



Summary of the White Paper on Remixes, First Sale, and Statutory Damages

Copyright Policy, Creativity, and Innovation in the Digital Economy

Background

The White Paper on Remixes, First Sale, and Statutory Damages is a product of the Department of Commerce’s Internet Policy Task Force. The Task Force was formed in 2010 to conduct a comprehensive review of the nexus between privacy policy, copyright, the global free flow of information, cybersecurity, and innovation in the Internet economy. One of its goals has been to support modernization of copyright policy by striking an appropriate balance between “the meaningful protection of intellectual property and preserving the dynamic innovation and growth that have made the Internet and digital technology so important to our economy and society.” In 2013, the Task Force published a Green Paper on Copyright Policy, Creativity, and Innovation in the Digital

Economy—the most comprehensive assessment of digital copyright policy issued by any administration since 1995.

Since the publication of the Green Paper, the Task Force has launched three separate initiatives: (1) facilitating a multistakeholder forum to improve the operation of the notice and takedown system of the Digital Millennium Copyright Act; (2) engaging with stakeholders on ways that the government can facilitate the development of the online licensing environment for copyrighted works; and (3) undertaking a broad consultation on three copyright policy issues—remixes, first sale, and statutory damages—culminating in the preparation of this White Paper.

Summary of the White Paper’s Recommendations

Remixes

Remixes are works created by changing and combining existing materials to produce something new and creative, such as mashups of songs, fan fiction, and collages. It is important that the U.S. copyright framework continue to allow a broad range of remixes to thrive, ensuring that a vibrant fair use space can coexist with effective licensing structures.

In the White Paper, the Task Force concludes that the record has not established a need to amend existing law to create a specific exception or a compulsory license for remix uses. To provide more clarity, however, the White Paper encourages stakeholders to develop voluntary fair use guidelines and best practices and to offer enhanced licensing options.

First Sale

The first sale doctrine—which allows the owner of a physical copy of a creative work to lend or resell it to another person without the copyright owner’s consent—provides a number of benefits to the public, including the ability to share favorite books with

friends and family, enabling libraries to lend materials to their patrons, and providing reduced-price versions of books to students. The Task Force examined how the doctrine’s benefits may be preserved in the online environment given current marketplace

options for consumers, the state of technology, and the risks to copyright owners' primary markets. It concluded that amending copyright law to extend the first sale doctrine to digital transmissions of copyrighted works is not advisable at this time. Meanwhile, libraries and other stakeholders have raised important issues regarding preservation and e-

lending, and the Task Force will continue to monitor legal and marketplace developments to ensure these concerns are appropriately addressed. It also recommends that stakeholders develop best practices for communicating with consumers about the terms of online transactions involving creative works.

Statutory Damages

The Task Force is mindful that statutory damages serve a critical compensatory and deterrent function, and are particularly important in cases of online infringement, where the scope of the infringing use may not be ascertainable. At the same time, however, excessive and inconsistent awards can risk encouraging disrespect for copyright or chilling investment in innovation. The Task Force's inquiry focused on the appropriate calibration of statutory damages that may be assessed against individual file-sharers and against online services, which can be secondarily liable for infringement of large numbers of works. It recommends the following three amendments to the Copyright Act to address some of the concerns presented:

- Incorporate into the Copyright Act a list of factors for courts and juries to consider when determining the amount of a statutory damages award, providing a greater degree of predictability in infringe-

ment cases across the country. In considering what factors should be included, the Task Force drew upon existing model jury instructions as well as federal case law.

- Amend the copyright notice provisions to remove a bar to eligibility for the lower "innocent infringement" statutory damages awards.
- In cases involving non-willful secondary liability of online services offering a large number of works, give courts discretion to assess statutory damages other than on a strict per-work basis.

The Task Force also supports the creation of a streamlined procedure for adjudicating small claims of copyright infringement and believes that further consideration should be given to the proposal of the Copyright Office to establish such a tribunal. This could help diminish the risk of disproportionate levels of damages against individual file-sharers.

How to Obtain the Report

The text of the White Paper is available for downloading at:

www.uspto.gov/copyright-white-paper-2016

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