Submission of Digital Liberty Regarding the Patent and Trademark Office and The National Telecommunications and Information Administration's Request for Reply Comments on the *Department of Commerce Green Paper: Copyright Policy, Creativity, and Information in the Digital Economy.*

I would like to thank the Patent and Trademark Office and the National Telecommunications and Information Administration for the opportunity to contribute reply comments regarding the Department of Commerce Green Paper: Copyright Policy, Creativity, and Information in the Digital Economy.

I. INTRODUCTION

Copyright enables and encourages experimentation and innovation, and provides both content creators and distributors the certainty they need to invest billions of dollars in entertainment and knowledge based products and services, which create jobs across the country. In fact, since filing initial comments, the International Intellectual Property Alliance released a study concluding that the core copyright industries contributed over ***one trillion dollars*** to U.S. gross domestic product in 2012. This represents over 6.5 percent of the US economy, which translates to 5.4 million jobs, or almost 5 percent of the entire US workforce.[1]

Copyright has proven to be an essential ingredient to innovation. As we continue to shift to a knowledge based economy, increasingly, it is the fruits of the mind that are driving growth, experimentation, competition and innovation. Unfortunately, as the digital marketplace continues to evolve, some voices assert that copyright stands in the way of innovation. This claim is unfounded when one observes the marketplace, where new entrants – both content producers and distributors – offer new products and services seemingly every day. For instance, an incredible array of new products and services were announced at the Consumer Electronics Show (CES) in Las Vegas regarding the delivery of content, including a new cloud-based TV service by Sony Computer Entertainment that combines live TV with VOD. These developments do not indicate a market failure or lack of innovation. On the contrary, the certainty and flexibility created by copyright law allows entrepreneurs to take risks and make investments that lead to compelling new opportunities and experiences for consumers, creators, and other stakeholders in the ecosystem. As such, the government should continue to enable this extraordinary market to flourish by recognizing the underlying property rights of participants and otherwise allowing the consumers, the market, and competition to determine outcomes.

In these comments, I would like to contribute thoughts on two of the topics raised in the Federal Register notice: 1) **the relevance and scope of the first sale doctrine in the digital environment**; and 2) **the application of statutory damages in the context of individual file-sharers and secondary liability for large-scale online infringement**.

II. THE FIRST SALE DOCTRINE

Some commenters and participants in the public forum advocated changing the first sale doctrine so that it also applies to purely digital content. The first sale doctrine, however, should not apply to digital products, which are different from tangible products in a very important way

[1] http://www.iipa.com/pdf/2013_Nov19_Press_Release_Copyright_Report.pdf

that is often not recognized in this discussion. When buying a digital product, consumers are buying a license to use the copyrighted material under certain restrictions; they are not buying the copyrighted material itself.

The first sale doctrine is what allows people to sell their books, CDs, DVDs, and other tangible items they own that contain copyrighted material. The purpose of the doctrine is to recognize the difference between the physical object and the underlying copyright.

For example, when you buy a book from a store the property rights in the physical book have been transferred from the store to you. You may now dispose of THAT physical copy of the book as you see fit. You can lend it to someone, give it away, or sell it to a used bookstore. But you only purchased that physical object; no interest in the underlying copyright in the content contained in the book has been transferred to you. That is why you are not permitted to duplicate the book. Doing so would violate the exclusive right of the copyright holder to make reproductions of the work.

Gaining possession of physical objects that contain copyrighted content was previously the only way consumers could access that content. However, digitization and the Internet now make it possible to access copyrighted content purely in its intangible form. Because no physical object is transferred in these scenarios, the first sale doctrine is inapplicable, and should remain so.

In fact, there is actually less need for a first sale doctrine in the digital world than the physical world. Sometimes consumers buy used books, CDs, DVDs, and Blu-ray discs because they are cheaper. They are cheaper because they have "decayed" with use and time. In at least some respect, the object is different than it was when it was new. The cover of the book faded; the binding marred; the pages frayed, dog-eared, or annotated. The booklet of the DVD or Blu-Ray disc missing; the disc itself cosmetically scratched. The plastic case of the CD unwrapped, covered with fingerprints, or cracked. The difference may even be minor, in which case the discount over the object in new condition may be small. There is at least some difference from the object new, if perhaps only the secondary owner's knowledge that the object was once in someone else's hands and home. Other times consumers look for used books, CDs, DVDs, and Blu-ray discs not to save money, but because new ones are hard to find. Because of the marginal cost in creating the physical objects, and the expense of storing them, they are often produced in limited runs. Neither the price nor scarcity rationales are as salient when it comes to purely digital content. Consumers already have a number of ways to access content in digital form at a variety of price points, including through downloads and video on demand, and because the marginal and storage costs for digital content are smaller, scarcity is less of an issue.

Creating a first sale doctrine for purely digital content will also harm creators and the public. When you transfer a physical object containing copyrighted content, no reproduction takes place, and so there is no fear that a copy has been made without compensation to the copyright holder. However, transferring a digital file in purely intangible form is impossible without making a copy. Not only is this itself a violation of the copyright holders reproduction right, there is no practical and minimally invasive way of really ensuring the first user has not kept the original copy. Moreover, because the "used" copy of the digital content is identical to the original, it is a complete substitute for the original. Thus, even if the original copy is not retained, the availability of an infinite number of transfers of perfect copies could shrink the market for "new" copies, thus shrinking the compensation available to creators, their incentives to create,

and the diversity of content available to the public. Because used physical goods containing copyrighted material are not perfect substitutes for those goods new, as discussed above, the first sale doctrine provides benefit in the physical world with much less concomitant harm.

III. STATUTORY DAMAGES

Some commenters and participants in the public forum spin horrific tales of a spate of gazillion dollar statutory damage awards and innovation screeching to a halt. These stories are so fanciful they deserve to be copyrighted as works of fiction in their own right!

In reality, juries have discretion to award a range of damages depending on the particulars of a given case. Those awards can be as low as a few hundred dollars. When they are not, it is because a jury has found substantial violations. We are aware of only a few large awards against individuals. Anyone who reads about those cases, rather than relying on urban legend, will see that the plaintiffs were culpable for massive infringement; *Jammie Thomas-Rasset v. Capitol* records is an example of a defendant culpable of infringement, including making over 1,700 songs available to others, and who refused multiple opportunities to settle for far less than the final judgment.[2] As for claims by critics that the current statutory damages regime chills innovation, one need only look at the explosion of legitimate sources of content online and the services, applications and devices that deliver them to see their fallacy.

Property rights are only as valuable as a rights holder's ability to enforce them. As such, the continued development of the legitimate digital market for content is advanced when content creators – as well as developers of legitimate services, devices, and applications to access that content – have a measure of security that others will not be able to free ride on their efforts without consequences.

Unfortunately, piracy continues to be a significant problem encumbering legitimate growth. According to the recent NetNames study, "absolute infringing bandwidth use increased [in North America, Europe, and Asia-Pacific] by 159.3% between 2010 and 2012 … This figure represents 23.8% of the total bandwidth used by all internet users, residential and commercial, in these three regions."[3]

As the NetNames evidence reveals, online piracy represents a demonstrable threat to the ability of rights holders and legitimate distributors to profit from their work. Measuring actual damages from online theft, however, is difficult if not impossible, because of challenges in quantifying the number of times an unauthorized copy of a movie, TV show, or song has been downloaded. The current statutory damages regime provides the remedy in such cases, and plays an important role in the development of the legitimate online marketplace by deterring bad actors. I would also note that instances of these types of cases have dramatically decreased as intellectual property holders and ISPs have been working together to alert Internet subscribers that the content they are downloading may be in violation of copyright. In other words, stolen.

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[2] http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-715.htm
[3] http://www.netnames.com/digital-piracy-sizing-piracy-universe

IV. CONCLUSION

The online marketplace for digital content is flourishing. The best thing government can do to ensure it continues to grow is enforce the intellectual property rights that underpin that marketplace and facilitate collaboration between content creators and distributors. If content creators and distributors are assured their work won't be co-opted, and if all players in the ecosystem work together to make it harder for thieves to benefit from the Internet's legitimate infrastructure, the communications and technology industries will continue to thrive. Businesses will be rewarded based on the quality of the products and services they create and consumers will benefit from an increasingly dynamic marketplace for digital content.

Respectfully,

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