

***Reply Comments in Response to the Department of Commerce's Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy***

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*Julie A. Ahrens*

*Timothy Greene*

Center for Internet & Society

Stanford Law School

559 Nathan Abbott Way

Stanford, CA 94305

[jahrens@law.stanford.edu](mailto:jahrens@law.stanford.edu)

[tgreene@law.stanford.edu](mailto:tgreene@law.stanford.edu)

*Corynne McSherry*

*Mitchell L. Stoltz*

Electronic Frontier Foundation

815 Eddy St.

San Francisco, CA 94109

[corynne@eff.org](mailto:corynne@eff.org)

[mitch@eff.org](mailto:mitch@eff.org)

## *Introduction*

We commend the Task Force for its commitment to exploring ways to improve copyright law fearlessly and with a focus on evidence. These reply comments address two points. First, we respond to positions taken by other commenters about much-needed changes to copyright’s statutory damages regime and reiterate the importance of data-driven policymaking. Second, in response to discussions at the December 12, 2013 conference about how to improve the notice-and-takedown regime, we attach the Fair Use Principles for User Generated Video Content endorsed by many of the participants in the discussion.

### **I. Statutory Damages Must Be Made Predictable and Proportional Using An Evidence-Based Approach.**

As numerous commenters have reported, copyright’s statutory damages regime has serious problems. Statutory awards for similar infringing conduct vary widely from case to case. This uncertainty discourages beneficial risk-taking and investment in both art and technology. Lacking any explicit connection to actual harm, or other guidelines for consistent application, damage awards are often excessive beyond any reasonable measure of either compensation or deterrence.

In contrast, a well-crafted damages regime for the 21st century could deter truly harmful infringement while being proportional and predictable – and thus a reliable guide to behavior – for users of creative works. Better damages provisions would also curb the scourge of lawsuit abuse that has terrorized and extorted hundreds of thousands of Internet subscribers over the past four years.

In addition to the undersigned, comments in this proceeding by the Consumer Electronics Association,<sup>1</sup> Public Knowledge,<sup>2</sup> the Internet Association,<sup>3</sup> the Digital Media Association,<sup>4</sup> the Center for Democracy and Technology,<sup>5</sup> and the Information Technology and Innovation Foundation<sup>6</sup> all called for more clarity and predictability for copyright damages. In addition, Professor David Nimmer has recently spoken out about the need for reform of the damages regime, noting that “statutory damages against an individual file-sharer should not ramify to the level of a small nation’s gross national product” and

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<sup>1</sup> Comments of the Consumer Electronics Assoc. at 3-4.

<sup>2</sup> Comments of Public Knowledge at 33-34.

<sup>3</sup> Comments of the Internet Assoc. at 1-5.

<sup>4</sup> Comments of the Digital Media Assoc. at 9.

<sup>5</sup> Comments of the Ctr. for Democracy and Tech. at 9.

<sup>6</sup> Comments of the Information Tech. and Innovation Found. at 3.

that all statutory damages “should bear some relationship to the actual damages suffered.”<sup>7</sup> Even the Recording Industry Association of America calls for more predictability in its comments to the Task Force, suggesting that courts “provide guidance on additional factors that a jury may take into account in determining statutory damages in any given case.”<sup>8</sup>

### **1. The Presumption That Harm Is Always Difficult To Prove Is No Longer Valid.**

Several commenters have defended the concept of statutory damages as being important for compensating copyright holders, owing to difficulties in proving actual harm. The Motion Picture Association of America believes that copyright holders “face substantial hurdles in quantifying the actual harm from illegal uploading and downloading” of creative works.<sup>9</sup> Yet no commenter provides any evidence that damages are difficult or impossible to prove in *every* copyright suit, or even most. They give no reason why damages in copyright cases are categorically harder to prove for copyright claims than for other complex civil claims that do not provide for statutory damages, such as antitrust or RICO. It’s more likely, and we believe that good empirical evidence will show, that difficulty of proof varies greatly among copyright cases, and that evidence to guide judges and juries will often be readily available. Requiring proof of damages when available would serve to contain excessive damage awards and assure that like cases are treated alike.

The oft-cited maxim that proof of damages is categorically difficult in copyright cases has its origin in court decisions from the nineteenth and early twentieth century.<sup>10</sup> At the time, the tools of modern civil discovery were not yet available, and courts often required a much higher quantum of proof before letting a jury decide an award. Today, civil litigants can use liberal discovery of paper and electronic records and the testimony of accountants and economists to arrive at a measure of actual harm. And courts now hold that a plaintiff’s inability to prove damages with precision does not foreclose its ability to recover damages. The concerns that prompted the maxim are antiquated, and the Task Force should re-evaluate them with current data.

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<sup>7</sup> David Nimmer, “Policy Considerations Relating to Copyright Law’s ‘Making Available’ Right” at 12-13, presented at the hearing on “The Scope of Copyright Protection,” Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Jan. 14, 2014, available at <http://judiciary.house.gov/index.cfm/2014/1/the-scope-of-copyright-protection>.

<sup>8</sup> Comments of the Recording Industry Assoc. of Am. at 11.

<sup>9</sup> Comments of the Motion Picture Assoc. of Am. at 6-7.

<sup>10</sup> See, e.g., *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 222, 231-33 (1952); *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106-07 (1914); *Brady v. Daly*, 175 U.S. 148, 154 (1899).

We believe reliable research will show that proof of damages (to the degree ordinarily required by courts) will be readily available in most copyright cases, and that such proof is not categorically more difficult in copyright cases. If so, statutory damages should be explicitly tied to actual harm, or a reasonable multiple in cases of willful infringement, perhaps with an exception for cases where proof of damages is truly and demonstrably impossible to obtain.

In short, concerns about adequate compensation do *not* require maintaining a status quo that so many organizations, industries, and experts believe is broken.

## 2. Inconsistency and Unpredictability

Without guidelines in the statute, or a consistent set of norms arising from caselaw, to guide judges and juries in setting statutory damage amounts, copyright litigation becomes a high-stakes casino game. The unpredictable nature of statutory damages awards is well documented.<sup>11</sup> Courts award maximum statutory damages in cases lacking particularly egregious conduct.<sup>12</sup> They award different per-work statutory awards for the same type of infringement.<sup>13</sup> The \$30,000 maximum for non-willful conduct is sometimes taken to be the minimum award for willful infringement, without a basis in the statute.<sup>14</sup> And the reduction in damages for innocent conduct is essentially an illusion, requiring the defendant to satisfy a monumental burden of proof. Professor Pamela Samuelson and Tara Wheatland, researching this history, found only two cases in the four-decade history of the current Copyright Act in which the defendant successfully invoked the discretionary “innocent infringer” reduction in minimum damages.<sup>15</sup>

The result of this uncertainty and inconsistency, combined with the vast range of damages permitted by the statute, is that minor infringements can and do lead to massive penalties, and windfall recoveries are common. Thus, the MPAA’s “confiden[ce] that juries will continue to award statutory damages only in appropriate cases, in appropriate amounts, taking into consideration all salient factors”<sup>16</sup> – a confidence not justified by data – is misplaced.

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<sup>11</sup> See, e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 459 (2009).

<sup>12</sup> *Id.* at 481.

<sup>13</sup> *Id.* at 484.

<sup>14</sup> *Id.* at 484.

<sup>15</sup> *Id.* at 474.

<sup>16</sup> Comments of the Motion Picture Assoc. of Am. at 7.

Changes to the Copyright Act's damages regime could make awards more predictable and consistent, which would make the Act as a whole a better guide of conduct for copyright holders and users alike.

## **II. Improving Notice and Takedown Using the Fair Use Principles for User Generated Video Content.**

EFF appreciated the opportunity to participate in the December 12, 2013 conference to discuss various issues raised in the Green Paper. At that meeting, as in the Green Paper itself, it was suggested that some of the problems with the notice and takedown system could be addressed through a multi-stakeholder dialogue. In addition to the recommendations made in its initial submission, EFF recommends that to the extent any such dialogue addresses user-generated content, it be informed by the Fair Use Principles for User Generated Video Content. These principles, attached hereto, were endorsed by EFF; the Center for Social Media, School of Communications, American University; the Program on Information Justice and Intellectual Property, Washington College of Law, American University, Public Knowledge, the Berkman Center for Internet and Society at Harvard Law School and the ACLU of Northern California. They reflect some of the concrete steps that content owners and service providers can and should take to help limit unnecessary collateral damage to important fair uses.

**Attachment: Fair Use Principles for User Generated Video  
Content**

## Fair Use Principles for User Generated Video Content

Online video hosting services like YouTube are ushering in a new era of free expression online. By providing a home for “user-generated content” (UGC) on the Internet, these services enable creators to reach a global audience without having to depend on traditional intermediaries like television networks and movie studios. The result has been an explosion of creativity by ordinary people, who have enthusiastically embraced the opportunities created by these new technologies to express themselves in a remarkable variety of ways.

The life blood of much of this new creativity is fair use, the copyright doctrine that permits unauthorized uses of copyrighted material for transformative purposes. Creators naturally quote from and build upon the media that makes up our culture, yielding new works that comment on, parody, satirize, criticize, and pay tribute to the expressive works that have come before. These forms of free expression are among those protected by the fair use doctrine.

New video hosting services can also be abused, however. Copyright owners are legitimately concerned that a substantial number works posted to some UGC video sites are simply unauthorized, verbatim copies of their works. Some of these right holders have sued service providers, and many utilize the “notice-and-takedown” provisions of the Digital Millennium Copyright Act (DMCA) to remove videos that they believe are infringing. At the same time, a broad consensus has emerged among major copyright owners that fair use must be accommodated even as steps are taken to address copyright infringement.<sup>1</sup>

Content owners and service providers have indicated their mutual intention to protect and preserve fair use in the UGC context, even as they move forward with efforts to address copyright concerns. The following principles are meant to provide concrete steps that they can and should take to minimize the unnecessary, collateral damage to fair use as they move forward with those efforts.

- 1. A Wide Berth for Transformative, Creative Uses:** Copyright owners are within their rights to pursue nontransformative verbatim copying of their copyrighted materials online. However, where copyrighted materials are employed for purposes of comment, criticism, reporting, parody, satire, or scholarship, or as the raw material for other kinds of creative and transformative works, the resulting work will likely fall within the bounds of fair use. But a commitment to accommodating “fair use” alone is not enough. Because the precise contours of the fair use doctrine can be difficult for non-lawyers to discern, creators, service providers, and copyright owners alike will benefit from a more easily understood and objectively ascertainable standard. Accordingly, content owners should, as a general matter, avoid issuing DMCA or other informal takedown notices for uses of

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<sup>1</sup> See User Generated Content Principles, Principle #6.

their content that constitute fair uses or that are noncommercial, creative, and transformative in nature.<sup>2</sup>

**2. Filters Must Incorporate Protections for Fair Use:** Many service providers are experimenting with automated content identification technologies (“filters”) to monitor their systems for potential copyright infringements. If a service provider chooses to implement such filters, the following precautions should be taken to ensure that fair uses are not mistakenly caught in them:

- **Three Strikes Before Blocking:** The use of “filtering” technology should not be used to automatically remove, prevent the uploading of, or block access to content unless the filtering mechanism is able to verify that the content has previously been removed pursuant to an undisputed DMCA takedown notice or that there are “three strikes” against it:
  1. the video track matches the video track of a copyrighted work submitted by a content owner;
  2. the audio track matches the audio track of that same copyrighted work; and
  3. nearly the entirety (e.g, 90% or more) of the challenged content is comprised of a single copyrighted work (i.e., a “ratio test”).

If filtering technologies are not reliably able to establish these “three strikes”, further human review by the content owner should be required before content is taken down or blocked.

- **Humans Trump Machines:** Human creators should be afforded the opportunity to dispute the conclusions of automated filters. If a user's video is “matched” by an automatic filter, the user should be promptly notified by the service provider of the consequences of the “match” and given the opportunity to dispute the conclusions of the filtering process. Notice should be provided to the user whether or not the “match” results in the blocking of content (e.g., a parodist may not want the target of the parody receiving a share of revenues generated by it). If the user disputes a “match” pursuant to the above dispute mechanism provided by the service provider, the provider should promptly notify the relevant content owner. The service provider may choose to impose a brief “quarantine” period on the content (no more than three business days), in order to afford content owner an opportunity to issue a DMCA takedown notice after human review of the disputed content.

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<sup>2</sup> Viacom’s website, for example, states that “regardless of the law of fair use, we have not generally challenged users of Viacom copyrighted material where the use or copy is occasional and is a creative, newsworthy or transformative use of a limited excerpt for noncommercial purposes.”



- **Minimization:** In applying automated filtering procedures, service providers should take steps to minimize the impact on other expressive activities related to the blocked content. For example, automated blocks should not result in the removal of other videos posted by the same user (e.g., as a result of account cancellation) or the removal of user comments posted about the video.
3. **DMCA Notices Required for Removals:** The DMCA’s “notice-and-takedown” procedures provide two important protections for creators whose noninfringing materials are improperly targeted for removal: (1) the right to sue where the removal is the result of a knowing material misrepresentation<sup>3</sup> and (2) a “counternotice-and-putback” procedure that overrides a takedown notice unless a content owner is willing to file an infringement action in court.<sup>4</sup> In order to preserve these protections, service providers should require compliant DMCA takedown notices from content owners before removing content in any manner that does not afford users the ability to contest and override the removal (such as the dispute and notice procedure described in Principle #2b above).
  4. **Notice to Users upon DMCA Takedown:** Upon issuance of any DMCA takedown notice by a content owner, the service provider should provide prompt notice to the user who posted the allegedly infringing material. Such notices should include (1) an entire copy of the takedown notice, (2) information concerning the user's right to issue a DMCA counter-notice and the provider's procedures for receiving such notices, and (3) information about how to contact the content owner directly in order to request a reconsideration of the takedown notice (see Principle #5 below). Where feasible, this information should be made available to the posting user on the page where the content formerly appeared, as well as in private communications (such as email).
  5. **Informal “Dolphin Hotline”:** Every system makes mistakes, and when fair use “dolphins” are caught in a net intended for infringing “tuna,” an escape mechanism must be available to them. Accordingly, content owners should create a mechanism by which the user who posted the allegedly infringing content can easily and informally request reconsideration of the content owner's decision to issue a DMCA takedown notice and explain why the user believes the takedown was improper. This “dolphin hotline” should include a website that provides information about how to request reconsideration, and a dedicated email address to which requests for reconsideration can be sent.<sup>5</sup> Service providers should ensure that users are informed of these mechanisms for reconsideration, both on the site where the removed material previously appeared, as well as in the notice described in Principle #4 above. Upon receiving an informal request for reconsideration of a particular takedown notice, the content owner should evaluate the request promptly, generally within three (3) business days, and retract the notice where it was issued in error.

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<sup>3</sup> 17 U.S.C. § 512(f).

<sup>4</sup> 17 U.S.C. § 512(g).

<sup>5</sup> Viacom, for example, has established a dedicated email address for this purpose: [counternotices@viacom.com](mailto:counternotices@viacom.com).

- 6. Mandatory Reinstatement upon Counter-notice or Retraction:** Service providers should establish and follow the formal “counternotice-and-putback” process contemplated by the DMCA. Service providers also should provide users with a streamlined mechanism to reinstate content in cases when a takedown notice has been retracted by the content owner.

**These Principles endorsed by:**

Electronic Frontier Foundation

Center for Social Media, School of Communications, American University

Program on Information Justice and Intellectual Property, Washington College of Law,  
American University

Public Knowledge

Berkman Center for Internet and Society at Harvard Law School

ACLU of Northern California