant to the Task Force. Indeed, I now believe that it should very strongly suggest that the problems that copyright owners face when trying to enforce copyrights on the Internet are just the "tip of the iceberg" of a much broader problem of Internet-intermediary lawlessness that now broadly threatens not only the enforceability of copyrights and trademarks, but also U.S. public safety and health, U.S. sovereignty, and the rule of law generally. I intend to provide the Task Force with the final results of my research as soon as it is ready for publication, which should occur well in advance of the public meeting that the Task Force has proposed to hold on December 12, 2013.

I believe that the results of my forthcoming research can inform the work of the Task Force because it was designed to further investigate the potentially broader significance of law-enforcement efforts previously undertaken by the Executive Branch and State law-enforcement officials. In 2011, those federal-state law-enforcement efforts culminated in a *Non-Prosecution Agreement* in which Google, Inc. avoided federal criminal prosecution by agreeing to accept corporate responsibility for seven years of egregious wrongdoing and to assume special duties intended to prevent further wrongdoing relating to the illegal promotion, importation and distribution of illegal controlled drugs, including highly addictive, habituating controlled narcotics.

By definition, that *Non-Prosecution Agreement* (the "NPA"), did not require Google, Inc. to admit that it had committed any federal wrongs or crimes. Nevertheless, the NPA did require Google to admit facts that—when compared with the elements of violations of the federal Controlled Substances Act and federal RICO Act—could enable reasonable persons to conclude that from at least 2003 through 2009, Google violated both the Controlled Substances Act and RICO by systematically and profitably aiding, abetting and conspiring with foreign drug traffickers who intended to sell illegal, unprescribed controlled drugs to American children and consumers.

When thus examined, the Google wrongdoing admitted in the NPA could be fairly described as "murderous." By 2003, Google knew that "rogue pharmacies" selling no-prescription controlled narcotics had killed and institutionalized American children. Nevertheless, for at least seven more years, Google admittedly chose to increase its own profits and market share by helping foreign traffickers of illegal controlled drugs to use AdWords to target the U.S. market.

Consequently, the Google wrongdoing admitted in the *NPA* can reasonably suggest that illegal trafficking of controlled drugs may have been only one element in a much broader pattern of illegal wrongdoing. If Google chose to treat dead or institutionalized American adults and children as the acceptable “collateral damage” of its efforts to use illegal trafficking in controlled drugs to increase its profits and market share, then it becomes difficult to imagine why it would not also have been using Internet search, hosting, and advertising to monetize other illegal activities—like massive copyright piracy—that would have been less likely to kill people and attract the attention of federal prosecutors. Consequently, some commentators warned that the controlled-drug-related wrongdoing admitted in the *NPA* could be the “tip of the iceberg”—the first admitted evidence of a much broader pattern of wrongdoing.

I realized that such concerns could be tested because advertisements differ from icebergs. Icebergs can be deadly because 90% of their mass can be invisible to human observers. But advertisements must be visible to humans in order to be effective. Therefore, if the controlled-drug-related wrongdoing admitted in the *NPA* might have been the first evidence of a much broader pattern of wrongdoing that could encompass even the copyright-related wrongdoing of interest to the Task Force, then a researcher could confirm or refute that possibility by conducting a comprehensive analysis of whether Google seemed to be reasonably enforcing all of its law-or-public-safety-related *Advertising Policies*.

I have conducted such a comprehensive analysis, and I am finalizing my report on its results. Unfortunately, those results appear to confirm what common sense could already suggest: in Google’s case, the seven-year pattern of sustained, controlled-drug-related wrongdoing admitted in the *NPA* not only seems to have continued in the case of controlled drugs, it also seems to extend far enough beyond that context to encompass wiretapping, hacking, sex trafficking, copyright piracy, counterfeiting, and other wrongs defined as predicate acts of “racketeering” within the meaning of the federal RICO Act and analogous state anti-racketeering laws.

It is one thing to ask copyright owners to defend themselves against specialized copyright-piracy operations like Grokster, Morpheus, KaZaA and LimeWire. It is quite another to conclude that we should restrict existing copyrights or copyright-enforcement mechanisms in ways that could tend to further compromise whatever existing capacity copyright owners may have to defend themselves against equally malign, but far more diversified, foes.

Consequently, I respectfully conclude that the Task Force should reject claims that this would be an opportune time to further narrow the scope of existing copyrights or to further constrain existing means of enforcing them. More specifically, I offer the following responses to the questions raised by the Task Force.

The Task Force should not “recalibrate” statutory damages in cases involving online-service providers:

I am unaware of any empirical evidence that proves that our judicial system’s many existing mechanisms for preventing unjustly large damage awards of any kind have clearly failed in any case involving an online service provider. Indeed, given the appalling conduct of defendants like LimeWire LLC—conduct that I documented while working for USPTO—even existing settlements seem quite generous.

The Task Force should not “recalibrate” statutory damages in cases involving individual file sharers: I am unaware of any empirical evidence that proves that statutory damages awarded in any case involving an individual file sharer were more than merely compensatory, reasonable-royalty-based awards—much less awards in excess of those that could have been justified by legitimate deterrent or punitive motives. More importantly, individual file sharers would never had had to have been sued for copyright infringement had would-be Internet pirate-kings like the distributors of KaZaA not tried to insulate themselves from secondary liability for intentionally induced mass piracy by using consumers as human shields against copyright enforcement. Moreover, while such deplorable conduct continues, major copyright owners and ISPs have devised a *Memorandum of Understanding* that creates a layered process of escalating warnings that should significantly reduce the extent to which copyright owners need to sue infringing consumers in order to deter peer-to-peer piracy.

The Task Force should not restrict or otherwise restrain copyright enforcement in order to create a “digital first-sale doctrine” or to further encourage “remix” in contexts in which it is not already flourishing: I do not believe that existing empirical evidence justifies either restriction.

The Task Force should focus any multi-stakeholder process designed to improve existing notice-and takedown mechanisms on the special case of political candidates re-using the works of news journalists: Until we know what role notice-and-takedown must serve in the copyright-enforcement process, I conclude that a multi-stakeholder process could not be expected to produce agreements on means to improve the process. However, the special case of candidates for political office making use of the works of news journalists could serve as a useful opportunity to examine the major issues in a particularly important context before the next election cycle.