



United States Patent & Trademark Office

RE: Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy (78 Fed. Reg. 61,337) — Docket # 130927852–3852–01

Reply Comments

Submitted on January 17, 2014 via: CopyrightComments2013@uspto.gov

Introduction

The Association of American Publishers (AAP) now represents over 470 publishers, ranging from major commercial book and journal publishers to small non-profit, university, and scholarly presses.¹ AAP appreciates this opportunity to submit Reply Comments to highlight a few issues raised by others in their submitted Comments and at the December 12, 2013 public meeting (“Public Meeting”) on the Department of Commerce Internet Policy Task Force’s (“Task Force”) “Green Paper” on *Copyright Policy, Creativity, and Innovation in the Digital Economy*.² Specifically, the following Reply Comments address certain statements in Comments addressing (1) the legal framework for remixes; (2) the first sale doctrine in the digital environment; (3) the government role in improving the online licensing environment; (4) the operation of the DMCA notice-and-takedown system; and (5) whether the current Copyright Act has spawned a “litigation business model.” To the extent that AAP’s views on the first four of these issues have already been conveyed to the Task Force in our Comments submitted on November 13, 2013 (“AAP Comments”) they are not repeated below.³

¹ AAP’s membership is comprised of three main sectors: trade (e.g., popular fiction/non-fiction); academic (e.g., textbooks and other curriculum materials); and professional and scholarly publishing (e.g., journals, books and monographs), which leads publishers to have a variety of interests and concerns.

² Department of Commerce, Internet Policy Task Force, “Copyright Policy, Creativity, and Innovation in the Digital Economy” July 31, 2013 <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (hereinafter referred to as “Green Paper”).

³ ASSOCIATION OF AMERICAN PUBLISHERS, Comments in response to Department of Commerce, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Internet Economy, 78 Fed. Reg. 61,337 (Oct. 3, 2013) <http://www.gpo.gov/fdsys/pkg/FR-2013-10-03/pdf/2013-24309.pdf> (hereinafter referred to as “Green Paper Request for Comments”), *submitted* (Nov. 13, 2013)

1. Legal framework for the creation of remixes.

a. Fair Use

In general, AAP believes that there is no need to amend the Copyright Act in order to facilitate legitimate use of copyrighted content in the context of “remixes” and “mashups.” AAP agrees that, in appropriate circumstances, “remixes” and “mashups” may qualify as fair use of the original expression that is taken from preexisting copyrighted works without permission of their copyright owners and combined to create such new works. Moreover, as discussed at the Public Meeting, there are an increasing number of licensing mechanisms available in the market to facilitate the legal creation of such combination works that would not qualify as fair use (e.g. YouTube’s Content ID⁴; IFPI’s pilot program for micro-licensing; and, low-cost music samples). Investment in these and other legitimate methods of facilitating the easy and efficient creation of remixes, with appropriate authorization where necessary, should be encouraged instead of undermined by compulsory licenses or overbroad interpretations of fair use that erode the fundamental rights of copyright owners.

The general consensus that *some* remixes may constitute fair use of copyrighted works, however, does not mean that the technological filters used by copyright holders to protect their works must “allow [such] a wide berth” for any use of less than the entirety of the work that such filters should exclude remixes generally.⁵ As Google correctly noted in its comments, we “cannot categorically separate remixes that qualify as fair uses . . . from remixes that are infringing.”⁶ Fair use is, as the Task Force and many submitted comments noted,⁷ a complex inquiry that requires case-by-case analysis in order to maintain its fundamental flexibility, which permits new and evolving uses of copyrighted works where the particular facts and

http://www.ntia.doc.gov/files/ntia/association_of_american_publishers_comments.pdf (hereinafter referred to as “AAP COMMENTS”).

⁴ Content ID is described as “a pragmatic, efficient, and scalable” technological solution providing “intermediary” (i.e., invisible to the user) licensing of user-generated content, which allows copyright holders to authorize and monetize the use of their works in whole or in part to the extent such works are included in new works posted on YouTube without the prior authorization of the copyright owner. *See generally*, GOOGLE, Green Paper Request for Comments Nov. 13, 2013, http://www.ntia.doc.gov/files/ntia/google_comments.pdf (hereinafter “GOOGLE COMMENTS”).

⁵ CENTER FOR DEMOCRACY & TECHNOLOGY, Green Paper Request for Comments page Nov. 13, 2013, http://www.ntia.doc.gov/files/ntia/center_for_democracy_and_technology_comments.pdf (hereinafter “CDT COMMENTS”). (advocating for filters to “distinguish remixes from garden-variety infringement and provide reasonable ways for lawful remixes to remain accessible on mainstream platforms,” i.e., exempting remixes from filtering in general).

⁶ GOOGLE COMMENTS, *supra* at note 4, at 4-5 (noting further that “while Content ID is quite adept at identifying the *inclusion* in an uploaded video of preexisting material for which it has a reference file, it cannot apply the case-by-case, four factor legal analysis that is required to determine whether that inclusion constitutes a fair use.”).

⁷ CDT COMMENTS, *supra* at note 5, at 11 (stating that “fair use is inherently uncertain and fact-specific”); GOOGLE COMMENTS *supra* at note 4, at 5 (noting that an automated system cannot replace the “case-by-case, four factor legal analysis that is required to determine whether that inclusion constitutes a fair use”).

circumstances indicate that the rights of the original copyright owner will not be unduly prejudiced. Such complex analysis cannot be reduced to automated technological filters. Furthermore, requiring a fair use analysis would likely preclude the sending of automated takedown notices and completely undermine the utility of the DMCA as a tool for responding to the millions⁸ of specific URLs for infringing content online.⁹

Fair use originally evolved as a judicially-created *affirmative equitable defense* to a claim of copyright infringement. Even as codified in Section 107 of the Copyright Act, it must still be asserted by the *user* of a work as an exception to the exclusive rights of a copyright owner because it is the alleged infringer that has the legal burden of raising fair use as a defense against the copyright owner's claim of infringement. Still, Section 512(g) of the Copyright Act ensures that a work taken down at the request of a copyright owner can be re-posted online if the alleged infringer submits a valid counter-notification and the copyright owner decides not to pursue the claim in federal court.¹⁰ The alleged infringer is also in the best position to provide the facts and circumstances necessary for the fair use analysis and thus is the proper party to bear any burden of making a preliminary fair use assessment. To shift this burden to the copyright owner as a threshold inquiry before assertion of a takedown claim would necessarily require the imposition of objective and formalistic constraints on the fair use analysis to make it applicable because that person would typically lack any subjective knowledge of the actual intent and purpose underlying the alleged infringement. This type of objective analysis conflicts with the intended *ad hoc* flexibility of the fair use defense and would undermine the value of a key doctrinal element that has been an integral part of the success of the U.S. copyright regime.

To be clear, AAP welcomes the observations made by representatives of Google and the Electronic Frontier Foundation (“EFF”) at the Public Meeting noting that current technology can distinguish between “whole” and partial works, which may be a useful threshold screen to identify unauthorized postings of copies of works. However, such screening would not indicate whether works containing partial copies of works would qualify as fair use, which must first be

⁸ Paul Resnikoff, *Google Receives its 100 Millionth Piracy Notice, Nothing Changes...*, DIGITAL MUSIC NEWS, Jan. 14, 2014, <http://www.digitalmusicnews.com/permalink/2014/01/14/googlereceives> (note this is the 100 millionth piracy notice from *just* the music industry).

⁹ See generally, Br. of Amici Curiae MPAA, support appellant Universal Music, *Lenz v. Universal Music Corp.*, No. 13-16106 (9th Cir., Dec. 13, 2013) <https://www.eff.org/files/2013/10/16/lenzmpaaamicusbrief.pdf>; Br. of Amici Curiae RIAA, support appellant Universal Music, *Lenz v. Universal Music Corp.*, No. 13-16106 (9th Cir., Dec. 13, 2013) <https://www.eff.org/files/2013/10/17/riaaamicusbrief.pdf> (highlighting the fact that fair use analysis “does not lend itself to rapid or simple judgments...and [that] it can require consideration of facts that may lie exclusively with the party asserting the defense” in explaining why requiring a fair use analysis as a prerequisite to sending a notice “would effectively decimate the one, albeit imperfect, rapid legal tool – notice and takedown – that copyright holders have to fight online infringement.”).

¹⁰ Defined in 17 U.S.C. § 512(g)(2)(b)-(c) (2010) (explaining that in order to benefit from a safe harbor, a service provider must “upon receipt of a [valid] counter notification” provide the original notice sender with the counter notification and replace “the removed material and cease disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice” unless the original notice sender has filed a court action to block the infringement from the service provider’s network).

asserted by the users and undergo a fact-specific analysis which cannot be replicated by an automated filter.

b. Copyright Office Best Practices for Remixes and Mashups

Additionally, AAP Comments suggested that the Task Force should work with stakeholders to clarify how remixes and mashups fit within the Copyright Act's taxonomy of compilations and derivative works, the creation of which generally require the permission of copyright owners for the inclusion of their preexisting works or portions thereof. This topic was raised at the Public Meeting as a number of panelists also acknowledged that "clearer derivative rights [in addition to fair use would] ease the uncertainty to which remixers may be subject"¹¹ and that defining remix, sample and mashup is important for implicating different rights in [S]ection 106.¹² To more thoroughly address the general call for increased clarity with respect to these issues, further discussion of remixes and derivative rights should be a priority in upcoming roundtable discussions or should be addressed by the Copyright Office through a notice and comment process, culminating, in either case, with the Copyright Office issuing a circular or other statement of best practices on creating remixes and mashups.

2. The relevance and scope of the first sale doctrine in the digital environment.

a. General Statement

It is encouraging that other submitted comments recognize that an "all-or-nothing approach to digital first sale" is "undesirable" because it would undermine new business models that rely upon licensing in order to offer consumers a variety of price, content, authorized use and customization options.¹³ As noted in our Comments, copyright law must continue to ensure that the exclusive rights granted to copyright owners under the Copyright Act remain meaningful in the digital environment and provide adequate incentives for the continued creation of works of original expression and the development of new business models to distribute, access and use such works in the future. Publishers have not yet seen a viable proposal for implementing digital first sale in a way that would not create confusion or disruption across the innumerable licensing arrangements that currently provide consumers with an unprecedented amount of choices for accessing content. Thus, publishers remain concerned that a "digital first sale" doctrine would undermine these fundamental aims of U.S. copyright law. In this context, publishers participated in the discussion at the Public Meeting, which focused on the pros and cons of licensing

¹¹ STANFORD CENTER FOR INTERNET & SOCIETY AND ELECTRONIC FRONTIER FOUNDATION, Green Paper Request for Comments 7 Nov. 13, 2013, http://www.ntia.doc.gov/files/ntia/stanford_center_for_internet_and_society_comments.pdf. (hereinafter "EFF COMMENTS").

¹² See PUBLIC KNOWLEDGE, Green Paper Request for Comments 5 Nov. 13, 2013, http://www.ntia.doc.gov/files/ntia/public_knowledge_comments.pdf (hereinafter "PUBLIC KNOWLEDGE COMMENTS").

¹³ See CDT COMMENTS, *supra* at note 5, at 14-15.

transactions as distinguished from “sales” (*i.e.*, purchase transactions that transfer ownership), which have been the principal method of distributing physical copies of works.

b. License v. Sale

While panelists had differing opinions on the impact of recent court decisions in Europe¹⁴ and the Ninth Circuit¹⁵ that attempt to distinguish “true” license transactions from “sales,” there was unanimous agreement during the Public Meeting that rights holders and distributors of their content should ensure that contracts constituting the basis for any transaction to acquire copyrighted content in a digital format are clear to consumers about whether the consumer is acquiring *ownership* of a particular digital copy of that content or is simply acquiring the right to *access* and use the digital content according to the terms and conditions imposed by the contract in the form of a license. Providing consumers with this type of clarity about their rights with regard to digital content is particularly important to AAP members, given the continuing popularity of physical books that are sold and subject to the first sale doctrine. Thus, to avoid any undue assumptions that eBooks must be acquired and used in exactly the same way as physical books, publishers and their retailers should strive to clarify whether eBooks are licensed or sold to consumers and make key terms easy to see and understand. As publishers and other rights holders continue to explore new business models for distributing digital books and journals, terms to clarify the rights granted in any contract should be determined by each individual company and not mandated by any third party.

Providing clear terms will educate consumers and further stimulate development of a variety of business models for distributing copyrighted digital content with broader options for its acquisition and use by consumers. Therefore, publishers disagree with EFF’s Comments that simplistically dismiss end user license agreements (EULAs) as harmful “contracts of adhesion” because users “have no ability to negotiate” their terms individually.¹⁶ Standard EULAs enable efficient access to the copyrighted content that millions of U.S. consumers are constantly downloading or streaming on Amazon, Spotify, Scribd, etc.¹⁷ Just as in the world of physical goods and related consumer services, where basic contract agreements for renting or purchasing an automobile, a refrigerator or a night’s lodging at a hotel typically are not negotiated anew with each consumer, negotiating individual contracts would add transaction costs and delays that negate the efficiencies of digital availability that are essential to expanding access to copyrighted works. Furthermore, as Professor Villasenor points out in his article, *Rethinking A Digital First Sale Doctrine in a Post-Kirtsaeng World: The Case for Caution*, the “best way to reduce the prevalence of [“overly-restrictive”] licenses...is *market competition*” where content providers will respond to consumer demands for more flexible license terms in order to compete for market

¹⁴ *UsedSoft GmbH v. Oracle International Corp.*, E.C.J. Case C-128/11 (Jul. 3, 2012).

¹⁵ See *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010); *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011).

¹⁶ See EFF COMMENTS, *supra* at note 11, at 17.

¹⁷ See Steven E. Siwek, *Copyright Industries in the U.S. Economy: The 2011 Report*, (Nov. 2, 2011), http://www.iipa.com/copyright_us_economy.html.

share.¹⁸ Publishers and distributors of books and journals exist in a very competitive marketplace that drives solutions to meet customer needs, meaning that copyright owners will continue to invest in new ways to enhance their digital products to provide even greater customer experiences so long as the Copyright Act continues to protect the rights afforded under Section 106.

For these reasons, publishers also disagree with comments advocating that “the concept of ownership should apply in a technology neutral manner,”¹⁹ *i.e.*, that all copyrighted works must be sold outright instead of being licensed and should therefore be subject to first sale regardless of format.²⁰ As stated earlier, publishers believe that there remain significant differences between physical and digital works and that, due to these differences, a digital first sale doctrine would undermine the fundamental incentives of the Copyright Act to create and distribute creative works. However, in the spirit of an open dialogue, AAP appreciates that the CDT recognizes that “forcing digital content to be distributed via “ownership” models in order to permit resale when the market is [also] embracing subscription and service-based distribution models” is undesirable.²¹

Ensuring that the Copyright Act continues to incentivize investment in the creation of new works, as well as in the distribution mechanisms that provide access to these works, is critical to publishers and society. Maintaining these incentives will ensure that innovation is not stifled and will allow publishers to continue investing in new works and business models. The publishing industry’s commitment to developing great literary and scholarly works and new business models to disseminate them is evident in AAP’s recent statement submitted to the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet describing a number of new business models and partnerships with technology companies publishers are pursuing to provide even more options for discovering, accessing, and interacting with digital book and journal content.²²

In any continued discussion of a digital first sale doctrine, the concerns raised by the Copyright Office in its 2001 Report;²³ the challenges to effective enforcement; and, the proactive

¹⁸ John Villasenor, *Rethinking A Digital First Sale Doctrine In a Post-Kirtsaeng World: The Case for Caution*, CPI ANTITRUST CHRON. May 2013, at 10. (emphasis added).

¹⁹ OWNERS’ RIGHTS INITIATIVE, Green Paper Request for Comments, 3 (Nov. 13, 2013) http://www.ntia.doc.gov/files/ntia/owners_rights_initiative_comments.pdf.

²⁰ See PUBLIC KNOWLEDGE COMMENTS, *supra* at note 12, at 29.

²¹ CDT COMMENTS, *supra* at note 5, at 15.

²² *The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Post-hearing Statement of the Association of American Publishers available at http://www.publishers.org/_attachments/docs/publicstatements/aapstatement-riseofinnovativebusinessmodels.pdf).

²³ See generally Copyright Office, *DMCA Section 104 Report*, 83-84 (2011), http://www.copyright.gov/reports/studies/dmca/dmca_study.html (hereinafter “Section 104 Report”) (noting that: “Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright owner’s

steps being taken by copyright industries to effectively give consumers an array of options and choices with respect to digital content in competitive markets should be kept in mind as roundtables and policymakers try to assess whether there are any scenarios where, as CDT states, it may be feasible to “extend first sale into the digital world without foreclosing business models where it does not fit [*i.e.* non-purchase business models].”²⁴ At this time, however, publishers have yet to see a viable proposal for implementing a digital first sale doctrine that would not undermine the incentives underpinning the U.S. copyright system that has fostered the growth of a \$1 trillion copyright-based industries sector.²⁵

c. Perfect “Used” Copies

The continuing relevance of the Copyright Office’s 2001 Report is discussed in more detail in AAP Comments. However, given ReDigi’s claim that “concerns that electronic content does not degrade over time, particularly when concerning e-books, are misplaced [because although] the content may not degrade...public tastes change,” it is important to note that many books and journals are in fact written with the intention and expectation that they will have enduring relevance, and that a publisher’s “back list” of published works is typically relied upon to help generate continuing revenue permitting the publisher to undertake future investments in the publication of new works. Furthermore, new subscription models providing unlimited access to collections of eBooks often comprised of entire backlists from numerous publishers are making such works more discoverable and available than ever before.²⁶ The Copyright Office concluded that the comparative lack of susceptibility to the kind of wear-and-tear that afflicts physical books over time makes a “used” digital copy “just as desirable” as a new digital copy, so that its ability to “compete for market share with new copies is thus far greater in the digital world.”²⁷ That conclusion is not only still valid but has likely been strengthened by advances in technology, and claims about “changing public tastes” cannot offset the significance of this concern.

d. Library Lending of eBooks

The Califa Group seems to suggest in its comments that the Copyright Act needs to be amended to include digital first sale to enable public libraries to freely “preserve” and “make [eBook] titles available” to users, claiming that the “picture has been grim, in that many publishers have limited content that they make available to public libraries” under “restrictive”

market, no longer exists in the realm of digital transmissions. The ability of such ‘used’ copies to compete for market share with new copies is thus far greater in the digital world.”).

²⁴ CDT COMMENTS, *supra* at note 5, at 15.

²⁵ See generally, Siwek, *supra* note 17.

²⁶ See Press Release, HARPER COLLINS, *Scribd Launches First Global, Multi-Platform Digital Book Subscription Service* (Oct. 1, 2013) <http://www.harpercollins.com/footer/release.aspx?id=1060&b=&year=2013> (noting the availability of “majority of backlist” in Scribd’s subscription service); Press Release, SCRIBD, *The New Scribd* (Oct. 1, 2013) <http://blog.scribd.com/2013/10/01/the-new-scribd/>.

²⁷ See *Section 104 Report*, 82-83 (2001).

licensing terms.²⁸ Aside from the fact, as noted in AAP Comments, that *all* of the competing major trade publishers (*i.e.*, publishers of popular works of fiction and non-fiction) have each developed their own policies on library lending of eBooks, OverDrive—the [self-described] leading eBook, audiobook, music and video distributor for schools and libraries—announced just last month that six libraries “made the 2013 Million Digital Checkouts Club” due to “each of these libraries...providing their users a *robust collection, ample copies of popular titles* and access to help resources and discoverability tools.”²⁹ In light of this evidence of a clearly functioning, albeit continually evolving, market in this area, such assertions that the continued functioning of libraries is being threatened by a lack of reasonable licensing deals permitting the lending of eBooks to library patrons lack any basis in fact.

Furthermore, creating a digital first sale doctrine would not address whether existing publisher policies permitting library eBook lending are “reasonable,” whereas permitting these new policies to be tested and evaluated in the competitive market will lead to changes that better address both library and publisher objectives. To the extent that the Califa Group and the Ohio Library Council both raised concerns about preserving and updating exceptions and limitations in the Copyright Act to ensure that libraries can fulfill their mission in the digital age, AAP agrees that Section 108 merits review and would suggest that the extensive Section 108 Study Group Report issued by the Copyright Office and the Library of Congress in March of 2008, is a good place to start.³⁰ However, for the reasons stated above, we reject the notion that amendment of Section 108 is necessary to facilitate library eBook lending. As noted in OverDrive’s announcement, the six libraries in the Million Digital Checkouts Club experienced “significant year-over-year growth” in usage of eBooks and other digital media, and this momentum should not be halted by unnecessarily inserting a digital first sale doctrine into a market which is significantly improving each year.³¹

²⁸ THE CALIFA GROUP, Green Paper Request for Comments, 1 (Nov. 13, 2013) http://www.ntia.doc.gov/files/ntia/califa_group_comments.pdf (hereinafter referred to as “CALIFA COMMENTS”) (demanding that “libraries...be able to preserve books and to make titles available to users, subject only to budget constraints).

²⁹ Press Release, OVERDRIVE, *Libraries Exceed 1 Million Digital Checkouts in 2013 Through OverDrive Collection* (Dec. 23, 2013) <http://www.overdrive.com/news/libraries-exceed-1-million-digital-checkouts-in-2013-through-overdrive-collection/>.

³⁰ See generally, Copyright Office, *Section 108 Study Group Report* (Mar. 4, 2008) <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>; CALIFA COMMENTS, *supra* note 28; OHIO LIBRARY COUNCIL, Green Paper Request for Comments (Nov. 13, 2013) http://www.ntia.doc.gov/files/ntia/ohio_library_council_comments.pdf.

³¹ Press Release, OVERDRIVE, *supra* note 24 (noting that the growth in digital checkouts grew year-over-year between 16% to 68% from 2012 to 2013 at these libraries).

- e. *Question 10: Are there any changes in technological capabilities since the Copyright Office's 2001 conclusions that should be considered? If so, what are they? For example, could some technologies ensure that the original copy of a work no longer exists after it has been redistributed?*

According to ReDigi, “systems now exist that allow...the transfer of single instances of [digital files] while rendering ancillary copies inoperable.”³² However, as stated in AAP’s Comments, regardless of technological advancements, the inability of copyright owners to effectively monitor or enforce “forward-and-delete” requirements, due to privacy and numerous other practical considerations, makes the question of whether such technologies exist or could be developed a red herring. As the Copyright Office stressed in its 2001 Report, “in applying a digital first sale doctrine as a defense to infringement it would be difficult to prove or disprove whether that act [to “forward-and-delete” the file without retaining a backup copy] had taken place, thereby complicating enforcement.”³³ And, as Professor Villasenor pointed out at the Public Meeting, it is not clear that technology can ensure that backup copies are deleted³⁴ and there will always be individuals that will crack such safety measures and increase online piracy to the detriment of creators that deserve compensation for their works.

Furthermore, there are other risks posed by technological “loop holes,” such as the “short duration loan problem” discussed by Professor Villasenor that could “decimate the market opportunities for creators and providers of digital content.”³⁵ Taking such risks seems increasingly unnecessary given the development of “services such as Spotify that provide on-demand music access today... [delivering] essentially the same [experience] as that envisioned in the [short duration loan] hypothetical scenario... [but allowing] compensation to be provided to holders of music copyrights.”³⁶ And, with the advent of “Spotify-like” subscription services for eBooks, such as 24Symbols, Scribd, Oyster and Entitle, the competitive market is continuing to develop and deliver increasing options for readers that parallel the experience of library lending.³⁷

³² REDIGI, Green Paper Request for Comments 8 (Nov. 13, 2013)

http://www.ntia.doc.gov/files/ntia/redigi_comments.pdf (hereinafter “REDIGI COMMENTS”).

³³ See *Section 104 Report*, at 83 (2001).

³⁴ Given the fact that many users of digital content (typically, but not always, pursuant to an authorizing license) can currently download multiple copies on multiple devices (desktop computer, laptop, tablet, e-reader, smart phone, etc.) or access copies through remote cloud storage, the practical likelihood that any technology could ensure compliance with a “forward and delete” requirement is virtually nil, and the copyright owner’s ability to monitor or enforce such compliance is essentially non-existent.

³⁵ Villasenor, *supra* note 6, at 7 (explaining that demand for music by millions of individuals could be satisfied by only “a few hundred copies” of a song, and thus “dramatically reduce the market for digital music sales”).

³⁶ *Id.* at 8.

³⁷ See generally, Press Release, SCRIBD, *supra* note 22; FAQs, ENTITLE, <http://www.entitlebooks.com/faq-online-ebook-subscription-service> (last visited Jan. 16, 2014); FAQs, 24SYMBOLS, *Keys to Understanding 24Symbols*, http://www.24symbols.com/docs/FAQ24symbols_en.pdf (last visited Jan. 16, 2014) (offering a “freemium” subscription service where books can be accessed for free with ads or, for a fee, without ads); T.C. Sottek, *Oyster’s Netflix-life Ebook Subscription Service Now Available for all iPad and iPhone Users*, THE VERGE (Oct. 16, 2013) <http://www.theverge.com/2013/10/16/4846734/oyster-ebook-subscription-ipad-iphone>.

f. Impact of Kirtsaeng Decision

In its submitted Comments, the Internet Association claims that “the [*Kirtsaeng*] decision should have very little impact on the ability of rights holders to engage in...differential pricing [*i.e.* offering “works at different prices and different times in different online markets].”³⁸ With respect to the sale of *tangible* copies of copyrighted works, such as foreign editions of textbooks, this is simply false. The reality experienced by AAP’s members is that the *Kirtsaeng* decision³⁹ has eliminated, as a practical matter, a copyright owner’s ability to utilize the protections of the unauthorized importation prohibitions of the Copyright Act to “price to the market” and prevent arbitrageurs from importing lower-priced versions of works made for foreign markets into the U.S. for sale (online or offline) to U.S. retailers and consumers in competition with the copyright owners’ domestic versions of those products.

Furthermore, while AAP agrees with the American Free Trade Association that the *Kirtsaeng* decision “must not be mitigated by...anti-competitive licensing regimes or policies,”⁴⁰ we would question the basis for such a concern. “Pricing to the market” had never been characterized as “anti-competitive” until the announcement of the majority opinion in this controversial split-decision by the U.S. Supreme Court. Supporters of this decision, which undercuts a strong U.S. export sector, have used the majority opinion’s dubious assumptions and rationales as license to mischaracterize market segmentation as “anti-competitive” in order to profit domestically from U.S. publishers’ efforts to participate competitively in foreign markets.⁴¹

3. Whether and how the government can facilitate the further development of a robust online licensing environment?

While the Library Copyright Alliance (“LCA”) opposes “a central, online licensing platform for high-volume, low value uses” based on its claim that any increase in online licensing will lead “rights-holders [to] argue even more vigorously that courts should reject the assertion of fair use in cases involving high-volume, low-value uses,”⁴² the numerous Comments received by the Task Force agreed that “improving the online licensing environment would be

³⁸ INTERNET ASSOCIATION, Green Paper Request for Comments 7 (Nov. 13, 2013) http://www.ntia.doc.gov/files/ntia/internet_association_comments.pdf (hereinafter “IA COMMENTS”).

³⁹ See *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11-697, slip op. 3 (U.S. 2013).

⁴⁰ AMERICAN FREE TRADE ASSOCIATION, Green Paper Request for Comments 2 (Nov. 13, 2013) http://www.ntia.doc.gov/files/ntia/american_free_trade_association_comments.pdf.

⁴¹ See Siwek, *supra* note 15, at 16 (noting that exports from the core copyright industries accounted for \$142 billion in 2012, more than aerospace, agriculture, and the pharmaceutical industries).

⁴² LIBRARY COPYRIGHT ALLIANCE, Green Paper Request for Comments 4 (Nov. 13, 2013) http://www.ntia.doc.gov/files/ntia/library_copyright_alliance_comments.pdf (hereinafter “LCA COMMENTS”).

welcome.”⁴³ Licensing, as the Green Paper accurately points out, has led “in recent years, [to] numerous services [being] launched across copyright sectors to provide consumers with unprecedented access to content in a wide variety of formats”⁴⁴ Therefore, increasing the availability and efficiency of online licensing will increase dissemination and access for copyrighted works, a goal that publishers and libraries have historically shared. Furthermore, improved online licensing for high-volume, low-valued uses would bolster the market for existing works by facilitating additional new creative uses of such works.

According to its submitted comments, the LCA is also opposed to publisher use of license terms to “restrict libraries’ ability to exercise their rights under §§ 107, 108, and 109(a)” based on its view that the risk of such restrictions “will only get worse as publishers distribute more of their materials solely in digital formats.”⁴⁵ Yet today’s markets clearly establish that advances in technology have opened a realm of new possibilities for distributing digital works through various licensing arrangements. Publishers want to experiment with these capabilities to meet existing and developing customer needs, including those of libraries. As mentioned above, all of the major trade publishers have developed eBook lending terms to support the core mission of libraries to make books, whether in print or digital formats, available to the public. This is clear evidence that the growth of digital formats is not, as the LCA asserts, some kind of conspiracy to impose restrictions on libraries that will jeopardize their mission, but rather the result of market supply and demand — today’s consumers want instant access to digital content, as is clear from the dramatic increase in library eBook and other eMedia loans in 2013.⁴⁶ Publishers appreciate the role of libraries in fostering a wider culture of literacy and awareness of new publications which, as libraries often note, stimulates book sales⁴⁷ in a manner that should give publishers no desire to unduly restrict the ability of libraries to fulfill their mission.

4. **Establishing a multi-stakeholder dialogue on improving the operation of the notice and takedown system for removing infringing content from the Internet under the Digital Millennium Copyright Act.**

There is no dispute that effective copyright protection, online and off, is essential to ensuring that the rights afforded to creators under Section 106 of the Copyright Act are meaningful and serve as an incentive to create new works. Rights holders, ISPs, and content

⁴³ See, e.g., CDT COMMENTS, *supra* at note 5, at 16; see generally, COPYRIGHT CLEARANCE CENTER, Green Paper Request for Comments (Nov. 13, 2013)

http://www.ntia.doc.gov/files/ntia/copyright_clearance_center_comments.pdf.

⁴⁴ Green Paper at 99.

⁴⁵ LCA COMMENTS, *supra* at note 42, at 7.

⁴⁶ Press Release, OVERDRIVE, *supra* note 29 (noting that six libraries, up from two, joined the 1 Million Loan Club in 2013).

⁴⁷ See, e.g., Michael Kelley, *OverDrive and Sourcebooks to Launch Ambitious eBook Data Experiment*, OVERDRIVE (MAY 3, 2013) (for example, OverDrive and Sourcebooks conducted an experiment in eBook lending, the goal of which was “to clearly demonstrate the [positive] impact library eBook lending has on book sales and author recognition.”).

creators also agree that the DMCA’s notice-and-takedown system “can become unwieldy and burdensome” and that there is work to be done to improve this enforcement mechanism.⁴⁸ AAP, thus, rejects eBay’s claim that the DMCA’s notice-and-takedown system is “effective” and that there is “no reason to revisit at this time [its] intricate set of obligations and protections.”⁴⁹

As indicated in AAP’s Comments, we agree *in part* with the Task Force’s assertion that it is important to start the conversation about improving online copyright enforcement by developing best practices to improve the notice-and-takedown system within the bounds of the current terms of the DMCA.⁵⁰ However, AAP believes that legislative change may be necessary to make the overall U.S. copyright enforcement system truly effective in the online environment.

We agree with the Consumer Electronics Association that, in order to stay within the bounds of the terms of the current DMCA, the multistakeholder dialogue is not the forum through which to develop a proposal for “*mandatory* content filtering.”⁵¹ However, the dialogue is certainly an appropriate forum in which to discuss the modalities through which the goals of the DMCA, including the development of “standard technical measures” to identify and protect copyrighted works as indicated in Sections 512 (m) and (i), may finally be borne out. Given that both notice senders and recipients agree that the current notice-and-takedown system is inefficient and that technology provides increasingly effective, affordable and reasonable measures to prevent the appearance (or reappearance) of infringing content,⁵² the conditions appear ripe for collectively developing the standard technical measures that Congress envisioned in its crafting of the DMCA 15 years ago.⁵³

Both Google and EFF acknowledge that current filtering technologies can distinguish “whole” copies of copyrighted works from partial copies and thus separate the most likely infringements from those that may require a more nuanced examination. Thus, the development and implementation of standard technical measures should provide an effective threshold

⁴⁸78 Fed. Reg. at 61,340.

⁴⁹ EBAY, Green Paper Request for Comments 1 (Nov. 13, 2013)

http://www.ntia.doc.gov/files/ntia/ebay_comments_0.pdf.

⁵⁰ *Id.*

⁵¹ CONSUMER ELECTRONICS ASSOCIATION, Green Paper Request for Comments 5 (Nov. 13, 2013)

http://www.ntia.doc.gov/files/ntia/consumer_electronics_association_comments.pdf (hereinafter “CEA COMMENTS”). (emphasis added).

⁵²There are a number of companies offering technological measures to protect sites against unauthorized posting of copyrighted content, with a variety of pricing and implementation models. *See e.g.*, Audible Magic <http://audiblemagic.com/solutions-compliance.php> (last visited Nov. 13, 2013) (providing “turnkey compliance and filtering solutions powered by sophisticated and patented digital fingerprinting technology”); Gracenote, http://www.gracenote.com/case_studies/itunes/ (last visited Nov. 13, 2013) (being used for more than “filtering” as it underlies iTunes Match as well); Vobile, <http://vobileinc.com/> (last visited Nov. 13, 2013); Sandvine <https://www.sandvine.com/downloads/general/success-stories/success-story-40-successful-value-added-services-deployments.pdf> (last visited Nov. 13, 2013) (explaining how its service allows broadband networks to efficiently and cost-effectively filter content).

⁵³ *See* AAP COMMENTS, *supra* note 3, at 15-16 (describing our specific suggestion to enlist the National Institute of Standards and Technology (NIST) to lead a multistakeholder group in devising such measures).

protection against a large number of what are often the most damaging type of copyright infringements on the Internet (*i.e.*, unauthorized copies of works in their entirety) and will surely improve notice-and-takedown efficiency by reducing the need to send notices in the first place.

However, to the extent that an alleged infringement is not a “whole” copy of another copyrighted work or there are other limits to the effectiveness of technical measures, filtering will not provide a complete solution. Therefore, it is still important that concerns with the actual sending and processing of notices be addressed through the multistakeholder dialogue. For instance, the Internet Commerce Coalition noted that “the volume of invalid DMCA notices clearly suggests a problem” with the current operation of the notice-and-takedown system.⁵⁴ Such a concern can most certainly be properly evaluated through the Task Force’s multistakeholder dialogue. The Task Force can take into account the volume of notices actually sent to notify ISPs of infringing files on their sites, as a measure against which non-compliant notices may be compared. Thus, in assessing the significance of the number of non-compliant notices, the Task Force should view this number in juxtaposition with the volume of takedown notices actually sent over a period of time.⁵⁵ For example, Google has made a concerted effort to be transparent about the number of notices it processes, regularly numbering into the “tens of millions of DMCA notices...each month.”⁵⁶ Thus, while it is important to address the fact that Google has received “hundreds of [non-compliant] notices,” as was noted in an amicus brief it filed just last month,⁵⁷ even 1,000 notices out of ten million notices is less than one hundredth of one percent. Put differently, of the millions of notices that Google receives each month; over 99.9999% are sent in good faith compliance with the terms of the DMCA.

Still, to the extent that “non-compliant” may encompass subjective or technical reasons for viewing a given notice as insufficient, AAP Comments suggested that it may be useful for copyright owners and service providers to: (1) establish a list of criteria to serve as a benchmark for assessing whether a notice contains “information *reasonably sufficient* to permit the service provider to locate the [infringing] material;”⁵⁸ (2) to develop templates for one-off notices as well as notices providing a “representative list” of infringed works; and (3) to establish best practices for sending, accepting, and responding to electronic notices, including but not limited to addressing certain current barriers such as the use of “CAPTCHAS” which prevent the automated sending of takedown notices.

⁵⁴ INTERNET COMMERCE COALITION,, Green Paper Request for Comments 3 (Nov. 13, 2013) http://www.ntia.doc.gov/files/ntia/internet_commerce_coalition_comments.pdf.

⁵⁵ See *e.g.*, Resnikoff, *supra* note 8 (noting that Google has received over 100 million takedown notices from the music industry alone); Br. of Amici Curiae RIAA, *supra* note 9, at 21 (noting that “over the last five years, the RIAA has received a minuscule number of counter-notices in response to the over 46 million takedown notices it has issued”).

⁵⁶ Br. of Amici Curiae Google Inc., in support of Lenz, *Lenz v. Universal Music Corp.*, No. 13-16106 at 10 (9th Cir., Dec. 13, 2013) https://www.eff.org/files/2013/12/13/osp_lenz_amicus_brief.pdf.

⁵⁷ *Id.*

⁵⁸ 17 U.S.C. § 512(c)(3)(A)(iii).

Finally, much of the discussion at the Public Meeting focused on increasing transparency in the operation of the notice-and-takedown system, which requires information sharing by all stakeholders, *i.e.*, copyright owners, service providers, and enforcement vendors. AAP member companies' enforcement vendors were surveyed to provide some preliminary answers to questions raised at the Public Meeting.

For instance, the Internet Association and the Consumer Electronics Association were interested in the “mechanisms” or “strategies” rights holders use “to ensure the accuracy or appropriateness of their notices.”⁵⁹ Enforcement vendors employed by AAP member companies use a combination of automated crawling, using proprietary technologies, to identify potentially infringing content, and manual verification to eliminate false positives. This manual verification process usually involves at least one person checking indicators such as file size, file name, file content, etc. to ensure that the work is an unauthorized copy of their client’s copyrighted work. Furthermore, vendors regularly update their monitoring and enforcement protocols to ensure accuracy by taking into account factors such as counter notices and feedback from ISPs and site administrators.

There were also concerns raised at the Public Meeting about the lack of contact information in notices. Based upon the sample notices provided to AAP, all enforcement vendors included at least one type of contact information, specified as satisfactory in Section 512(c)(3)(A) of the DMCA, that would thus allow a notice recipient to query the sender.

Publishers hope that search engines, service providers, and other rights holders will also share information about their notice-and-takedown processes and use the Task Force’s multistakeholder dialogue to achieve meaningful improvement to this system. Information that would be useful for stakeholders that process notices to provide includes: (1) statistics on page impressions per day; (2) how often actions are taken in response to notices; (3) processes for tracking for repeat infringers; and (4) frequency and process of forwarding notices to users.

5. “Litigation Business Model”

AAP agrees that copyright law should not act as a “Sword of Damocles”⁶⁰ that thwarts innovation, or be used to pursue frivolous legal claims to “generate profit”⁶¹ instead of serving as a mechanism to protect the integrity of rights afforded under Section 106. However, AAP rejects the notions that the current availability of statutory damages has “spawned a litigation business model”⁶² to pursue baseless legal claims, and that “the doctrine of fair use and the instability of

⁵⁹ IA COMMENTS, *supra* note 38, at 6; CEA COMMENTS, *supra* note 51, at 5.

⁶⁰ EFF COMMENTS, *supra* note 11, at 24.

⁶¹ IA COMMENTS, *supra* note 38, at 4.

⁶² *Id.*

licensing arrangements provide cover for copyright holders to make overbroad threats of litigation.”⁶³ AAP acknowledges that Congress has made efforts to address the issue of “patent trolls,” given the multitude of stakeholders that have raised concerns about the costs and obstacles to technological innovation that such vexatious suits present. For the reasons explained below, however, it appears unlikely that such “trolls” will become a similarly pervasive problem in the copyright context. Specifically, two examples clearly illustrate that judges are using existing judicial authority to sanction such behavior and provide strong deterrents against any perceived development of a copyright-based “litigation business model.”

First, in *Righthaven v. Hoehn*,⁶⁴ the Ninth Circuit affirmed the district court’s finding that an assignment merely granting plaintiffs the bare right to sue for copyright infringement of a number of newspaper articles was invalid, and thus upheld the district court’s dismissal of the case for lack of standing. Also in 2013, district court judges in Minnesota, California and Illinois sanctioned attorneys affiliated with the firm Prenda Law⁶⁵ for filing baseless copyright infringement and secondary liability claims or, as one judge put it, “[using] copyright laws to ‘plunder the citizenry’”⁶⁶ and show “serious and studied disregard for the orderly process of justice.”⁶⁷ Sanctions from these three courts included making the plaintiffs personally liable for repaying various defendants’ attorneys’ fees (totaling over \$261,000) and “being referred to state and federal bars, the United States Attorney in at least two districts, one state Attorney General, and the Internal Revenue Service.”⁶⁸

In general, litigation is an expensive and time-consuming process with uncertain results that is usually disruptive to businesses, making it illogical for legitimate businesses to pursue baseless litigation. Moreover, to the extent that anyone would try to build a business model on meritless litigation, federal law provides tools for judges to deter such claims. For example, under 28 U.S.C. §1927, “any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” Additionally, Federal Rule of Civil Procedure 11 allows a court to “impose an appropriate sanction [i.e., one that will “deter repetition of the conduct or comparable conduct by others similarly situated”] on any attorney, law firm, or party” that pursues a frivolous or improper case or makes false statements to the

⁶³ EFF COMMENTS, *supra* note 11, at 3.

⁶⁴ *Righthaven, LLC v. Hoehn*, No. 11-16751, slip op. at 12, 13 (9th Cir. Feb. 5, 2013); *Righthaven, LLC v. Wolf*, Case No. 11-cv-00830-JLK, (D. Colo. September 27, 2011).

⁶⁵ Prenda Law generated revenue by “suing thousands of Internet users over allegations of illegal porn downloads.” See Joe Mullin, *Unhappy Thanksgiving for Prenda Law Ordered to Pay 261K to Defendants*, ARS TECHNICA (Nov. 29, 2013) <http://arstechnica.com/tech-policy/2013/11/unhappy-thanksgiving-for-prenda-law-ordered-to-pay-261k-to-defendants/>.

⁶⁶ *Ingenuity 13 LLC v. John Doe*, Case No. 12-cv-8333-ODW, 2013 WL 1898633, at 1-2*, *5 (C.D. Cal. May 6, 2013).

⁶⁷ *AF Holdings, LLC v. John Doe(s)*, Case No. 12-cv-1445-JNE-FLN, (D. Minn. November 6, 2013), ECF No. 67; *Lightspeed Media Corp. v. Smith*, Case No.12-cv-00889-GPM-SCW, (S.D. Ill. November 27, 2013).

⁶⁸ *Lightspeed Media Corp. v. Smith*, Case No.12-cv-00889-GPM-SCW, (S.D. Ill. November 27, 2013) (internal citations omitted); see also, Mullin, *supra* note 63.

court. Thus, current law provides and, as shown in the examples, judges use such measures to sanction counsel that pursue baseless, reckless, or vexatious claims, which are certainly not limited to copyright cases. In sum, there is no reason to amend the Copyright Act to combat a “litigation business model” that is, if it exists at all, being pursued only by a small handful of miscreants and effectively addressed by the federal courts through the application of existing federal statutes and rules authorizing judicial sanctions.

6. Conclusion

AAP appreciates this opportunity to provide the Task Force with Reply Comments and looks forward to continued engagement with the Task Force and the various stakeholders to further explore ways to make copyright meaningful in the twenty-first century.

Sincerely,



Allan Adler
General Counsel
Vice President for Government Affairs
Association of American Publishers
455 Massachusetts Ave. NW
Washington, D.C. 20001