



January 17, 2014

Filed via CopyrightComments2013@uspto.gov

Office of Policy and External Affairs
United States Patent and Trademark Office
Mail Stop External Affairs
P.O. Box 1450
Alexandria, Virginia 22313-1450

Re: Request for Comments on Department of Commerce Green paper,
Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed.
Reg. 61337 (October 3, 2013), Docket No.: 130927852-3852-01

To the Office of Policy and External Affairs:

BSA | The Software Alliance (BSA)¹ appreciates this opportunity to respond to the Internet Policy Task Force's Request for Comments ("RFC") on the Department of Commerce's Green Paper, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (the "Green Paper").² BSA members rely on copyright and other forms of intellectual property to make their innovations broadly available to consumers without losing the ability to protect the commercial value of those innovations. Many of these same BSA members also offer data services as well as services that function as online intermediaries. Given these dual roles as both rights holders and intermediaries, BSA members bring a balanced perspective to the topics addressed in the Green Paper. They also give BSA members a unique appreciation of the interests of content creators, technology companies, and the public in maximizing the potential of the Internet and related technologies.

These comments address four issues raised in the RFC: (1) application of the first sale doctrine to distribution of works through digital transmission; (2) secondary liability of online services; (3) operation of the DMCA notice and takedown system; and (4) the creation of best practices.

¹ BSA | The Software Alliance (www.bsa.org) is an association of the world's leading software and hardware technology companies. BSA's members include Adobe, Apple, Autodesk, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, IBM, Intel, Intuit, McAfee, Microsoft, Minitab, Oracle, PTC, Rockwell Automation, Rosetta Stone, Siemens PLM Software, Symantec, Tekla, and The MathWorks.

² U.S. Department of Commerce, *Request for Comments on Department of Commerce Green paper, Copyright Policy, Creativity, and Innovation in the Digital Economy*, 78 Fed. Reg. 61337 (Oct. 3, 2013); see also U.S. Department of Commerce, *Extension of Comment Period for Public Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy*, 78 Fed. Reg. 78314 (Dec. 26, 2013) (extending deadline for filing of post-meeting comments to January 17, 2014).

I. Application of the First Sale Doctrine to Digital Transmissions

BSA members strongly oppose applying the first sale doctrine, which the Copyright Act limits to the owner of a particular copy of a work distributed through the sale of a physical product, to works distributed through digital transmissions. First, such a change would materially increase risks of infringement, particularly for digital works such as software. As the Copyright Office noted in opposing this extension to the first sale doctrine in 2001,

In applying a digital first sale doctrine as a defense to infringement it would be difficult to prove or disprove whether that act had taken place, thereby complicating enforcement. This carries with it a greatly increased risk of infringement in a medium where piracy risks are already orders of magnitude greater than in the physical world. Removing, even in limited circumstances, the legal limitations on retransmission of works, coupled with the lack of inherent technological limitations on rapid duplication and dissemination, will make it too easy for unauthorized copies to be made and distributed, seriously harming the market for those works.³

These concerns are even more valid today given the rapid growth in online distribution of works. When the owner of a physical copy of a work, such as a book, sells that copy, the owner loses possession of that copy. If the book is acquired through a transmission in digital form, the now “sold” copy may continue to reside on the original customer’s device even after the original copy is re-distributed. Although such retained copies would be infringing even if the first sale doctrine were extended to digital transmissions, enforcement authorities and consumers alike would find it exceedingly difficult to determine which copy is genuine and which is infringing, and rights holders would find it nearly impossible to ensure that the original customer’s copy had been eliminated. Extending the first sale doctrine to digital transmissions would thus invariably lead to an escalation in infringement, depriving developers of revenues and leaving them with less to invest in innovation and to serve their customers.

Extending the first sale doctrine to digital transmission also would harm customers by undermining the substantial benefits that flow from the licensing models that apply to nearly all digital transmissions today. Licenses provide copyright holders and customers with clarity about the explicit bundle of rights and obligations undertaken by each in the transaction, including in many cases rights that are more extensive than would be conveyed by a “sale” under the copyright laws. Licenses also establish a relationship between the software developer and the customer that often continues long after the initial transaction takes place. For example:

- Software licenses may entitle the licensee to patches and other updates for improved functionality and to fix security vulnerabilities, and in some cases even provide access to new versions of the software. These updates can help protect software users from malware and other security threats that can have disastrous consequences, including theft of personal information and permanent corruption of their computers.⁴ Critically,

³ U.S. Copyright Office, *A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act* 83-84 (2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

⁴ The threats posed by malware and other cyber threats—both to a customer’s computer or system and to the country’s information technology infrastructure more broadly—are well recognized. See, e.g.,

licenses also often provide authorization for the developer to install such updates on the licensee's computer—conduct that in some cases could trigger civil or criminal liability in the absence of such authorization—and provide reasonable limitations on liability to ensure that developers are not deterred from making these benefits available to their customers.

- Software licenses also enable software developers to tailor their offerings to accommodate a range of customer needs, allowing them to offer different features and charge different prices to different types of customers (e.g., students and academic institutions, home users, businesses) and for different customer needs (e.g., per-use, per-user, per-device). A business customer, for instance, might be willing to pay a higher price for a copy of software that has relatively broader use rights, additional features, or with network licensing options (e.g., allowing software to be installed on multiple devices for non-concurrent use). A student, by contrast, might prefer a version of the software with fewer features and usage options for a lower price. Licensing facilitates a far greater range of choices for consumers than would be possible if digital transmissions of software were treated as “sales.”

Courts have repeatedly upheld the enforceability of such software licenses, including against claims that the first-sale doctrine applies to them.⁵ The importance of licensing will only increase as “cloud computing” and other online models for distributing and accessing software become more widespread. One of the advantages of the cloud model is that ongoing relationship between licensor and licensee is even stronger than when software is loaded and used locally. In cloud based models software is updated and adapted to the user's needs on a regular basis, making even more problematic if the first sale doctrine were applied in these circumstances and such updates could not occur.

Extending the first-sale doctrine to digital transmissions would undermine existing business models that are universally used to distribute software and other works online, conflict with existing precedent recognizing the distinction between copyright licenses and sales, and frustrate settled market expectations, ultimately harming consumers. Creating a blanket right for licensees to transfer a digitally transmitted copy of a work to a new user would raise difficult issues of privity between the software developer and the subsequent transferee, which would complicate efforts to enforce the original license, including provisions specifying the terms of the transaction and the remedies and other rights of the parties. It also would create uncertainty as to whether the subsequent transferee was entitled to services, updates, or other benefits granted to the original licensee, and even whether the developer might incur liability in providing such updates.

These uncertainties would deter developers from offering consumers multiple purchasing options for their works and leave them less able to offer a range of prices for different users and usage scenarios. Developers would be particularly averse to offering these options if they faced the risk of having lower-cost versions of their software (e.g., versions intended and priced for educational use) displace versions intended for commercial settings (e.g., for enterprise use).

Dep't of Homeland Security, *Fact Sheet: Protecting Our Federal Networks Against Cyber Attacks* (2008), at <http://www.hsdl.org/?view&did=486707>.

⁵ See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010) (overturning district court decision applying first-sale doctrine to software license), *cert. denied*, 132 S. Ct. 105 (2011).

In sum, extension of the first sale doctrine to digital transmissions would sharply increase infringement risks in ways that do not arise with respect to sales of physical copies of works and would reduce consumer choice by undermining the legal foundations that software developers—and increasingly other content creators as well—rely on to offer multiple licensing options that increase utility and enhance value for customers. For these reasons, BSA opposes any extension of the first sale doctrine to copies of works distributed through digital transmissions.

II. Secondary Liability of Online Services

The RFC also seeks views on the current rules governing secondary liability claims against online service providers, and in particular, whether the level of statutory damages available in such cases is appropriate. BSA members believe the current rules generally work well in practice and therefore do not support any change to the rules, especially any change that would disrupt the careful balance of the existing structure.

As already noted, BSA members own a significant number of valuable copyrights and rely on the Copyright Act to protect and enforce these copyrights, including online. At the same time, several BSA members operate online data management and intermediary services within the scope of Section 512 of the Act. Accordingly, BSA members have a unique and balanced perspective on how the current rules are working.

The level of statutory damages currently available against online intermediaries and the limitations on remedies established by the DMCA represent a careful compromise between the interests of copyright owners and online intermediaries, one that has worked remarkably well, including in the 15 years since the enactment of the DMCA. Moreover, this structure is specifically designed to work within the broader framework of the U.S. legal system, with its strong approach to statutory damages for copyright infringement, relatively smoothly functioning judiciary branch, and advanced civil procedures.

The rules have given online intermediaries clear incentives to behave responsibly in operating their services, including by acting expeditiously to remove infringing content in response to appropriate notices from rights holders, while ensuring that bad actors remain subject to substantial criminal penalties and civil remedies. At the same time, the rules have shielded responsible online intermediaries from the burden of actively policing their users or constantly monitoring their networks for infringing conduct—obligations that would weaken incentives for innovation and threaten the dynamism and values that have made the Internet so valuable and attractive to users.

In our experience, the current rules provide sufficient flexibility to impose meaningful penalties and damages on bad behavior by online providers, and thereby generate meaningful deterrence, without raising undue risks of punitive measures that could deter legitimate actors from engaging in socially beneficial behavior. Any effort to “recalibrate” the level of remedies available against online service providers for secondary infringement liability, by contrast, could undermine the balance struck under the existing rules and disrupt the legitimate expectations that have been built around it.

III. Operation of the DMCA Notice and Takedown System

After noting certain respects in which the DMCA’s notice and takedown system is sometimes perceived as unwieldy, the RFC states that the Internet Policy Task Force “believes that one potential solution to ease burdens and improve results that would not

require legislation is the creation of best practices . . . [to] support[] a more efficient and reliable notice and takedown system.”⁶ BSA supports this proposal.

Although BSA members consider the current notice and takedown system to be working reasonably well in practice, it is important for all stakeholders to remain receptive to opportunities for improving effectiveness and efficiency. The current rules allocate the costs of operating the system between rights holders and online intermediaries. Among the costs borne by intermediaries are the establishment of systems for receiving notices from rights holders, verifying whether notices comply with statutory requirements, taking appropriate action against the targets of such notices, responding to counter-notices from such targets, and so on. Some online intermediaries today receive thousands or even millions of notices per month, which can result in millions of dollars annually in compliance costs. While large online intermediaries may be able to absorb these costs, smaller intermediaries, especially innovative start-up companies that are struggling to survive, may not.

We recognize that poorly drafted or inaccurate notices can raise compliance costs for online intermediaries or lead to improper removal of non-infringing material, while also reducing the effectiveness of notices for owners of the works involved. Given the critical role that online intermediaries, both large and small, play in realizing the Internet’s potential to advance freedom of expression and other important values, improving the efficiency and reliability of the notice and takedown system would have broad benefits.

That said, BSA strongly supports the Task Force’s view that improvements to the current system should be achieved through voluntary best practices, not new legislation or regulation. In crafting such best practices, it also will be important to share them with stakeholders in major foreign markets in order to promote common practices across markets to the maximum extent possible.

IV. The Creation of Best Practices

The RFC states that the Task Force intends to “provide a forum for discussion and consensus-building among stakeholders” on how the current notice and takedown system can be improved and invites commenters to identify potential topics that would benefit from this process and information on “[e]xperiences with other Internet-related multistakeholder processes on policy or technical issues.”⁷

BSA supports voluntary, market-led efforts to improve the current notice and takedown system. In the preceding section, we listed several issues that might be appropriate for discussion among stakeholders, including how to better manage the volume of notices sent to online intermediaries without materially impairing rights holders’ ability to combat online infringement; how to improve the accuracy and reliability of notices; and how to make the entire system more efficient and effective. On the latter point, several BSA members have made significant progress in using technology tools to improve the efficiency of both their systems for preparing and issuing notices (as rights holders) and their systems for processing such notices (as online intermediaries). BSA believes that more widespread use of technology tools by both rights holders and online intermediaries could achieve real, concrete gains in the short term (of course, use of any such tools should remain wholly voluntary).

⁶ 78 Fed. Reg. at 61340.

⁷ 78 Fed. Reg. at 61340.

With regard to other multistakeholder initiatives that the Task Force might consider, BSA members have had positive experiences with market-led voluntary processes in which the U.S. Intellectual Property Enforcement Coordinator ("IPEC") has been involved. These include the Center for Safe Internet Pharmacies (<http://www.safemedsonline.org/>), which seeks to address the problem of consumer access to counterfeit and other illegitimate pharmaceuticals on the Internet; best practices for payment processors to investigate complaints and terminate processing of transactions for Internet sites that distribute counterfeit and pirated goods; and the *Best Practices Guidelines for Ad Networks* (<http://2013ippactices.com/>). From the perspective of individual BSA members participating in these initiatives, these initiatives have helped promote transparency and understanding between rights holders and affected intermediaries and have been able to leverage technology solutions to help content owners and intermediaries take more effective action against infringers.

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Thank you again for this opportunity to share our views on these issues.

Sincerely,

A handwritten signature in black ink that reads "Victoria A. Espinel". The signature is written in a cursive, flowing style.

Victoria Espinel
President and CEO