



gains from the success of the other in a virtuous circle, with consumers reaping the ultimate rewards. Demand for creative and innovative content generates a market for, and promotes investment in, Internet-enabled services, devices, and applications that can deliver the content to audiences. And as those markets grow, it becomes easier for content creators to reach audiences, promoting further investment in the creation of yet more content. Both sectors need to be strong to drive growth at home and to maintain competitiveness abroad.

While commenters such as the Computer and Communications Industry Association may be correct that “[i]t is no accident that the U.S. Internet industry dominates audience metrics throughout industrialized nations,”<sup>2</sup> it is also no accident that the U.S. entertainment industry is also the envy of the world. And while it is true that “Congress’ calculated efforts to encourage rapid innovation and an entrepreneurial spirit online permitted Internet businesses to flourish more readily in the U.S. than elsewhere,”<sup>3</sup> it is also true that Congress’ calculated efforts to recognize and enforce intellectual property rights have permitted the trillion-dollar U.S. creative industries to flourish.

In light of the tremendous success U.S. copyright law has spurred, and the rapid growth the Internet economy is enjoying under that regime, policymakers should aim to give clear effect to the rights of creators and disseminators of content. This will allow the free market to continue facilitating tremendous innovation in the production, dissemination, and consumption of content, including through the use of Internet-enabled services, devices, and applications. Regulating the market is inherently difficult to get right, and government efforts to intervene are likely to be both under and over-inclusive, which would hamper innovation. Absent proof of market failure, evolving business models based on existing exclusive rights should be allowed to grow and thrive. As MPAA highlighted in its opening comments, so long as a framework exists for the effective enforcement of intellectual property rights, the government need not manage the underlying business relationships. That should be left to creators, distributors, consumers, and competitive forces.

Enforcing intellectual property rights is no small task in the digital environment, however. The most productive role policymakers could play at the moment is to encourage voluntary initiatives among all stakeholders to ensure respect for intellectual property rights. The great success of the Internet can be attributed to its decentralized nature, allowing parties around the globe to participate in the creation of both its content and its architecture. That also means, however, that no one party can remedy problems that arise. Ensuring a healthy ecosystem requires a group effort.

## **II. Responses to Comments**

### **A. Online Licensing Environment**

As MPAA suggested in its comments, there is no need for government intervention related to online licensing of creative content. Seemingly every week, the motion picture industry introduces yet another innovative and often experimental offering in response to

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<sup>2</sup> Computer & Communications Industry Association (“CCIA”) Comments, at 1.

<sup>3</sup> *Id.*

consumer demand for more interactive, more immersive, and more portable entertainment. Whether in state-of-the-art cinemas, on the latest mobile devices, or on high-definition TVs, content creators are working every day on their own and in partnership with other technology companies to create innovative ways for audiences to easily access content.

The comments filed buttress the conclusion that policymakers should support private initiatives and maintain a market-oriented approach based on existing, clearly-defined exclusive rights.<sup>4</sup> One way that government should be able to do so is through the Copyright Office's efforts to enhance access to its databases to facilitate licensing. There is clear support for these efforts in the record from MPAA and others.<sup>5</sup> Although a few calls for consideration or adoption of new or expanded compulsory licenses were put forward,<sup>6</sup> MPAA believes that the best way to improve access to content is through voluntary contractual arrangements, not compulsory licenses.

#### B. Multi-Stakeholder Dialogue on Notice and Takedown

All players in the digital ecosystem share responsibility and have a role to play in developing and implementing best practices. These best practices would benefit from a multi-stakeholder discussion, facilitated by the Administration. MPAA was pleased to see that the comments exhibited a general consensus on this point.<sup>7</sup>

Some groups of rightholders seem to have concluded that the current legal framework is broken and must be fixed, presumably through statutory amendment.<sup>8</sup> MPAA does not endorse the view that the challenges around the DMCA notice and takedown system can only be addressed through statutory changes at this time. However, the widespread lack of confidence in the current system underscores MPAA's belief that the DMCA provisions have yet to fulfill their

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<sup>4</sup> See, e.g., Copyright Clearance Center, Inc. ("CCC") Comments, at 6 (robust market already in place for music, movies, and video works); National Music Publishers Association, et. al. ("NMPA et. al.") Comments, at 13 (issues best addressed in private sector); American Society of Composers, Authors and Publishers ("ASCAP") Comments, at 9 (existing private initiatives are sufficient); Recording Industry Association of America ("RIAA") Comments, at 11 (noting "phenomenal growth of resources that enable digital deal making").

<sup>5</sup> See, e.g., Association of American Publishers ("AAP") Comments, at 12 (stating a more robust and searchable USCO rights database is essential); CCC Comments, at 4 (praising "major strides" by USCO).

<sup>6</sup> See, e.g., Public Knowledge ("PK") Comments, at 35-37.

<sup>7</sup> See, e.g., Internet Association ("IA") Comments, at 5-6 (suggesting that multistakeholder discussions regarding how the notice and takedown regime functions could be greatly beneficial to everyone involved and would not require any legislative action); Digital Media Association ("DiMA") Comments, at 11 (voluntary solutions are the best way forward); RIAA Comments, at 5 (noting that content creators and Internet intermediaries are interdependent); Independent Film & Television Alliance ("IFTA") Comments, at 6 (broad-based voluntary initiatives, such as Copyright Alert System, must continue to be encouraged); Entertainment Software Association ("ESA") Comments, at 6 (multistakeholder process must involve those with operational expertise in order to improve the system).

<sup>8</sup> See, e.g., NMPA et. al. Comments, at 13-16; ASCAP Comments, at 11-12.

full potential, and that it is critical to bring all the relevant players together to reach agreement on steps to increase the effectiveness of the law.

There also appears to be some divergence of views regarding what the key target of discussions should be. Whereas MPAA and others believe that identifying and spreading rapid and effective ways to identify and block access to infringing content and keep it from re-appearing must be the primary goal,<sup>9</sup> others cautioned the Administration to “take care to avoid being too ambitious” with respect to “minimizing reappearance of infringing material.”<sup>10</sup> And other commenters took the position that only a narrow sliver of the online ecosystem, such as hosting services, should be addressed.<sup>11</sup> These comments are misguided. Given the breadth of the issue, it will require some ambition to have a meaningful impact. The Administration should encourage stakeholders to try to agree on ways to significantly reduce piracy – which should be achievable – by discussing all aspects of the marketplace.

Several comments identified elements that may play a role in such an agreement. For example:

- streamlining notice practices, including through use of representative lists and automatable functions, could result in faster takedowns;<sup>12</sup>
- reaching a common understanding regarding how to identify and handle repeat infringers could provide clarity and standardize consumer expectations;<sup>13</sup>
- exploring increased use of standard technical measures, including filtering tools, within the existing DMCA framework could limit the whack-a-mole problem and reduce the number of repeat notices that service providers must process;<sup>14</sup>
- adopting common-sense processes designed to avoid widespread infringement via hosting sites could drive additional investments in licensed services;<sup>15</sup> and

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<sup>9</sup> See, e.g., RIAA Comments, at 4 (“instant and widespread repopulation” of files is a problem that undermines Congress’ intent in adopting DMCA); Broadcast Music, Inc. (“BMI”) Comments, at 14 (Congress did not envision “instant and rampant reposting of self-same works on the services of the self-same ISPs”).

<sup>10</sup> Center for Democracy and Technology (“CDT”) Comments, at 2.

<sup>11</sup> See, e.g., Internet Commerce Coalition (“ICC”) Comments, at 3.

<sup>12</sup> See AAP Comments, at 15-16.

<sup>13</sup> See *id.* at 17 (suggesting best practices for identifying repeat infringers); RIAA Comments, at 5 (voluntary best practices should assure “clarity and efficacy of repeat infringer termination policies”).

<sup>14</sup> See AAP Comments, at 15; RIAA Comments, at 5 (ensure that “take down means keep down”); see also Google Comments, at 3-4 (discussing Content ID).

<sup>15</sup> See RIAA Comments, at 5 (common-sense steps include checks on content widely disseminated from the site or removing financial incentive to upload copyrighted content to the site).

- reforming search practices, including rankings of authorized and illicit sites and the use of auto-complete to suggest search terms, could help consumers locate legitimate services rather than unauthorized distributors while simultaneously reducing advertising and other sources of revenue for pirates.<sup>16</sup>

Although some commenters focused exclusively on placing more burdens on copyright owners seeking to enforce their rights,<sup>17</sup> this approach stems from largely unsubstantiated claims that “abuse is rampant” of the notice and takedown system.<sup>18</sup> The Electronic Frontier Foundation maintains a “Takedown Hall of Shame;”<sup>19</sup> but the entire contents of this collection, even if all of them constituted true abuses, is an infinitesimal fraction of the literally millions of takedown notices sent each month. Mainstream copyright owners send takedown notices for more than 6.5 million infringing files each month, and MPAA member studios alone sent over 13 million notices to website operators, and over 11 million notices to search engines, between March and August of 2013.<sup>20</sup> The similarly infinitesimal use of the free mechanism Congress provided to push back against mistaken or misidentified notices – section 512(g) counter-notification – provides further meaningful context. Only 8 counter-notices were sent in response to over 25 million takedown notices sent by MPAA member studios in a six month period during 2013.<sup>21</sup> While there likely are ways for stakeholders to work together to reduce inaccurate and misplaced takedown notices, which the evidence shows are few in number, reducing piracy should be the first priority of any discussions.

Commenters who focused on placing more burdens on copyright owners also expressed concern regarding the burdens that notice and takedown places on small technology companies.<sup>22</sup> But these commenters ignore the burdens placed on copyright owners of all sizes. The view of some seems to be that it is proper to require online service providers to do next to nothing to comply with section 512; but this fundamentally misinterprets Congress’ goal of encouraging cooperation.<sup>23</sup> The Internet Association asserts that the “bedrock principle of U.S. Internet

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<sup>16</sup> See RIAA Comments, at 5 (suggesting changes for search rankings and auto-complete in search activity to avoid recommending “rogue sites”); see also Green Paper at 70 (“Search engines can also play a role in stemming the proliferation of online infringement, by taking steps that make it less efficient to operate a profitable [infringing] business.”).

<sup>17</sup> For example, the Internet Association provides a list of additional burdens it would like to place on rightsholders without offering any suggestions as to how to curb piracy. IA Comments, at 6.

<sup>18</sup> Stanford Center for Internet & Society and Electronic Frontier Foundation (“SCIS/ EFF”) Comments, at 8.

<sup>19</sup> See *id.* at 10.

<sup>20</sup> See Bruce Boyden, Center for the Protection of Intellectual Property, *The Failure of the Notice and Takedown System* at 2 (Dec. 2013), available at <http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>. The figures cited in this article do not include notices sent to user generated content (“UGC”) sites, like YouTube.

<sup>21</sup> See *id.* at 3.

<sup>22</sup> See, e.g., IA Comments, at 6-7; Consumer Electronics Association (“CEA”) Comments, at 5.

<sup>23</sup> See H.R. Rep. No. 105-551 (pt. 2), 10th Cong., 2d Sess. at 49 (1998) (Online Copyright Infringement Liability Limitation Act “preserves strong incentives for service providers and copyright owners to

policy” is that “Internet companies cannot *and should not* police their platforms to discover and adjudicate the illegal activities of third parties that use their systems.”<sup>24</sup> There might be room for reasonable debate regarding the extent to which *some* service providers *can* mitigate the harm caused by infringers who use their services. However, there should be no question that where a service provider reasonably *can* do so, it *should*. Norms of responsibility and accountability are critically important both to a healthy Internet ecosystem and to a copyright law that remains true to its purpose in the digital environment. Any discussions that fail to begin from that starting point have dim prospects for success.

Nor is it constructive to characterize the notice and takedown process as “censorship.”<sup>25</sup> Commenters like the Center for Democracy and Technology express concern that notice and takedown “is no small power for private-sector entities to exercise on an essentially unsupervised basis.”<sup>26</sup> But private sector players have always been able to handle privately complaints raised by copyright owners through cease and desist letters and other actions short of lawsuits. These practices, which long pre-date the DMCA, even in the online environment, were never “supervised” by the government or the courts. Notice and takedown creates a limited safe harbor for potential defendants who cooperate to limit infringement, not an unchecked power for copyright owners. Everyone involved in the discussions should see the system for what it is: a tool for cooperative engagement aimed at limiting infringement in the online space, operated by private actors for everyone’s benefit.

### C. Remixes

Numerous stakeholders echoed MPAA’s view that creators possess all of the necessary tools for creating remixes under current law.<sup>27</sup> There is a vibrant licensing market for remixes that is not in need of any legislative repair. Content and technology companies are working together on market solutions, which should not be undermined by government action.<sup>28</sup>

Millions of artists and small businesses, as well as MPAA’s members and other large companies, engage in transformative, creative uses of copyrighted works online. Defenses and doctrines like fair use, the idea-expression dichotomy, the substantial similarity requirement, and the concept of de minimis use, make much of this creative activity lawful.<sup>29</sup> The widespread

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cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”).

<sup>24</sup> IA Comments, at 5 (emphasis added).

<sup>25</sup> SCIS/EFF Comments, at 8.

<sup>26</sup> CDT Comments, at 2.

<sup>27</sup> See, e.g., RIAA Comments, at 6 (“stakeholders have the tools necessary to further promote progress in this arena”); NMPA et. al. Comments, at 5 (noting that companies exist solely to facilitate the licensing of digital samples, “and the marketplace works”).

<sup>28</sup> See, e.g., AAP Comments, at 3 (no amendment necessary); ASCAP Comments, at 9-10 (third party clearance entities exist to address digital sampling); Google Comments, at 4-6.

<sup>29</sup> See PK Comments, at 5-12 (discussing traditional copyright defenses and doctrines as applied to remixes).

availability of transformative works, and the extremely low number of lawsuits filed over such activity, is proof that these defenses and doctrines, alongside licenses, are adequate to preserve breathing room in which to create and disseminate cutting-edge content.<sup>30</sup>

Nevertheless, MPAA agrees with other commenters that educational efforts and voluntary guidelines can benefit new artists and existing copyright owners alike.<sup>31</sup> It is important to ensure that misunderstandings and a lack of access to information are not impeding legitimate creative activity. Scare tactics used by some critics of copyright protection to paint copyright law as an inflexible and rigid regime, and to gin up support for their agendas, contribute significantly to public misperceptions.

But there is no need to narrow the adaptation right, as some commenters proposed.<sup>32</sup> Voluntary licensing of adaptations is the appropriate solution in many circumstances. The availability of licenses is not a threat to fair use, as some commenters seem to believe,<sup>33</sup> but rather the end goal of copyright law in the vast majority of circumstances, and a valuable method by which parties can avoid unnecessary disputes in other circumstances.

There is also no need to lower enforcement standards for the benefit of smaller companies and individuals. Of course, it is easier for companies with resources to defend meritless copyright lawsuits than it is for individuals and start-ups. But by allowing judges to award attorneys' fees to the prevailing party,<sup>34</sup> the Copyright Act already makes it easier than it is in other areas of the law for parties with limited resources to defend themselves. MPAA also supports the Copyright Office's inquiry into the feasibility of creating a "small claims court" of sorts to enable copyright owners and users of copyrighted material to get rulings quickly and cheaply in appropriate circumstances.<sup>35</sup>

Any effort to make it more difficult for copyright owners to pursue claims and seek removal of material from online services will actually burden individual creators with limited

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<sup>30</sup> MPAA would oppose the adoption of any remix statutory "safe harbor" similar to the provision adopted in Canada and supported by some commenters. *See, e.g.*, Organization for Transformative Works ("OTW") Comments, at 79. The Canadian provision places no limitation on the amount of a work that a user may copy to create a new work and fails to require that the newly created work qualify as transformative. In addition, the provision is ostensibly aimed at "non-commercial" uses by individuals, but it apparently authorizes dissemination through commercial sites that profit from the use of popular, copyrighted material.

<sup>31</sup> *See, e.g.*, IFTA Comments, at 3.

<sup>32</sup> *See* SCIS/EFF Comments, at 7, *citing* Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 *Geo. L.J.* 1505 (2013).

<sup>33</sup> *See, e.g.*, Library Copyright Alliance ("LCA") Comments, at 3; New Media Rights Comments, at 30-31; SCIS/EFF Comments, at 17; OTW Comments, at 70.

<sup>34</sup> *See* 17 U.S.C. § 505.

<sup>35</sup> *See* Comments of the MPAA In the Matter of Remedies for Small Copyright Claims (Apr. 12, 2013), *available at* [http://www.copyright.gov/docs/smallclaims/comments/noi\\_02263013/MPAA.pdf](http://www.copyright.gov/docs/smallclaims/comments/noi_02263013/MPAA.pdf); Report of the Register of Copyrights on Copyright Small Claims (Sept. 2013), *available at* <http://www.copyright.gov/docs/smallclaims/>.

resources, rather than helping them.<sup>36</sup> Moreover, threatening copyright owners with liability under section 512(f) for making “knowing material misrepresentations” every time a case involving a takedown notice is resolved in favor of the defendant, as some would apparently like to do,<sup>37</sup> would further discourage legitimate copyright owners from policing their rights by using the very mechanism – notice and takedown – that Congress wished to encourage. Liability under section 512(f) should be reserved – as Congress intended – for preventing takedowns made in bad faith.<sup>38</sup>

Finally, there is no need to amend section 1201 to allow circumvention for the purposes of creating remixes, as some contend.<sup>39</sup> The statute already provides a process for obtaining exemptions to the ban on circumventing access controls, which stakeholders have been using effectively for many years to deal with issues related to access controls and the creation of transformative works.

#### D. So-Called “Digital First Sale”

As many commenters, including MPAA, noted, the digital environment is unlike any market that existed previously, and the extension of the first sale doctrine beyond its current statutory construct and into the digital environment is unjustified.<sup>40</sup> In the digital environment, there is no practical way to guarantee that the transfer of digital files would not result in unauthorized additional copies. These copies would serve as complete substitutes for new goods in a way that used copies of physical goods do not. As Professor Villasenor stated at the Green Paper Public Meeting, it is “impossible” to draft statutory language to create a “digital first sale” defense without “creating gaping loopholes that would then be easily exploited to the really grievous detriment of rights holders.” If unlimited digital copies of creative works were allowed to flood the marketplace, there would be less incentive for creators to develop new material, and for new and innovative purveyors of licensed access to open up shop.

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<sup>36</sup> For example, eliminating or dramatically reducing statutory damages where arguably transformative works are at issue (as suggested in the SCIS/EFF Comments, at 7; CDT Comments, at 11-12; Derek Khanna & John Tehranian Comments, at 13-15) or requiring copyright owners to file lawsuits against anonymous John Doe defendants when supposedly transformative works are posted to online services (as suggested in the SCIS/EFF Comments, at 11-12) would both unfairly burden small copyright owners.

<sup>37</sup> See, e.g., SCIS/ EFF Comments, at 8.

<sup>38</sup> See *Rossi v. Motion Picture Assn. of Am.*, 391 F.3d 1000, 1005 (9th Cir. 2004) (“A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. See § 512(f). Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.”).

<sup>39</sup> See, e.g., New Media Rights Comments, at 12.

<sup>40</sup> See RIAA Comments, at 7; NMPA et. al. Comments, at 9; AAP Comments, at 4; accord United States Copyright Office, DMCA Section 104 Report, at 73-76 (Aug. 2001), available at [http://www.copyright.gov/reports/studies/dmca/dmca\\_study.html](http://www.copyright.gov/reports/studies/dmca/dmca_study.html). Although Public Knowledge claims (PK Comments, at 16) that the first sale doctrine has always been a defense to infringement of the reproduction and adaptation rights, this is revisionist history. The statute could not be clearer which exclusive rights are impacted by section 109. First sale does not allow unauthorized reproductions. The (mostly ancient) cases Public Knowledge relies on do not say otherwise.

The current online marketplace is providing an unprecedented range of choices at a variety of price points to meet consumer demand.<sup>41</sup> A rapidly evolving array of services currently offer consumers access to movies and TV programs in a variety of forms (*e.g.*, hard copy, digital download, on-demand transmission, and streaming) through a variety of business models (*e.g.*, purchase, rental, and subscription).<sup>42</sup> Consumers can access works through TV Everywhere, Amazon, iTunes, Hulu, Netflix, Vudu, Flixster, and HBO GO. The UltraViolet model and other cloud storage options also provide flexible means of multi-copy, multi-format access to content anywhere, at any time, by multiple members of a household and on multiple devices and platforms. This diversity of models for providing access undermines calls for sanctioning “resale” in the digital environment.<sup>43</sup> In fact, this diversity would likely be threatened by an expansion of the first sale doctrine, which should remain a physical concept.<sup>44</sup> Imposing new limitations on emerging business models would be counterproductive. It would reduce options for viewing the movies and TV programs we all love, and might result in higher prices.

Some commenters complain that licensing agreements sometimes include provisions that establish agreed upon terms of use that may not be derived from the Copyright Act itself.<sup>45</sup> Although these comments tend to refer to EULAs as “adhesive contracts,”<sup>46</sup> the overwhelming case law has approved of online and shrink-wrap licenses.<sup>47</sup> EULAs often expand the rights that users obtain beyond the rights provided to users in the Copyright Act, and there is no reason why private parties cannot agree on how to calibrate the contours of a acceptable use. It is unreasonable for some to expect that the consumer would obtain the manifold benefits and flexibility associated with obtaining access to and copies of works online without some contractual limitations on use.

It is also unreasonable and unfounded to claim, as ReDigi does, that the inability to freely make additional, unauthorized copies of digital files justifies piracy.<sup>48</sup> It is simply untrue that

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<sup>41</sup> See RIAA Comments, at 8; IFTA Comments, at 4.

<sup>42</sup> See [wheretowatch.org](http://wheretowatch.org) for a list of licensed services.

<sup>43</sup> See AAP Comments, at 7.

<sup>44</sup> Accord ESA Comments, at 2-5; see also AAP Comments, at 6-7. Given that first sale should not be extended to digital transactions, there is also no need for the exception to section 1201’s prohibitions on circumvention and trafficking in circumvention devices that some commenters propose. See, *e.g.*, Ohio Library Council Comments, at 2.

<sup>45</sup> See SCIS/EFF Comments, at 16-17; PK Comments, at 22-26; Califa Group Comments, at 1; ReDigi, Inc. (“ReDigi”) Comments, at 6-7.

<sup>46</sup> CEA Comments, at 6.

<sup>47</sup> See, *e.g.*, *Guadagno v. E\*Trade Bank*, 592 F. Supp. 2d 1263 (C.D. Cal. 2008) (click-through contract not a contract of adhesion); *Meier v. Midwest Recreational Clearinghouse, LLC*, No. 2:10-cv-01026, 2010 U.S. Dist. LEXIS 68949 (E.D. Cal. July 12, 2010) (same); see also *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012), *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904 (N.D. Cal. 2011); *E.K.D. v. Facebook, Inc.*, No. 11-461-GPM, 2012 U.S. Dist. LEXIS 113761 (S.D. Ill. Mar. 8, 2012).

<sup>48</sup> See ReDigi Comments, at 10.

piracy is occurring because “[n]ever before in the history of property in the United States has a group of powerful monopolies so controlled the legal rights of both creators and consumers.”<sup>49</sup> Instead, diverse methods of dissemination are sprouting up on a daily basis, operated by myriad players. ReDigi’s rhetoric is not only disingenuous: it negates the enormous benefits – such as time-limited access for a very low price, and choice – consumers enjoy from the proliferation of diverse services. This state of affairs could never have developed if all recipients of digital copies enjoyed the privilege of making one or more additional unauthorized copies and disseminating them.

#### E. Statutory Damages

The availability of statutory damages helps ensure a thriving online marketplace and copyright ecosystem by giving content creators – as well as developers of legitimate services, devices, and applications to access that content – a measure of security that others will not be able to free ride on their innovative efforts and investments without consequence. The deterrence provided by the current range of statutory damages is of vital importance to MPAA’s members and other copyright owners, especially in the online environment.<sup>50</sup> As the Recording Industry Association of America noted, infringers must be made to pay damages “beyond mere restitution.”<sup>51</sup> Infringement actions are about more than just direct harm to copyright owners: they are about righting a public wrong.<sup>52</sup>

There is no evidence of any epidemic of unreasonably large statutory damages awards in copyright cases. And courts are already considering a variety of factors while calculating statutory damages in order to determine what amount is “just,” as the statute instructs.<sup>53</sup> Policymakers should not give undue attention to rare, exceptional cases, nor to anecdote, but should instead focus on the importance of statutory damages to the overall copyright system.

Unfortunately, multiple commenters put forward proposals that could do significant harm to copyright owners and undermine incentives for engaging in creative activities by unnecessarily reducing the availability of statutory damages. MPAA urges the Administration to reject these proposals.

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<sup>49</sup> *Id.*

<sup>50</sup> *See, e.g.*, ASCAP Comments, at 10; IFTA Comments, at 4 (“[S]tatutory damages provide an essential mechanism of protection for legitimate portals that license independent films and television programming.”).

<sup>51</sup> RIAA Comments, at 9.

<sup>52</sup> *See* AAP Comments, at 9.

<sup>53</sup> *See* M.B. Nimmer & D. Nimmer, *Nimmer On Copyright* § 14.04[C][3] (2013) (discussing factors already considered by U.S. courts, including the duration of the infringement, the nature of the infringement, the defendant’s purpose and intent, the profits earned and expenses avoided by the defendant, revenues lost by the plaintiff, the value of the copyright at issue, and the need to deter the type of infringement at issue); *see also* Ninth Circuit Model Civil Jury Instruction No. 17.25 and Comment thereto, *available at* <http://www3.ce9.uscourts.gov/jury-instructions/model-civil>.

## 1. Expanding “Innocent Infringement”

The Library Copyright Alliance proposed three expansions of the scope of “innocent infringement” under section 504(c).<sup>54</sup> First, Library Copyright Alliance proposes to do away with sections 401(d) and 402(d), which incentivize the provision of copyright notice by preventing infringers of works bearing copyright notices from obtaining a reduction of statutory damages under section 504 to \$200 per work, even if the infringer sustains the burden of proving that he or she was not aware that the infringing acts were unlawful. Library Copyright Alliance may believe it is “useless” to incentivize notice in this manner,<sup>55</sup> but the social value of notice has only increased in the digital age (see the Orphan Works debate). Taking away this incentive to provide notice would be bad policy.

Second, Library Copyright Alliance proposes that a finding of innocent infringement under section 504(c) should allow a court to remit statutory damages for nonprofit libraries, archives and educational institutions beyond cases involving only infringements of the **reproduction right** where there is a reasonable belief that an infringing act constituted a fair use. But internal library reproductions have far less of an impact on the market value of works than online (or offline) distributions and public performances. Thus, cabining this limitation on damages to cases involving only reproductions makes good sense.

Third, extending the courts’ ability to remit statutory damages in cases where defendants have supposed good faith fair use defenses beyond the nonprofit library, archive and educational institution sector, as Library Copyright Alliance and Computer & Communications Industry Association propose, is also unjustified.<sup>56</sup> Library Copyright Alliance says that such an expansion of the doctrine would benefit “individual file sharers” and “secondary infringers.”<sup>57</sup> However, it is hard to imagine how the former group would have a reasonable basis to believe their actions are fair,<sup>58</sup> and the latter group includes those who build their business models on infringement, as discussed further below. Moreover, some courts have already held that a reasonable fair use defense can preclude a finding of willful infringement, which reduces the potential statutory damages dramatically.<sup>59</sup>

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<sup>54</sup> See LCA Comments, at 2-3.

<sup>55</sup> *Id.*

<sup>56</sup> See LCA Comments, at 3; CCIA Comments, at 6.

<sup>57</sup> LCA Comments, at 3.

<sup>58</sup> See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939-40 (2005); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005); *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 223 (D. Mass. 2009).

<sup>59</sup> See 4 *Nimmer On Copyright* § 14.04[B][3][a], n. 120 and 121 (collecting cases).

## 2. Reducing or Eliminating Statutory Damages for Secondary Infringers

Multiple commenters propose eliminating or reducing statutory damages in cases against intermediaries who facilitate online infringement.<sup>60</sup> This proposal is based on an incorrect understanding of secondary liability doctrines.

First, the Internet Association is wrong to say that “the concept of secondary liability for infringement does not appear in the Copyright Act.”<sup>61</sup> The legislative history and numerous cases have explained that the concept of secondary liability is acknowledged in section 106’s language providing the exclusive right to do *or to authorize*.<sup>62</sup>

Second, the Computer and Communications Industry Association misleadingly describes secondary liability cases as those where “an intermediary is being penalized for the misconduct of another party.”<sup>63</sup> The concept behind secondary liability is that the intermediary has profited from or knowingly contributed to the infringement at issue. If such intermediaries are “being penalized,” it is because of their own connection to the infringing activity, not as helpless or disinterested victims of third-party behavior.

Third, the comments arguing for reduced damages in cases against intermediaries fail to back up their claims that significant additional legitimate innovation is being prevented by the threat of statutory damages.<sup>64</sup> No adverse impact on legitimate innovation has been demonstrated.<sup>65</sup> And the statistics provided by the Internet Association regarding the extraordinary success of Internet companies in the current environment belie these claims.<sup>66</sup> Instead, the evidence tends more toward the statement that entities will build new business models that rely on infringement unless the risk of significant statutory damages enforces more prudent behavior.

For example, the Center for Democracy and Technology cites *Viacom v. YouTube* as a case against an intermediary where the damages requested (\$1 billion) were supposedly

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<sup>60</sup> See, e.g., IA Comments, at 2, 5; CCIA Comments, at 4-7; CEA Comments, at 3-4.

<sup>61</sup> IA Comments, at 2.

<sup>62</sup> See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 61 (1976) (“[U]se of the phrase ‘to authorize’ is intended to avoid any questions as to the liability of contributory infringers.”); see also *Subafilms, Ltd. v. MGM-Pathe Communications, Co.*, 24 F.3d 1088, 1092-93 (9th Cir. 1994) (*en banc*); *Venegas-Hernandez v. ACEMLA*, 424 F.3d 50, 58 (1st Cir. 2005); *Rundquist v. Vapiano SE*, 798 F. Supp. 2d 102, 129 (D.D.C. 2011).

<sup>63</sup> CCIA Comments, at 6; see also CDT Comments, at 10 (“a secondary infringer doesn’t control the number of works ultimately infringed”).

<sup>64</sup> See, e.g., Andrew P. Bridges (“Bridges”) Comments, at 11 (stating that he has “personally witnessed the early deaths of several companies” without providing any examples).

<sup>65</sup> See RIAA Comments, at 10 (noting the “robust development of new digital content services” and investment in such services in the years following the large LimeWire settlement during a trial to determine statutory damages).

<sup>66</sup> See IA Comments, at 3.

excessive.<sup>67</sup> But that case actually offers an example of a clear intent (articulated in documented evidence) by a defendant to use infringing content to draw attention to itself and then to sell for a huge windfall of \$1.65 billion.<sup>68</sup> If the potential damages did not approach or exceed this amount there would be no deterrence for such schemes.

### 3. Capping Statutory Damages

An attorney in private practice who frequently represents large technology companies, Andrew Bridges, proposes limiting a plaintiff to \$150,000 in statutory damages against *all defendants* for *all infringements* committed by them during a *thirty-six month period*.<sup>69</sup> Mr. Bridges also proposes limiting the statutory damages that may be awarded to a plaintiff against an “individual” for violating the reproduction right to five hundred times the “normal exploitation value by that individual (such as 99 cents for a downloaded song or \$15 for a motion picture).”<sup>70</sup> Neither of these caps would preserve the necessary deterrent impact of the current statutory damages regime. The first proposal would essentially allow, for example, a technology company and its affiliates to offer infringing downloads of a copyright owner’s entire catalogue of motion pictures for a flat fee of \$150,000 for a three year term, unless the copyright owner could prove its actual damages and the defendants’ profits. This would render the availability of statutory damages meaningless. And the second proposal seems willfully blind to the fact that in the digitally networked environment an “individual” infringer, whatever that means, can cause just as much harm to a copyright owner as a corporation can.<sup>71</sup>

Mr. Bridges tries to support his proposals by focusing on what he calls “predatory enforcement operation[s]” whereby plaintiffs have sought statutory damages in cases of alleged online infringement.<sup>72</sup> However, by Mr. Bridges’ own admission, these schemes have crumbled under their own weight.<sup>73</sup> So, there is no need to undermine the ability of copyright owners to enforce their rights in order to deter such schemes. The exemplary failures of the schemes Mr. Bridges refers to will likely deter future efforts at similar conduct.

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<sup>67</sup> See CDT Comments, at 8.

<sup>68</sup> The most recent district court opinion, in which the Southern District of New York ruled in favor of YouTube under section 512, is currently on appeal to the Second Circuit. See *Viacom Intern., Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013). The Second Circuit already remanded the case once after reversing the district court’s prior opinion on multiple issues. See *Viacom Intern., Inc. v. YouTube, Inc.*, 676 F.3d 19 (2012).

<sup>69</sup> See Bridges Comments, at 13. See also PK Comments, at 35 (proposing cap on damages in any single case).

<sup>70</sup> Bridges Comments, at 13.

<sup>71</sup> Congress concluded that individual infringers can cause great harm to copyright owners when it amended 17 U.S.C. § 506 in response to the decision in *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). See No Electronic Theft Act (NET Act), Pub. L. 105-147, 11 Stat. 2678 (1997).

<sup>72</sup> See Bridges Comments, at 4-9 (discussing Righthaven and Prenda Law).

<sup>73</sup> See *id.*

#### 4. Expediting Damages Elections

There is no reason to force a copyright owner to elect statutory damages early in litigation, before discovery has revealed all pertinent facts. The potential to request statutory damages late in the process does not allow a plaintiff to “game the system,” as some commenters believe.<sup>74</sup> In some cases, if, for example, discovery reveals that actual damages are difficult to prove, late elections are necessary.

### III. Conclusion

The MPAA appreciates this opportunity to provide our views in response to the submitted comments. We look forward to providing further input and working with the Department of Commerce, the USPTO, and the NTIA going forward.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Michael O'Leary", with a long horizontal flourish extending to the right.

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<sup>74</sup> CCIA Comments, at 7.