

**BEFORE THE
DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE
U.S. PATENT AND TRADEMARK OFFICE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION**

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

Docket No. 130927852-3852-01

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting the ability of creative professionals to earn a living from their creativity. It represents the interests of creators¹ and copyright owners across the spectrum of creative industries — including writers, composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers, and software developers — as well as the creative union workers and small businesses in the creative industry and the organizations and corporations that support and invest in the creative sector.

For creators, copyright serves as a foundation, a building block for a thriving and ever expanding market of cultural, educational, and scientific works, one that in 2012 contributed over one trillion dollars to the U.S. economy and directly employed 5.4 million workers.² It is an economic asset, sometimes the only asset an creator has in negotiating with a distributor of their

¹ The term “creator” is used in this document to embrace all individual members of the creative community, regardless of the type of work of authorship they produce. We note also that in some instances the creator of the work will not necessarily be the copyright owner of the work. This statement does not generally address the situations in which this distinction is of greatest importance.

² STEPHEN SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2013 REPORT 5, 10-11 (IIPA 2013).

works – whether that distributor is an internet company or a traditional media company. If copyright is weakened or if it becomes harder for the creator to obtain or maintain its protections, the creator’s negotiating position is weakened, as well as the value proposition for the distributor.

Appropriately scoped copyright protection also promotes freedom of expression and individual autonomy. The Supreme Court has said, “[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”³ Internationally, the right of creators “to benefit from the protection of the material and moral interests resulting from any scientific, literary or artistic production” is recognized as a human right.⁴ Copyright empowers creators to choose how and when to release their work to the public, according respect for individual voices while also allowing flexibility to construct a range of business models that meet consumer interests. Empowered creators benefit the public at large by making more and better quality contributions to our society’s cultural life.

The Copyright Alliance is pleased to see the Internet Policy Task Force’s interest in examining copyright issues in the digital economy and welcomes the opportunity to participate in this process. As a representative of the diverse creative community, the Copyright Alliance is pleased to offer the following thoughts in response to the questions raised in the request for comments on *Copyright Policy, Creativity, and Innovation in the Digital Economy* (the “Green Paper”).

³ Harper & Row, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985).

⁴ International Covenant on Economic, Social and Cultural Rights art. 15, Oct. 5, 1977, 993 U.N.T.S. 3 (signed but not ratified by the U.S.).

TABLE OF CONTENTS

I. The Legal Framework For The Creation Of Remixes 4

 A. Fair Use As An Element Of The Copyright Ecosystem 7

 B. The Licensing Marketplace Offers Desirable Alternatives 8

 C. No New Changes To The Law Are Needed At This Time..... 10

II. The Relevance and Scope of the First Sale Doctrine in the Digital Environment 13

 A. Licensing Enables Broader Consumer Choice In The Digital Economy 14

 B. The *Kirtsaeng* Decision Has A Very Limited Impact In The Online Environment..... 17

III. The Appropriate Calibration Of Statutory Damages In The Contexts Of Individual File Sharers And Of Secondary Liability For Large-Scale Infringement 19

 A. Current Statutory Damage Provisions Adequately Address Infringement By Individual File Sharers 21

 B. Current Statutory Damage Provisions Adequately Address Secondary Liability By Online Services And Does Not Curtail The Development Of New, Legitimate Services 22

IV. Whether And How The Government Can Facilitate The Further Development Of A Robust Online Licensing Environment..... 25

V. Establishing A Multistakeholder Dialogue On Improving The Operation Of The Notice And Takedown System For Removing Infringing Content From The Internet Under The DMCA 27

I. The Legal Framework For The Creation Of Remixes

Is the creation of remixes being unacceptably impeded by [legal] uncertainty? If not, why not? If so, how? In what way would clearer legal options result in even more valuable creativity?

There is not sufficient evidence to suggest that the creation of remixes is being unacceptably impeded by legal uncertainty. To the contrary, copyright law enables the creation of new works, including remixes, through a number of core doctrines. These include the originality requirement, the distinction between idea and expression, the substantial similarity test, and fair use. These doctrines are inherently flexible and require a fact based analysis to allow copyright law to work effectively in a variety of situations. Additionally, the Copyright Act already recognizes and provides guidance on legal implications for certain works that may in some circumstances be considered “remixes,” for example, derivative works, collective works, and compilations.⁵

The Green Paper notes that considerable discussion over the value and copyright treatment of remixes has come about in recent years, but in some sense, this discussion has always been at the center of copyright law. As Justice Story wrote nearly two centuries ago:

*In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before...The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.*⁶

Indeed, if “everything is a remix,” then the ongoing addition of new creative works into both the marketplace and the public domain indicates that the current legal framework does not improperly impair the possibility of creating remixes.

It is notable that discussions of remixes are often plagued by misunderstandings of business practices and the law. It is common to hear little about authorized remixes. But the licensing market for derivative works, compilations, collections, and remixes is robust; for example, film studios regularly license existing properties to create new movies and record labels

⁵ Defined in 17 U.S.C. § 101 (2011).

⁶ Emerson v. Davies, 8 F.Cas. 615, 619 (D. Mass. 1845).

release numerous remixes of recordings and are developing systems including microlicensing for incorporating digital samples into new works. Moreover, third party services such as Amazon's Kindle Worlds have been developed and are being licensed by copyright owners to allow creators of fan fiction to easily make commercially profitable uses of the underlying works.

Also contrary to common claims, sampling in hip-hop “developed with a copyright regime fundamentally like today’s”⁷ and major appropriation artists like Andy Warhol and Robert Rauschenberg eventually either sought permission for the works they reused or ceased using unlicensed works as they grew in popularity.⁸ All of this demonstrates a vibrant and legal market for remixes.

Perhaps most illustrative of the misunderstanding of the law is the characterization of the 2005 Sixth Circuit decision in *Bridgeport Music v. Dimension Films*, which held that copying of sound recordings is not analyzed under the substantial similarity test, thus making even the slightest use of a sound recording without permission an infringement.⁹ Several comments have called *Bridgeport* “one of the most influential cases on sampling”¹⁰ and held it responsible for “contribut[ing] to the current malaise in hip-hop”,¹¹ “open[ing] a threat of licensing demands”¹² and revealing “an avenue for legal reform in the area of sampling.”¹³ This perhaps overstates the effect of a single circuit court decision. To date, no court outside the 6th Circuit has followed *Bridgeport*, and, in fact, a number of courts have explicitly rejected the court’s holding.¹⁴

⁷ Thomas W. Joo, *Remix Without Romance*, 44 CONN. L. REV. 415, 423-35 (2011).

⁸ Laura Gilbert, *No Longer Appropriate?*, THE ART NEWSPAPER, (May 9, 2012), <http://www.theartnewspaper.com/articles/No%20longer%20appropriate?/26378>.

⁹ *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792 (6th Cir. 2005).

¹⁰ SHERWIN SIY, JOHN BERGMAYER, PUBLIC KNOWLEDGE, COMMENTS 6 (2013) [hereinafter *Public Knowledge Comments*].

¹¹ DEREK KHANNA AND JOHN TEHRENIAN, COMMENTS REGARDING REFORMING STATUTORY DAMAGES FOR TRANSFORMATIVE USES 3 (2013).

¹² DEVIANTART, COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER: COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 18 (2013).

¹³ *Public Knowledge Comments, supra* not 10, at 6.

¹⁴ *VMG Salsoul, LLC v. Madonna Louise Ciccone*, No. 12-05967, slip op. (C.D. Cal. Nov. 18, 2013) (The opinion, which stated that the Ninth Circuit has never adopted the Sixth Circuit’s bright line rule, is currently on appeal, so any ultimate decision will likely impact this discussion); *Saregama India v. Mosley*, 687 F. Supp. 2d 1325 (S.D. Fla. 2009) (“Section 114(b) does not seem to support the distinction between sound recordings and all other forms of

It is important to bear in mind that there are fundamentally important reasons for existing copyright law regarding remixes and derivative uses. For instance, the law protects against unauthorized commercial uses of works for good reason. And while some comments tout the claim that many user-generated works incorporating existing works are not commercial,¹⁵ many of the platforms where this user-generated content is promoted to viewers *are*. Thus, sites such as YouTube, which generate revenues by serving advertising to viewers of user-generated content and remixes, have properly negotiated licenses and/or provided tools for copyright owners to regulate the use of their works on the site. Moreover, copyright law protects creators – whether they are private individuals or creators seeking to commercialize their works – from having their works used in advertising against their will,¹⁶ to cast them in an unflattering light,¹⁷ or by groups or individuals morally or politically opposed to them.¹⁸ Although fair use allows reasonable use of works in situations where permission is not likely to be granted, the law must not unwittingly allow morally repugnant uses, uses that may damage reputation, or uses that may imply endorsement. At its core, copyright law, when properly interpreted, ensures the protection of a creator’s freedom of choice in how and when she shares her work with the public. Protecting this choice furthers both the goals of copyright law and the First Amendment.¹⁹

copyrightable work that the *Bridgeport* court imposes” and its “policy prescriptions, however accurate they may be, do not present grounds for this Court to follow its direction.”); *EMI Records Ltd. v. Premise Media Corp.*, No. 601209, slip op. (N.Y. Sup. Ct. 2008) (“this Court declines to follow the statutory interpretation of Section 114 relied upon by the court in *Bridgeport Music* to declare the bright line rule that a de minimis exception is not available.”).

¹⁵ E.g., ORGANIZATION FOR TRANSFORMATIVE WORKS, COMMENTS (2013).

¹⁶ See, e.g., Eriq Gardner, *Beastie Boys vs. GoldieBlox: New Countersuit as Universal Music Group Watches Closely*, THE HOLLYWOOD REPORTER (Dec. 11, 2013, 10:45 AM), <http://www.hollywoodreporter.com/thr-esq/beastie-boys-goldieblox-new-countersuit-660575>.

¹⁷ See, e.g., *Chang v. Virgin Mobile*, No. 3:07-CV-1767-D (N.D. Tx 2009).

¹⁸ See, e.g., Miranda Leitsinger, *Gay Couple Sues After Photo Used In Anti-Gay Flier*, NBC NEWS (Sep. 26, 2012, 10:42 AM), <http://usnews.nbcnews.com/news/2012/09/26/14098656-gay-couple-sues-after-photo-used-in-anti-gay-flier?lite>; Daniel Kreps, “Don Henley Settles Suit Against California Rep. Chuck DeVore”, ROLLING STONE (Aug. 5, 2010, 2:28 PM), <http://www.rollingstone.com/music/news/don-henley-settles-suit-against-california-rep-chuck-devore-20100805>.

¹⁹ See *Schnapper v. Foley*, 667 F. 2d 102, 114 (D.C.Cir. 1981) (quoting *Estate of Hemingway v. Random House*, 244 N.E.2d 250, 255 (N.Y. 1968)) (“Copyright ... rests on the assumption that there are forms of expression, limited in kind, to be sure, which should not be divulged to the public without the consent of their author. The purpose, far from being restrictive, is to encourage and protect intellectual labor.... The essential thrust of the First Amendment is to

A. Fair Use As An Element Of The Copyright Ecosystem

The Green Paper’s discussion of remixes focuses primarily on fair use, thus meriting a closer look. This doctrine must be looked at within the larger context of copyright in general; indeed fair use only makes sense as part of the entire system of copyright. Fair use that is expanded too far or too wide, that permits the systematic or wholesale reproduction of copyrighted works for commercial reasons or beyond the bounds established under this long recognized and beneficial doctrine, would be detrimental to creators’ interests — and, consequently, the public’s interest.

Fair use of existing works has long been recognized by courts — the concept of “fair abridgment” (a precursor to modern fair use) dates back at least as far as the 1741 English case *Gyles v. Wilcox*.²⁰ As the Supreme Court has said, “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts...’”²¹ When properly applied, fair use fosters creativity by allowing creators to produce new cultural contributions that may not have been possible without building on or referencing existing copyrighted works. For instance, without fair use, criticism of original works and transformative parodies could not be produced because creators are unlikely to grant permission for such uses. In addition, news reporting and scholarship rely on a certain amount of reference to or building upon existing works in order to advance their goals. Creators of all types regularly rely on fair

prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”).

²⁰ 26 ER 489 (1741).

²¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). See also *Harper & Row, Inc. v. Nation Enter.*, 471 U.S. 539, 549 (1985) (quoting H. Ball, *Law of Copyright and Literary Property* 260 (1944): “[T]he author’s consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained.”).

use, and Copyright Alliance members have an extensive history of defending the vital doctrine in court.²²

Because fair use advances the ultimate goal of copyright itself, any weakening of copyright will concomitantly weaken fair use.²³ Remixes rely on “raw materials”, original works to be remixed. A broader fair use doctrine would reduce the number of protected original works and, eventually, the number of remixes. Unfortunately, courts have lately appeared to be expanding the fair use defense from a limited privilege to a broad alternative to licensing.²⁴

B. The Licensing Marketplace Offers Desirable Alternatives

In what ways, if any, can right holders be efficiently compensated for remixes in cases where fair use does not apply? What licensing mechanisms currently exist, or are currently under development, for remixes and for which categories of works?

As noted above, copyright owners have been licensing derivative works, remixes, and digital samples for decades. While it may be helpful to explore ways to make compensation for these works more efficient, any proposed solutions should not unduly erode the existing ability to license on terms set by the owner of the work. Private actors can and should take the lead to improve licensing of remixes as they are in the best position to do so.

A number of mechanisms for efficiently licensing remixes currently exist, such as the agreement between the National Music Publishers’ Association (NMPA) and YouTube²⁵ or the

²² Terry Hart & Evan Sheres, *How the Copyright Industries Defend Free Speech*, COPYRIGHT ALLIANCE (Oct. 23, 2012),

https://copyrightalliance.org/sites/default/files/defending_free_speech_final_layout.pdf.

²³ Cf. R. Polk Wagner, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 Columbia Law Review 995 (2003) (Arguing that because copyright protection does not cover the entirety of a work, “each creation of even proprietary information expands the sum total of open information available for further technological, cultural, and social development”).

²⁴ See, e.g., *Cariou v. Prince*, No. 11-1197-cv (2d Cir. 2013) (“The law imposes no requirement that a work comment on the original or its author in order to be considered transformative”); *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D.Ga. 2012) (finding university’s widespread, systematic reproduction of educational works to be fair use).

²⁵ See NMPA, *NMPA Reaches Resolution of Copyright Infringement Lawsuit Against YouTube, Agreement Results in New Licensing Opportunity for Music Publishers*, <http://www.nmpa.org/media/showrelease.asp?id=201> (last visited Jan. 13, 2014).

development of micro-licensing platforms like the Recording Industry Association of America (RIAA) and NMPA announced in June 2013.²⁶ Several companies have begun offering their own solutions, such as ZEFR, which helps “brands and advertisers identify videos being uploaded by their fans [and] connect with them”²⁷ and Amazon, through its new Kindle Worlds service, which provides a commercial venue for fan fiction of certain licensed media properties.²⁸

Creative Commons offers a set of standardized public licenses, some of which grant *a priori* permission to create derivative works.²⁹ While the Creative Commons organization does not provide any administration or enforcement of the licenses and there are some deficiencies to the licenses,³⁰ standardized, easy to understand licenses do have benefits for individual creators to readily communicate permissible uses of their works to downstream users.

Other potential solutions — a discussion that ties into the discussion of online licensing also raised by this Notice of Inquiry — may include a centralized “copyright hub” that facilitates

²⁶ See Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, Could Unlock ‘Millions’ in New Revenue*, BILLBOARD (Jun. 13, 2013 5:11 AM), <http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could>.

²⁷ Ryan Lawler, *How ZEFR Brings Content ID to Content Creators, Media Companies... And Now Brands*, TECHCRUNCH (Aug. 14, 2013), <http://techcrunch.com/2013/08/14/zefr-new-hollywood/>.

²⁸ See AMAZON, *What is Kindle Worlds*, <http://www.amazon.com/gp/feature.html?docId=1001197421> (last visited Jan. 7, 2014).

²⁹ See CREATIVE COMMONS, *About the Licenses*, <http://creativecommons.org/licenses/> (last visited Jan. 16, 2014).

³⁰ See Jane Ginsburg, *Public Licenses: The Gift that Keeps on Giving*, THE MEDIA INSTITUTE (Jun. 11, 2009), http://www.mediainstitute.org/IPI/2009/061109_PublicLicenses.php; Joan McGivern, *10 Things Every Music Creator Should Know about Creative Commons Licensing*, ASCAP (Sep. 1, 2007), http://www.ascap.com/playback/2007/fall/features/creative_commons_licensing.aspx; Chris Castle, *Carefully Co-writing without Creative Commons*, MUSICTEHPOLICY (Jul. 29, 2006), <https://musictechpolicy.wordpress.com/2006/07/29/carefully-co-writing-without-creative-commons/>. Note that Creative Commons released a new version of its licensing suite on Nov. 26, 2013, after the previous criticisms of license features and terms had been written, see <http://creativecommons.org/weblog/entry/40935>. The authors of this comment have not analyzed to what extent, if any, the new licenses address the specific deficiencies noted in these articles.

high volume, low individual value licensing, an example of which was recently introduced in the UK.³¹

Can more widespread implementation of intermediary licensing, such as YouTube's Content ID system, play a constructive role? If so, how? If not, why not?

Intermediary licensing such as YouTube's Content ID system can absolutely play a constructive role if more widely implemented. Content ID — a combination of audiovisual identification technology and licensing mechanism that Google describes thoroughly in its comment³² — is, despite its imperfections, useful for reducing piracy, helping creators maintain control over how their works are used, and providing certainty to fans and remixers. A wider variety of online service providers should be encouraged to adopt systems like Content ID and other reasonable technical measures, and these tools should be adjusted to be workable for the licensing of other media beyond audiovisual works and music.

C. No New Changes To The Law Are Needed At This Time

Should alternatives such as micro-licensing to individual consumers, a compulsory license, or a specific exception be considered? Why or why not? What specific changes to the law, if any, should be considered? To what extent are there approaches that do not require legislation that could constructively address these issues?

As stated above, the creative community is promoting a variety of consumer directed licensing approaches to enable fans of creative works to use them in new contexts. We believe this is the most constructive approach to address issues raised in the Green Paper. At the same time, we note that it is ironic that some in the copyright skeptic community are actually *opposing* the creation of new and efficient licensing and microlicensing models in order to advocate for expanding doctrines like fair use beyond their reasonable and appropriate borders.

Against this backdrop, the Copyright Alliance does not support the creation of new compulsory licenses or specific exceptions for remixes at this time. While compulsory licensing serves a useful purpose in instances where clear market failure exists, it is an extraordinary

³¹ See Olivia Solon, *Copyright Hub pilot launches in the UK*, WIRED UK (Jul. 10, 2013), <http://www.wired.co.uk/news/archive/2013-07/10/copyright-hub-pilot>.

³² PABLO CHAVEZ, GOOGLE, COMMENTS 3-5 (2013).

departure from property and copyright principles and should be reserved for the limited situations in which government intervention in a free market is needed. In the majority of cases, compulsory licenses carry the risk of market distortion and price stagnation. Standardized compulsory license terms are especially inappropriate for remixes because remixes are rarely standardized.

In the same vein, specific exceptions to copyright owner's exclusive rights are not warranted. The Copyright Alliance is not aware of any evidence that existing mechanisms and those currently in development are inadequate to address remix issues. Those mechanisms include the originality requirement, the distinction between idea and expression, the substantial similarity test, and fair use, as they have traditionally been applied. Despite comments that suggest the doctrine of fair use is not functioning for creators because it is uncertain,³³ recent empirical scholarship has demonstrated that application of fair use by courts is, in fact, predictable.³⁴

A copyright small claims court may help relieve tensions regarding remixes. Along with providing recourse to copyright owners who may be unable to assert their rights in federal court because of the time and expense involved, the small claims process recommended by the U.S. Copyright Office could have the ability "to render declaratory judgments pertaining to either the infringement or noninfringement of a copyrighted work."³⁵

Voluntary initiatives and best practices should also be encouraged. The Principles for User Generated Content (UGC) Services serve as an example.³⁶ Developed as a result of collaboration between leading commercial copyright owners and services providing user-uploaded and user-generated audio and video content, the Principles provide a set of recommendations that work toward the goals of eliminating infringing content on UGC services,

³³ DEVIANTART, COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER: COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 17-20 (2013).

³⁴ See Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Matthew Sag, *Predicting Fair Use*, 73 OHIO STATE LAW REVIEW 47 (2011); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM LAW REVIEW 2537 (2009); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008).

³⁵ U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 104 (2013).

³⁶ See Principles for User Generated Content, <http://www.ugcprinciples.com/>.

encouraging uploads of wholly original and authorized user-generated audio and video content, accommodating the fair use of copyrighted content on UGC services, and protecting legitimate interests of user privacy. The U.S. Copyright Office may have a role to play in developing further best practices.

Perhaps most helpful to this arena is simply education. Helping creators, remixers, and consumers understand better the legal principles involved and the licensing options available would go a long way in maintaining a well-functioning and effective copyright system. The Copyright Alliance echoes Register of Copyrights Maria Pallante's recommendation that "the next great copyright act should be as accessible as possible."³⁷

A few comments have suggested legislative changes that the Copyright Alliance believes are misguided and unproductive. Some have recommended changes to 17 U.S.C. § 512(f), which provides a cause of action against those who make knowing material misrepresentations in DMCA takedown notices or counter-notices. Courts have consistently held that Congress struck the appropriate balance under 512(f),³⁸ as one court noted, "The high standard for a § 512(f) claim reflects the reality that copyright owners face an uphill battle to protect their copyrights on the internet. ... Without the subjective standard, copyright owners ... could face limitless lawsuits just by policing [their] copyrighted material on the internet."³⁹ As it is currently interpreted, the DMCA already places a disproportionate burden of policing infringement on copyright owners. The overwhelming majority of takedown notices are legitimate, so lowering the threshold for illegitimate notices or increasing the penalties would severely undermine the system with little positive benefit. To the extent that 512(f) does not do enough to address abusive DMCA notices, best practices are the most appropriate vehicle for improvement.

One comment proposes legislative clarification that "criminal penalties cannot apply if the work in question is arguably transformative and does not take all or substantially all of the

³⁷ Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 316, 339 (2013).

³⁸ *Rossi v. MPAA*, 391 F.3d 1000 (9th Cir. 2004); *Tuteur v. Crosley-Corcoran*, No. 13-10159-RGS, slip op. (D. Mass. Apr. 10, 2013); *Ouellette v. Viacom Int'l, Inc.*, No. CV-10-133-M-DWM-JCL, slip op. (D. Mon. Mar. 13, 2012).

³⁹ *Ouellette v. Viacom Int'l, Inc.*, No. CV-10-133-M-DWM-JCL, slip op. (D. Mon. Mar. 13, 2012).

content of another work.”⁴⁰ Such a clarification is unnecessary. As the Department of Justice notes, “fair use rarely comes up in the criminal context, most likely because prosecutors are reluctant to prosecute where fair use is a serious issue.”⁴¹ This is primarily because a defendant who believed her use to be fair most likely lacks the necessary *mens rea* for willful infringement. “Prosecutors are—and generally should be—reluctant to seek charges where the defendant acted ‘for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research’ or any other use with a beneficial public purpose.”

II. The Relevance and Scope of the First Sale Doctrine in the Digital Environment

The applicability of the first sale doctrine in the digital environment has become a popular policy issue, but it should not serve as a talisman for addressing issues that are better addressed through other means. The first sale doctrine recognizes that physical goods become “used.” Consumers benefit by having secondary markets to extract value from “used” goods, but such markets are premised on the abandonment of ownership by a seller. In the digital environment, however, there are many transactions between copyright owners and users that do not involve abandonment of ownership; rather, they involve licensing. In fact, innovation in the digital economy is increasingly being driven by a meaningful ability to license creative works. Consumers benefit greatly from licensing, which has emerged as the principal mode of distribution for a wide array of creative works. Licensing creates a dynamic marketplace that affords creators and distributors the flexibility to give consumers a range of choices — accessing the creative works they want, when they want, at a variety of price points. The first sale doctrine should not be used to erode the sales/license distinction; availability of a greater selection of expressive works in the marketplace is not merely an abstract societal benefit, it is a principal goal of copyright law.

⁴⁰ WATTPAD, COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 3 (2013).

⁴¹ OFFICE OF LEGAL EDUCATION EXECUTIVE OFFICE FOR U.S. ATTORNEYS, PROSECUTING IP CRIMES MANUAL 72 (4th ed. 2013).

A. Licensing Enables Broader Consumer Choice In The Digital Economy

What are the benefits of the first sale doctrine? And to what extent are those benefits currently being experienced in the digital marketplace?

Licensing, a key adjunct to the first sale doctrine, has many benefits in the digital economy. Perhaps most importantly, licensing enables greater consumer choice as distributors can provide consumers options for accessing and using works beyond purchasing them outright. DVDs, CDs, and paperbacks remain an option, but customers today have exponentially more options than they did in the analog world. Rather than all fitting into a rigid sales model, consumers have the choice to either buy or license a physical copy of a work or obtain access on more flexible terms. Licensing allows the management of relationships among copyright owners, distributors, and consumers on a granular level, permitting a degree of customization not possible when a buyer-seller relationship exists is the only option.

To what extent does the online market today provide opportunities to engage in actions made possible by the first sale doctrine in the analog world, such as sharing favorite books with friends, or enabling the availability of less-than-full-price versions to students?

Consumers today can access and engage in content in a variety of ways at a range of price points — perhaps surpassing what was available in the analog world pursuant to the first sale doctrine.

It is worth pointing out that, even in the physical world, the first sale doctrine is not necessarily always the best mechanism for meeting consumer demand. Look at video rental, for example: demand for films can be unpredictable and vary over a film's lifespan—a film may be in higher demand when it has just been released or when it is seasonally appropriate. Video rental services that rely solely on the first sale doctrine thus run the risk of either buying too many films or buying too few. Licensing arrangements, such as the one Blockbuster had with studios, generally work better for all participants in a supply chain,⁴² which results in a market that better meets consumers' needs.

⁴² See Gérard P. Cachon & Martin A. Lariviere, *Supply Chain Coordination with Revenue-Sharing Contracts: Strengths and Limitations*, 51 MANAGEMENT SCIENCE 30 (2005).

Because of licensing, the online market provides opportunities far beyond those made possible by the first sale doctrine in the analog world. A few examples include the following:

- Digital music — Among the 60+ licensed digital services currently available in the U.S.,⁴³ iTunes, Rhapsody, Spotify, Pandora, GooglePlay, Amazon all provide flexibility in terms of access by offering, for example, individual songs instead of whole albums; downloads or on demand streaming of millions of songs; and different price points.⁴⁴
- Film and TV — Amazon offers short-term rentals, indefinite access, and on demand streaming; Netflix allows streaming on multiple devices simultaneously; services such as VUDU, Barnes & Noble's Nook Video, iTunes, GooglePlay, UltraViolet, and nearly 100 other services in the U.S. provide cloud storage, downloading, streaming and physical copies.
- Digital books and magazines — eBooks are now part of the mainstream. Amazon features different price points for access to different numbers of books. Sony ReadStore gives readers the right to download, read, listen and view digital content. Services such as Kobo, Barnes & Noble; audible.com, and audiobooks.com give readers an array of additional choices.
- Digital photography — Companies like Shutterstock and Getty Images allow access to millions of images under a variety of licensing terms using different price points, sizes, placements and uses.

This incomplete list barely scratches the surface of the possibilities beyond a simple buying/ownership model in the online market. UltraViolet, for example, goes beyond traditional licensing to offer a broader, multiple access framework for viewing films and television shows, one that currently allows a licensed movie to be watched on a dozen different devices by up to six individuals – and because the framework manages rights rather than content, it insulates customers from future technological advances.⁴⁵ This list also demonstrates that the online market is working to meet consumer demands and that upsetting existing contractual

⁴³ See <http://www.whymusicmatters.org> for a list of licensed digital music providers.

⁴⁴ See <http://www.wheretowatch.org> for a list of licensed online film and television providers.

⁴⁵ As of 2013, over 15 million households have signed up for UltraViolet accounts, and over 12,200 titles are available through the service. See Chris Tribbey, *UltraViolet Enjoys Record Week*, HOME MEDIA MAGAZINE (JAN. 2, 2014), <http://www.homemediamagazine.com/digital-evolution/ultraviolet-enjoys-record-week-32200>.

relationships and licensing expectations is not needed. Although issues are likely to arise, they will be best addressed through the private market.

If the market does not currently provide such opportunities, will it do so in the near future? If not, are there alternative means to incorporate the benefits of the first sale doctrine in the digital marketplace? How would adoption of those alternatives impact the markets for copyrighted works?

The examples above illustrate that the possibilities of new licensing and distribution models have only begun to be realized. Making sure that copyright owners have a meaningful ability to license is key to this realization. Trying to force digital works to behave like physical goods would be a big step backward. “Digital first sale” would have a chilling effect on the development of new business models based on licensing. Worse, it would open the gates to commercial services that take advantage of legal formalities to offer access to creative works without paying creators. This sort of destructive competition would have, as Prof. John Villasenor rightly observed during the Green Paper public meeting, devastating effects on copyright owners.

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?

Because of the nature of digital works, it is unlikely that a digital first sale doctrine will be workable in the foreseeable future. While theoretically a technology could be developed that eliminates all copies after the original has been redistributed, this is not currently a practical reality with sufficient security to be viable for commercial works of entertainment. Transmission of digital works necessitates the making of a new copy. This is not a purely formalistic approach to copyright law; it carries strong policy prescriptions. As the Copyright Office noted, a “used” digital copy is indistinguishable from a new one because digital goods do not degrade like physical goods. In addition, the need to transport physical copies “acts as a natural brake on the effect of resales on the copyright owner’s market” while digital copies can be transmitted instantaneously anywhere with minimal costs. A secondhand market for “used” digital goods would thus compete directly with “new” works.

Experience with technology since the Copyright Office’s report reinforces its conclusions. The Office noted that one of the only ways that a digital first sale doctrine could work is through technological measures (such as a “forward-and-delete” technology). It is questionable, however, whether this is even a theoretical possibility. Additionally, the Copyright Office points out some of the practical shortcomings of a technologically based approach: “Technological measures can be hacked; they are expensive; and they often encounter resistance in the marketplace.”⁴⁶ The twelve years since the report confirm the prescience of the Office. The time since the report also confirms that the robust online market for digital works seen today did not require a digital first sale doctrine to develop.

B. The *Kirtsaeng* Decision Has A Very Limited Impact In The Online Environment

How will the Supreme Court’s decision in Kirtsaeng v. John Wiley & Sons, Inc., 133 S.Ct. 1351 (2013), impact the ability of right holders to offer their works at different prices and different times in different online markets? How will any such changes impact the availability of and access to creative content in the United States and elsewhere?

The Supreme Court’s decision in *Kirtsaeng* was, as a three Justice dissent pointed out, a “bold departure from Congress’s design” to protect copyright owners from competing against unauthorized importation of works acquired abroad, one that hampers the ability of copyright owners to tailor works to the needs of specific markets. It is too early to tell what the ultimate impact of a decision that erodes decades of industry practice and reverses U.S. law on exhaustion will be. From a legal standpoint, because the Supreme Court’s decision in *Kirtsaeng* concerned the interpretation of a provision dealing with the importation of *physical* goods, it should not have any effect on digital works in the online marketplace — and it certainly should not have any impact on the distinction between sales and licensing of creative works. Because consumers are increasingly accessing many types of copyrighted works in digital form online (including eBooks, movies, music and games), the effect of the decision on copyright owners is likely to be limited. However, the expectation of a limited impact will be placed at risk if lawmakers respond

⁴⁶ By 2009, all major labels stopped requiring DRM on sound recordings licensed through Apple’s iTunes, in part because of customer resistance to copy protected files. See Brad Stone, *Apple Drops Anticopying Measures in iTunes*, NEW YORK TIMES (Jan. 6, 2009), http://www.nytimes.com/2009/01/07/technology/companies/07apple.html?_r=0.

favorably to those who would use *Kirtsaeng* as a rallying cry for first sale in the digital environment. More importantly, where purchases of books or other types of copyrighted works in *physical* copies still outnumber purchases in digital formats or otherwise clearly remain the subject of consumer demand, the Court's decision is already curtailing the ability of U.S. copyright owners to reasonably make such products available to nationals of countries in many overseas markets.

The Court's decision, unfortunately, hurts the ability of copyright owners to offer less expensive versions of works in lesser-developed countries without such works being arbitrated to cannibalize the U.S. commercial marketplace. For example, the result in the *Kirtsaeng* decision is forcing textbook publishers to change their business models if they want to offer hard copies of their works in foreign markets. Since they can no longer engage in price differentiation, some publishers are changing to a uniform pricing model to prevent their works that were intended for markets in other countries from making their way into the United States where they compete with the U.S. versions.⁴⁷ These publishers are now selling their works internationally at the U.S. price, notwithstanding that this makes their works much less affordable in many of these foreign markets.

The uniform prices will make it impractical for students and consumers in lesser-developed countries to buy these works. This will result in publishers selling fewer copies abroad, which in turn will reduce publishers' revenues in these foreign markets and possibly prevent them from investing in the creation of new works. Since they can expect to sell fewer copies abroad, publishers will no longer be able to count on profits in those markets substantially contributing to recovery of their investments and expenses in creating, producing and distributing their works, which helps them to avoid the need to increase domestic prices. So, in addition to making it less likely that students and consumers in lesser-developed countries can purchase U.S. works, U.S. publishers will sell fewer copies of their works abroad and U.S. consumers could end up paying more for the U.S. editions of these works. The ultimate losers from *Kirtsaeng's* questionable recasting of the first sale defense will not only be U.S. publishers but also both foreign and U.S. consumers.

⁴⁷ See e.g., Lisa Campbell, *Cengage adopts global pricing after Kirtsaeng*, The Bookseller, Oct. 6, 2013, available at <http://www.thebookseller.com/user/login?destination=node%2F210780>.

III. The Appropriate Calibration Of Statutory Damages In The Contexts Of Individual File Sharers And Of Secondary Liability For Large-Scale Infringement

Statutory damages are a positive feature of copyright law, enabling meaningful remedies for creators and affording courts flexibility in a variety of situations. Particularly in copyright infringement cases, actual damages are very difficult to prove. Moreover, even when actual damages can be proven, they are often less than the cost of detecting and investigating infringements. The current statutory damages regime is appropriate, necessary, and need not be recalibrated.

The availability of damages set by statute has been a feature of U.S. copyright since before the first federal Copyright Act. Five of the twelve original colonies that passed copyright statutes before the Constitutional Convention had pre-established damages provisions.⁴⁸ The 1790 Copyright Act provided for such damages, as did every revision since. In the Copyright Act of 1895, Congress for the first time departed from the traditional manner of calculating damages per infringing *copy* to adopt the per infringed *work* standard that is still used today. When adjusted for inflation, the current range of statutory damages is in line with, or in some cases lower than, statutory damages under the 1909 and 1976 acts.⁴⁹

It is incorrect to refer to the pre-established damages set in 17 U.S.C. § 504(c) as “exemplary” or “punitive” damages. Statutory damages are intended as a substitute for actual damages, primarily serving a compensatory and deterrent role, rather than punishment on top of ordinary damages. A report by the Register of Copyrights during the revision effort that led to the Copyright Act of 1976 details the principles underlying statutory damages: assuring adequate

⁴⁸ William S. Strauss, U.S. Copyright Office, *Studies on Copyright Law Revision Prepared for the Sen. Subcomm. on Patents, Trademarks, and Copyrights: The Damage Provisions of the Copyright Law (Study No. 22)* 1 (1956) [hereinafter *Study No. 22*] (stating that as a result of a 1783 Congressional resolution recommending states the adoption of copyright statutes, Massachusetts, New Hampshire, Rhode Island had statutorily provided minimum and maximum damages for copyright infringement; while Maryland and South Carolina had a fixed sum to be paid for each infringing sheet).

⁴⁹ Thomas Sydnor & Debbie Rose, *Capitalist Copyrights: A Republican Reply to “Three Myths about Copyright”*, COPYRIGHT ALLIANCE (Dec. 5, 2012), https://copyrightalliance.org/2012/12/capitalist_copyrights_republican_reply_three_myths_about_copyright?page=show#.UrzuXvRDu3Y.

compensation to a copyright owner for her injury and deterring infringement.⁵⁰ As the report says, it is difficult to establish the value of a copyright and the loss caused by infringement. Many times the only direct loss that can be proven is the amount of a license. If awards were limited to this amount, it would invite infringement because the risk of loss to the infringer would be negligible. Just as inadequate would be an award solely of an infringer's profits, which may be impossible to compute or not an accurate measure of the copyright owner's injury.⁵¹

Statutory damages are also legally and constitutionally sanctioned. There is little question that legislatures can set the amount of civil damages by statute. The Supreme Court has long held that such damages need not correspond to actual damages, particularly where the damages involve a public wrong rather than a private injury.⁵² "The protection of copyright," as the Eighth Circuit has said on another occasion, "is a vindication of the public interest."⁵³ Both appellate courts that have considered the constitutionality of copyright's statutory damages for individual file sharers have held that such awards are consistent with the Due Process Clause.⁵⁴

Statutory damages are most important to individual creators, a group that is typically overlooked in discussions about the remedy. The availability of statutory damages is often a threshold question for an individual creator deciding whether or not to pursue an infringement claim in federal court, given the extremely high costs involved. Eliminating or limiting this recourse deprives these creators of effective remedies for infringement of their works.

⁵⁰ See *Study No. 22, supra* note 46.

⁵¹ See *Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) ("... a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.").

⁵² *St. Louis IM & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919).

⁵³ *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 909-10 (8th Cir. 2012).

⁵⁴ See *Sony BMG Music Entertainment v. Tenenbaum*, 719 F.3d 67, 71-72 (1st Cir. 2013); *Thomas-Rasset*, 692 F.3d 899, 907-10.

To what extent is application of the current range of statutory damages necessary for effective deterrence with respect to (a) direct infringement by individual file sharers and (b) secondary liability by online services?

A. Current Statutory Damage Provisions Adequately Address Infringement By Individual File Sharers

The current range of statutory damages remains vital to providing meaningful protection, especially in the online environment. Education about legal options for accessing content and cross-industry voluntary initiatives, like the Copyright Alert System, remain the primary methods used to direct individuals away from infringement. Nevertheless, there is no compelling reason to recalibrate statutory damages in cases of individual file sharers.

The current range of statutory damages is flexible enough to tailor remedies for individual file sharers in light of factors that the fact-finder finds appropriate. The Eighth Circuit has remarked,

By its terms... the statute plainly encompasses infringers who act without a profit motive, and the statute already provides for a broad range of damages that allows courts and juries to calibrate the award based on the nature of the violation. For those who favor resort to legislative history, the record also suggests that Congress was well aware of the threat of noncommercial copyright infringement when it established the lower end of the range. Congressional amendments to the criminal provisions of the Copyright Act in 1997 also reflect an awareness that the statute would apply to noncommercial infringement.⁵⁵

Moreover, contrary to suggestions by some commenters, courts are not without guidance when awarding damages. In *Sony BMG Music Entertainment v. Tenenbaum*, one of only two record label individual file sharing lawsuits to reach trial, the jury awarded \$22,500 per infringed work for thirty works after finding the defendant's violations were willful (an award that is only 15% of the statutory maximum).⁵⁶ The jury was instructed to consider the following factors from a non-exhaustive list given by the court: "the nature of the infringement; the defendant's purpose and intent; the profit that the defendant reaped, if any, or the expense that the defendant saved; the revenue lost by the plaintiff as a result of the infringement; the value of the copyright; the duration of the infringement; the defendant's continuation of infringement after notice or knowledge of copyright claims; and the need to deter this defendant and other potential

⁵⁵ *Capitol Records, Inc. v. Thomas-Rasset*, 692 F. 3d 899, 908-09 (8th Cir. 2012).

⁵⁶ 719 F. 3d 67, 68 (1st Cir. 2013).

infringers.” The award reflected, among other things, the defendant’s own admission during trial that he had distributed thousands of recordings beyond the thirty at issue and the fact that the defendant was not simply downloading but also uploading and making the songs accessible to the entire internet.

Several commenters mention the fact that a small number of entities are pursuing actions against individual file sharers for the purpose of extracting quick settlements rather than vindicating their rights. These appear to be nothing more than isolated instances of overly aggressive litigators, and there is no evidence that they are a result of copyright law in general or the current statutory damages regime in particular. Moreover, courts are already employing sanctions against such bad actors. For instance, in *Ingenuity 13 LLC v. Doe*,⁵⁷ the District Court for the Central District of California relied on Federal Civil Procedure Rule 11 to rule against a group of abusive litigants. The court awarded attorney fees and punitive damages to the defendants based on “plaintiffs’ brazen misconduct and relentless fraud” to the court. The court also referred plaintiffs to their respective state and federal bars, the District Standing Committee on Discipline, the U.S. Attorney for the Central District of California, the Criminal Investigation Division of the Internal Revenue Service, and notified all judges before whom the plaintiffs had pending cases. Copyright owners as a whole should not be punished for the short-lived, ill-advised litigation tactics employed by a small number of individuals, since judicial safeguards against these sort of actions are already readily available and used by courts when appropriate.

B. Current Statutory Damage Provisions Adequately Address Secondary Liability By Online Services And Does Not Curtail The Development Of New, Legitimate Services

The current statutory damage provisions are also appropriate for dealing with secondary liability by intermediaries—if not more important than ever. Many services engaged in infringing activity profit through advertising revenues, making damages especially difficult to calculate, and the speed and scale of deploying new infringing services prove a great need for deterrence. Statutory damages against indirect infringers also protect legitimate services that partner with creators to provide sustainable and convenient platforms for consumers to access the

⁵⁷ No. 2:12-cv-8333-ODW(JCx), slip. op. at 10, 11 (C.D. Cal. May 6, 2013).

creative works they love. The availability of damages deters unfair competition that would otherwise undermine the ability of legitimate services to succeed.

Copyright Alliance members want to partner with innovative startups to provide users with new, exciting ways to disseminate works. They do not threaten litigation (and the potential of large statutory damage awards) against those who approach in good faith. In addition, good faith online service providers have DMCA safe harbors to provide a shield against unintended liability. However, a small minority of businesses adopts an aggressive “it’s better to ask forgiveness than permission” posture when it comes to creating platforms that exploit creative works—and then claim that copyright and statutory damages are chilling innovation when copyright owners take reasonable steps to protect their work.

Is the potential availability of statutory damages against online services for large scale secondary infringement hindering the development of new, legitimate services or platforms for delivering content? If so, how? What is the evidence of any such impact? If statutory damages for individual file sharers and/or services found secondarily liable for infringement were to be recalibrated, how should that be accomplished? Would legislation be required?

The sheer number of online services from the U.S. that have flourished online suggests that the potential availability of statutory damages is not hindering the development of new, legitimate services. At the same time, online infringement continues to increase at a significant rate,⁵⁸ meaning the deterrent effect of statutory damages remains necessary. For every infringing site like IsoHunt⁵⁹ and Hotfile⁶⁰ that goes offline, there are hundreds, thousands even, of illegitimate services that continue to operate—Google alone reports dozens of domains that receive over 100,000 takedown notices each month.⁶¹ Statutory damages work effectively to the

⁵⁸ DAVID PRICE, NETNAMES, *SIZING THE PIRACY UNIVERSE 2* (2013).

⁵⁹ Simon Pulman, *Columbia Pictures Industries v. Fung: IsoHunt Found Liable for Contributory Infringement*, CDAS IP, ENTERTAINMENT, AND MEDIA LAW BLOG (Apr. 9, 2013), <http://cdas.com/columbia-pictures-industries-v-fung-isohunt-found-liable-for-contributory-infringement-2/>.

⁶⁰ Todd Spangler, *Hotfile Shuts Down After \$80 Mil MPAA Piracy Settlement*, VARIETY (Dec. 4, 2013, 10:18 AM), <http://variety.com/2013/digital/news/hotfile-shuts-down-after-80-mil-mpaa-piracy-settlement-1200918378/>.

⁶¹ See GOOGLE, *TRANSPARENCY REPORT: REQUESTS TO REMOVE CONTENT DUE TO COPYRIGHT* (last visited JAN. 14, 2014), <http://www.google.com/transparencyreport/removals/copyright/?hl=en>.

extent that they chill the development of services that exploit creators' works outside the bounds of copyright law.

Warnings about the chilling effect of statutory damages on new services should be taken with a grain of salt. The National Venture Capital Association (NVCA) warned in 2005 that a Supreme Court decision holding P2P file sharing service Grokster liable for inducing massive amounts of copyright infringement would have a chilling effect on investment in digital services.⁶² The Supreme Court ultimately did hold Grokster liable,⁶³ but contrary to the NVCA's prediction, venture capital investment in the media and entertainment sector grew by over 50%; investment in online music companies alone topped over \$1 billion in 2011 and 2012.⁶⁴ Put simply, there is no evidence to suggest similar predictions today are any more accurate.

The growth of online services and employment in the creative industries indicates that innovation is not being stifled. As a result, no recalibration is necessary at this time. The Copyright Alliance hopes that the Task Force, in its review of this issue, appreciates the diversity of needs that rely on the flexibility of the statutory damages regime. Recalibrating to address issues raised in comments would be inelegant and overbroad. For example, adding any required "guidelines" that fact-finders should apply when awarding statutory damages would decrease flexibility without resulting in more just results than juries have so far provided.

The Copyright Alliance opposes the recommendation made by the Stanford Center for Internet & Society/Electronic Frontier Foundation: "plaintiffs seeking statutory damages should be required to produce evidence of their actual harm, or the infringer's profits, to the extent such evidence is reasonably available. If a plaintiff does not produce such evidence, or in the alternative, demonstrate to the court's satisfaction that such evidence cannot reasonably be obtained, statutory damages should be limited to the minimum amounts."⁶⁵ Such a proposal

⁶² Brief of the Nat'l Venture Capital Ass'n as Amicus Curiae for Respondents at 6, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁶³ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005).

⁶⁴ Steven M. Marks, *Debunking the "Stifling Innovation" Myth: The Music Business's Successful Transition to Digital*, 2013 WIS. L. REV. 21 (2013).

⁶⁵ JULIE AHRENS ET AL., CENTER FOR INTERNET & SOCIETY STANFORD LAW SCHOOL, ELECTRONIC FRONTIER FOUNDATION, COMMENTS IN RESPONSE TO THE DEPARTMENT OF COMMERCE'S GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 26 (2013).

would further put effective remedies for infringement out of reach of individuals and small businesses by imposing on them a requirement to assume legal expenses for an extensive damages phase of litigation. In other contexts, damages phase litigation can be as lengthy and exhaustive as the merits of a case. Casting such an onerous burden on creators and the courts will thwart the availability of appropriate legal recourse in meritorious cases. As a side note, commenters are incorrect when they say “this was the rule that applied under the U.S. Copyright Act as it existed before 1978.” The U.S. Copyright Office noted in its 1956 revision study on damages, “There are several conflicting decisions on the question whether statutory damages may be awarded when actual damages or profits can be assessed.”⁶⁶ Later decisions suggest they may: “if either profits or actual damages or both can be ascertained, the trial court has discretion to award statutory damages.”⁶⁷ More importantly, as stated above, the very purpose of setting damages available by statute is to provide relief precisely when actual damages cannot be easily established or proven. Courts currently retain the ability to consider actual damages involved when awarding statutory damages; no further legislative fixes are needed.

IV. Whether And How The Government Can Facilitate The Further Development Of A Robust Online Licensing Environment

Online licensing and its details most often raise issues of contract and business practices, issues the Copyright Alliance does not take a position on. But to the extent that the IPTF’s inquiry touches on general copyright principles, the Copyright Alliance notes as follows.

What are the biggest obstacles to improving access to and standardizing rights ownership information? How can the government best work with the private sector to overcome those obstacles? Would a central, online licensing platform for high-volume, low-value uses (a “copyright hub”) be a useful endeavor in the United States? If not, why not? If so, how can the government support such a project?

In general, the private sector should continue to take the lead in standardizing and improving access to rights ownership information. However, the U.S. Copyright Office does play an important role in administering public rights ownership information through the Copyright Act’s voluntary registration system. The Office should investigate what steps it can take to make

⁶⁶ *Study No. 22, supra* note 46, at 7.

⁶⁷ *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F. 2d 505, 520 (9th Cir. 1985).

the ownership information it maintains more useful in commerce, including by making it more accessible to potential registrants and their licensees. In order to do so, the Office needs more stable funding and improved technical capabilities to ensure it can continue to keep pace with the needs of the online licensing environment.

The Copyright Alliance rejects the reinstatement of mandatory formalities, such as registration. Not only would this bring the U.S. out of step with the rest of the world, but reinstating copyright formalities would harm individuals and small businesses who lack the resources to maintain compliance. Copyright protection that is not contingent on formalities ensures that individual creators and small businesses are not stripped of their rights for inadvertent mistakes or other technical reasons. If the goal is to increase Copyright Office registrations, the carrot is better than the stick: technical improvements to Copyright Office registration and a fee structure that better reflects the needs and practices of high volume/low individual value works would incentivize voluntary registration and provide much better results than a return to formalities.

The Copyright Alliance generally supports the idea of “a central, online licensing platform for high-volume, low-value uses”, but would need to see specifics before it could comment further. The IPTF should continue to look at the UK’s Copyright Hub⁶⁸ for information on how such a hub could be set up and maintained, and how well it meets its goals. Additionally, the IPTF should investigate industry operated registration and licensing models including systems like PLUS, and those operated by ASCAP, BMI and SESAC as well as SoundExchange for the business insights these can offer.

The Copyright Alliance is concerned with several comments that oppose a copyright hub—even in theory—because of fears that it would erode fair use.⁶⁹ Fair use is an important part of copyright law, but it should not be seen as a substitute for uses traditionally covered by

⁶⁸ THE COPYRIGHT HUB, <http://www.copyrighthub.co.uk/>.

⁶⁹ See, e.g. LIBRARY COPYRIGHT ALLIANCE, RESPONSE OF THE LIBRARY COPYRIGHT ALLIANCE TO THE REQUEST FOR COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 3-4 (2013) (stating “as online licensing platforms become more robust, rights-holders will argue even more vigorously that courts should reject the assertion of fair use in cases involving high-volume, low-value uses by libraries and education institutions.”).

licensing. Traditionally, the doctrine has been reserved for those “reasonable and customary” uses where creators did not seek permission.⁷⁰ These purposes are distinct from uses that would otherwise be licensed but for the ease of infringement or the lack of mechanisms that would make high volume/low value uses easier to license. “The fair use doctrine is not a license for corporate theft.”⁷¹ Licensing promotes certainty, collaboration, and respect, as well as ensuring a sustainable creative ecosystem for all.

What role should the United States government play in international initiatives at WIPO or elsewhere?

The Copyright Alliance echoes comments that recommend the U.S. should take an active role where appropriate in international initiatives, since online rights information and licensing is necessarily global. In addition, the U.S. should undertake government to government discussions to ensure developing efforts regarding ownership and rights information are compatible and interoperable.

V. Establishing A Multistakeholder Dialogue On Improving The Operation Of The Notice And Takedown System For Removing Infringing Content From The Internet Under The DMCA

The Copyright Alliance is pleased to see the IPTF’s interest in establishing a multistakeholder dialogue on improving the operation of the DMCA’s notice and takedown system. When the legislation that led to the statute was originally drafted in 1998, Congress’s intent was to promote cooperation between copyright owners and service providers to detect and deter online infringement.⁷² The motivation remains sound, and many agree that greater cooperation between stakeholders is needed to fully realize that goal.

⁷⁰ Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 550 (1985).

⁷¹ *Id.* at 557-58 (quoting Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., Inc., 621 F.2d 57, 61 (1980)).

⁷² See H.R. REP. NO. 105-796, at 72 (1998).

Unfortunately, courts have misinterpreted the law in ways that have created obstacles to reaching Congress's goal.⁷³ The effect of these decisions has been compounded by the scope and scale of infringement today. As Prof. Bruce Boyden has pointed out recently,

Section 512 was originally designed as an emergency stopgap measure, to be used in isolated instances to remove infringing files from the Internet just long enough to allow a copyright owner to get into court... Modern infringement is persistent, ubiquitous, and gargantuan in scale. It is a problem that needs to be policed, not prevented, if our current copyright system is to continue to function. Takedown notices, with their detailed requirements and elaborate back-and-forth, are a poor way to achieve the routine policing of sites that receive thousands of new files every hour.⁷⁴

The result is a mechanism whose burden falls heaviest on individual creators and small businesses. The notice and takedown procedure no longer provides effective relief for these creators, causing a chilling effect on speech that affects independent, niche voices the most. For example:

- Kathy Wolfe, owner of a small independent U.S. film-distribution company called Wolfe Video, has previously “found more than 903,000 links to unauthorized versions of her films” – this corresponds to an estimated loss of over \$3 million in revenue in 2012 from her top 15 titles alone.⁷⁵ In addition to her lost revenues, Ms. Wolfe “spends over \$30,000 a year – about half her profit – just to send out takedown notices for her titles.” This “very damaging trend” has forced her to halve her marketing budget, cut her employees’ pay, and discontinue her own salary.
- Artist Lorene Leftwich Sisk has said that in order to prevent online infringements of her work, she either stops selling her art on the Internet, or she ends up sending 50 DMCA

⁷³ See *Viacom Int'l. v. YouTube, Inc.*, 676 F.3d 19 (2012); *UMG Recordings v. Veoh Networks*, No. 10-55732, slip op. (9th Cir. Mar. 14, 2013).

⁷⁴ BRUCE BOYDEN, *THE FAILURE OF THE DMCA NOTICE AND TAKEDOWN SYSTEM: A TWENTIETH CENTURY SOLUTION TO A TWENTY-FIRST CENTURY PROBLEM 2* (2013).

⁷⁵ Christopher S. Stewart, *As Pirates Run Rampant, TV Studios Dial up Pursuit*, Wall Street Journal, March 5, 2013, available at <http://online.wsj.com/news/articles/SB30001424127887324906004578292232028509990>.

takedown notices per year. In her words, “[I] don’t have time to waste [on] all these infringements.”⁷⁶

- Author and publisher Morris Rosenthal has observed that “content farm” websites that post stolen content claim DMCA safe harbor protection while at the same time “syndicate the plagiarized material to hundreds or thousands of other sites, all of whom claim DMCA protection, making it impossible for an author to have all of the infringements removed.” In one instance, he “found [his] book . . . [online illegally] within a day of it being posted [for sale], and not only were there already a thousand downloads, there were over fifty comments posted by different people thanking the individual who posted the file.” Mr. Rosenthal told the Copyright Office that, as a result of the efforts required to fight the tsunami, he has “dropped all attempts at writing new books in an attempt to fight copyright infringements and preserve the core of my publishing business.”⁷⁷

The Task Force believes that at least the following issues could be constructively addressed through a notice and takedown multistakeholder dialogue: (i) Reducing the volume of takedown notices sent to service providers; (ii) Minimizing reappearance of infringing material; (iii) Inaccurate takedown requests; (iv) Misuse of takedown requests; and (v) Difficulties in using the system for individuals or small and medium-size enterprises (SME). What other issues could be considered? For each issue to be considered, who are the stakeholders needed at the table?

The Copyright Alliance welcomes a multistakeholder dialogue aimed at minimizing the enforcement burden for all entities involved including all varieties of copyright holders and the online service provider community. In undertaking this inquiry, other requirements in the statute—in particular, reasonable implementation of a repeat infringer policy,⁷⁸ accommodation of standard technical measures,⁷⁹ and lack of “red flag” knowledge of infringing activity⁸⁰ will of necessity also be worthy of discussion. It is likely that the volume of takedown notices has been

⁷⁶ Letter from Lorene Leftwich Sisk, to U.S. Copyright Office (2012) (on file with U.S. Copyright Office) (submitted in response to solicitation from U.S. Copyright Office re copyright small claims).

⁷⁷ Letter from Morris Rosenthal, to U.S. Copyright Office, at 2 (2012) (on file with U.S. Copyright Office) (submitted in response to solicitation from U.S. Copyright Office re copyright small claims).

⁷⁸ 17 U.S.C. § 512(i)(1)(A) (2011).

⁷⁹ *Id.* § 512(i)(1)(B).

⁸⁰ *Id.* § 512(c)(A)(ii).

exacerbated by the erosion of these other requirements by courts in the 2nd and 9th Circuits since these decisions have altered the settled understanding about what is required under the statute. Such dialogue need not always result in legislation. The Copyright Office could play a useful role in clarifying and provide guidance about these issues.

Just as with the remix and statutory damages issues discussed above, a copyright small claims process may help alleviate some of the tensions present in the notice and takedown system. The IPTF could consider incorporating this topic within the multistakeholder process where appropriate.

Search engines need to be involved in any multistakeholder dialogue. As a recent MPAA report found, search plays a significant role in directing consumers to infringing content, particularly users seeking new content online for the first time.⁸¹

The IPTF may also want to consider including representatives from federal law enforcement agencies charged with investigating criminal copyright infringement in multistakeholder discussions. Public enforcement may be appropriate against sites receiving inordinate amounts of takedown notices for infringing content while demonstrating little, if any, legitimate purpose. Sending enormous amounts of notices to sites like this only to see targeted content reappear shortly afterward is wasted effort. In addition, the Green Paper notes that criminal penalties for infringing a copyright owner's public performance rights should be harmonized with penalties for infringement of the exclusive rights of reproduction and distribution.⁸² Such a change is commendable in its own right.

How can the Task Force ensure participation by all relevant stakeholders, as well as effective and informed representation of their interests?

As an organization that represents an array of institutional members—including other membership organizations, trade unions, trade associations, and corporations—drawn from all creative sectors—music, film, photography and visual arts, publishing, software, and others—and over 13,000 grassroots creators, the Copyright Alliance would welcome the opportunity to

⁸¹ MPAA, UNDERSTANDING THE ROLE OF SEARCH IN ONLINE PIRACY 2 (2013).

⁸² DEPARTMENT OF COMMERCE, INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 76 (2013).

participate in any multistakeholder discussion. We can provide valuable insights into creators' practical experiences in a variety of fields, and represent the diverse needs and business models of the community of individuals and small businesses who derive their livelihoods from creative works.

Respectfully submitted,

Terry Hart
Director of Legal Policy
Copyright Alliance
1224 M St., NW Suite 101
Washington, DC 20005