GLOBAL RIGHTS MANAGEMENT
SYSTEMS & MARKETPLACES

October 6, 2016
4:15 pm to 5:45 pm

Moderator

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Forum on the Entertainment and Sports Industries

2016 Annual Meeting
Las Vegas, NV

Global Rights Management Systems & Marketplaces

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Copyright Policy, Creativity, and Innovation in the Digital Economy
U.S. Department of Commerce, Internet Policy Task Force (July 2013)

U.S. vs Broadcast Music, Inc
• Transcript
• Opinion and Declaratory Judgment: Judge Stanton

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As the proliferation of the internet continues to flourish, access to global rights management systems and marketplaces is becoming even more critical to the legal access, exploitation and protection of intellectual property assets.

This plenary session will discuss: how content owners are offering, monitoring and enforcing their copyrights in today’s music, film, television, book publishing and visual arts industries; what new companies have been established in an attempt to keep up with the ongoing rapid technological pace and avid consumer demands; how international developments are affecting this ever changing landscape; and related licensing, trade policy and enforcement issues.
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Introduction

Welcome to Copyright Workflow! This book is part legal manual and part software manual. The legal portion is designed to help you understand the basics of copyright law and how it pertains to your daily life as a photographer, while the software portion will help you build sensible copyright and rights-management concepts into your existing workflow. Before I get started, though, I want to describe the landscape of the copyright community and, more specifically, the photographer’s place within it.
The Plight of the Digital Photographer

In general terms, copyright law provides to creators—including photographers—the right to exclusively control and, thus, profit from their works for a fixed period of time. In the olden days, it was relatively difficult to infringe on a photographer’s work on any significant scale. You had to get access to the physical copy of the image—either the negative or the transparency—which usually required interacting with the photographer directly or with the photographer’s agent; then you had to make physical copies in a darkroom. Put simply, infringement of a photograph used to require a reasonable investment in terms of time, equipment, and technical skill.

Fast-forward to today. The Internet has become a primary mechanism for the marketing and distribution of images. Families share photos among relatives on commercial websites such as Flickr, and virtually every professional photographer has a website where his or her images are available for the entire world. Making copies of those images is typically as easy as right-clicking it and telling your computer where to save the file.

The relative ease with which people can remove and manipulate content has created a widespread infringement problem for many creative professionals. The music industry famously did battle with peer-to-peer file sharers who transferred digital copies of music with impunity, and other creative businesses such as the motion picture and publishing industries experience similar problems.

For photographers, the issues are particularly pronounced, however, because of the rich visual culture in which we live and the meteoric rise of web-based platforms that enable photo sharing. Because visual content has become so ubiquitous, many web users don’t think twice about uploading content they found from some other website—yet, technically, it amounts to infringement in most cases. With the right-click of a mouse, a user can make a reproduction of a copyrighted image and, with a few more clicks, upload that same image to his or her own social media profile, prompting a flurry of “likes” or “shares” that further disseminate the image without permission of the original photographer. Meanwhile, the companies that operate these platforms often benefit financially by selling advertising.

Indeed, as Eugene Mopsik, the executive director of the American Society of Media Photographers (ASMP) has quipped on numerous occasions, it often appears that everyone has figured out how to make money from photography, except for the photographers.
The Paradox of “Getting It Out There”

Among aspiring professional photographers, and even those who don’t intend to profit from their work, it has become a mantra that to be successful (however you might define that term), you have to “get your work out there.” You do so by uploading it to social networking sites, blogs, personal websites, and photo sharing sites. Sharing images has never been easier or cheaper, which has enriched the experience of photography for hobbyists and professionals alike and, perhaps most important, created a new sense of community among those with a passion for photography.

On the commercial side, marketing, distributing, and licensing photography has never been easier, at least from a technical perspective, as faster connection speeds and a proliferation of platforms on which to license works have brought image buyers and sellers closer together. (Of course, the business of marketing photography has become substantially more difficult than it once was because of increased competition and market fragmentation, which has resulted in downward price pressure on the industry.)

The necessary implication of “getting it out there” is making it available for others to infringe upon—whether intentionally or unintentionally. A recent post from a participant on a photography-related web forum summed it up nicely: “My quandry is between having Internet exposure to a broad audience and protecting my copyrights.”

Copyright’s Perception Problem

One of the biggest challenges facing the copyright system today is the broad public misunderstanding of copyright law. Too often, the public discourse surrounding copyright law gets characterized in terms of big content companies—film studios, recording companies, publishers, and the like—wanting to preserve their antiquated business models by bringing infringement litigation against those who find new, innovative ways to distribute or use copyrighted content. Many people even believe that copyright enforcement has led to a decline in technological innovation.

The reality is exactly the opposite. Without copyright law, those companies would have little incentive to invest in creating the content in the first place, let alone innovating new distribution technologies or business models. But more important, what’s often missing from the copyright discussion is the role of the individual creators—the people who actually put in
the work to create the books, music, films, and the like that comprise our cultural heritage.

For photographers, the problem is even more significant because photographers, more often than not, work independently and have nothing but their images—and more specifically the copyright interest in those images—from which to generate a living. Those who don’t generate income from their images still often avail themselves of the exclusive control that copyright provides in terms of deciding when and where to share their images. (And of course, those who don’t want to are free to disavow their rights by committing the work to the public domain.)

Even among those who do understand copyright law, there is increasingly little respect for it. The anonymity of the Internet has only advanced the erroneous perception that copyright infringement is victimless, or that simple online uses such as social media posts, should not require permission of the copyright owner, because it provides the creator with more exposure than he or she otherwise would have received. Such arguments ignore the fundamental principles of copyright, which include the right to control the use of the work, subject to certain exceptions (such as fair use, described in Chapter 1).

The point is that when copyright comes up in general social circles, it’s often met with hostility, which can be a challenge for photographers whose livelihoods depend on it. Grassroots organizations such as the Copyright Alliance (www.copyrightalliance.org) and Creative Future (www.creativefuture.org) are working to give independent creators a voice. Through recently improved public outreach initiatives, the Copyright Office is working hard to improve the public perception of the copyright system, but until the law is updated to accommodate the digital environment, and until it becomes more accessible to the public, the perception problem is one that we as independent creators and copyright owners must be aware of.

Specific Challenges for Photographers

Copyright law is outdated and, in some cases, it isn’t effectively serving the needs of the creative community. In this section, I provide some specific examples of how copyright law is presenting challenges that impact photographers specifically.
Lack of effective enforcement tools

Copyright infringement of images is rampant on the Internet. The ease with which images can be freely downloaded, copied, and re-uploaded or used in new types of digital content, coupled with a general sense among many Internet users that if something appears online, it’s free for the taking, has led to a widespread infringement problem for photographers.

Under the Digital Millennium Copyright Act, copyright owners are entitled to issue “takedown notices” to service providers (such as social networking sites) to demand that the infringing content be removed from their service. (I discuss takedown notices in more detail in Chapter 7.) That approach seems promising in theory, but in practice it’s largely ineffective because the takedown notice procedure applies only to a specific instance of infringing content. If a particular image is removed from a social networking site, the user may simply re-upload it, requiring the photographer to issue yet another takedown notice. To many in the copyright community, this has become known as the “whack-a-mole” problem.

Some service providers have implemented blocking technologies that identify previously removed content and prevent users from re-uploading it, and some will suspend or terminate the accounts of users caught engaging in such behavior. Still, the responsibility of Internet intermediaries to police their users’ infringements remains a very hotly contested issue between the copyright community and the technology community. Until Congress or the courts provide some clarity, it’s unlikely that the process will get much easier for photographers.

Depending on the nature of an infringement and the losses that result, a photographer might want to sue the alleged infringer in court. That, too, may seem like a good idea in theory, but the reality is that the cost to bring a lawsuit in federal court (copyright law is exclusively federal; see Chapter 1 for more on this) often far exceeds the likely recovery associated with a particular infringement, particularly in light of the declining value of individual image licensing in the marketplace. (Although there is no requirement that a court consider reasonable license fees when it’s determining an appropriate damages award, such fees are very often where courts begin their analyses.)

The Copyright Office recently studied the issue and issued a report encouraging Congress to consider developing a small claims tribunal within the Copyright Office to accommodate authors who want to sue for relatively small amounts of money. Although such a system is very likely many years away, the fact that the Copyright Office is evaluating the possibility is an encouraging step forward. You can read the Copyright Office’s report and proposal at www.copyright.gov/docs/smallclaims.
Time for a new copyright act?

In March 2013, the U.S. Register of Copyrights and Director of the U.S. Copyright Office, Maria A. Pallante, gave a landmark speech at Columbia Law School in which she called upon Congress to update the copyright law for the digital age. She noted that the current copyright law, which was passed in 1976, and negotiated for nearly 20 years before that, is “showing the strain of its age” and that because of the law’s outdatedness, “authors do not have effective protections, good faith businesses do not have clear road maps, courts do not have sufficient direction, and consumers and other private citizens are increasingly frustrated.”

The next month, Congress took her up on her offer, as Congressman Bob Goodlatte, Chairman of the House Judiciary Committee, announced his intention to undertake a comprehensive review of copyright law. Since that time, the committee has held a number of hearings on the matter and has heard from dozens of voices in the copyright debate, including photographers. The Copyright Office has also undertaken a variety of studies and reports to help guide Congress in its review.

It remains uncertain whether we’ll see any legislative change as a result of the current review process, but it’s a positive sign that the needs of the creative community are getting some much-needed and long-awaited attention from lawmakers.

You can read Pallante’s speech at www.copyright.gov/docs/next_great_copyright_act.pdf.

An outdated registration system

Copyright registration is effectively a bargain with the public: in exchange for the ability to receive enhanced damages, copyright owners agree to provide the public with certain information about the copyrighted works they’ve created. You can read more on this in Chapters 1 and 2.

The registration system (covered in detail in Chapters 3 and 4) benefits both sides of the copyright equation: by effectively putting the public on notice of a particular copyright claim, and by providing would-be users of copyrighted works with a source of contact information for rightsholders.

The system works quite well if you happen to know the title or author of the work that you’re searching for. But for photographers or image users, the current system presents significant challenges. Most photographers don’t give individual titles to their works, for example. And even when they do, very often they use the camera’s native filenames, which provide very
little guidance to users about the nature of the underlying work. In short, because the current registration system doesn’t supply image thumbnails or allow for reverse image searching, it’s of limited practical value to the photography community beyond the legal entitlements that registration provides.

Several years ago, the director of the Copyright Office launched a comprehensive evaluation of the office’s information technology systems with the goal of developing a framework for a next-generation registration system. In its public notice announcing the study, it specifically noted the need for improving the system for photographers, including the possible development of image-based technologies. The development of a new system is likely a number of years away, but the good news is that because the Copyright Office has broad legal authority to manage the registration system, such improvements may not require Congress to intervene.

The Digital Reality

The reality of the digital age is perhaps best characterized by the proverbial double-edged sword. On the one hand, the ease with which digital images are created, shared, and distributed offers photographers—professionals and amateurs alike—with more opportunity than ever before to expose the world to their work; on the other hand, that work is now more easily stolen or otherwise misappropriated, and photographers can very quickly lose control.

Assuming that keeping your work locked away on private hard drives is not an option, you need to develop copyright management and content protection strategies that fit within your existing workflow that will help you optimize the balance between maximizing exposure and maintaining control of your work. Developing those strategies is the focus of this book.
CHAPTER 2

Foundations of Copyright Management

In the Introduction and Chapter 1, I write about the basics of copyright law and how the digital environment has impacted photographers and their ability to protect their use from unauthorized uses. In this chapter, I build on that basic knowledge by discussing some practical best practices that will help you manage the copyright aspects of your image library and get ready to register your works with the U.S. Copyright Office, which will help maximize your rights.
Camera Considerations

In most cases, the copyright workflow begins right in the camera. Most modern DSLR cameras have the ability to include copyright information at the moment of the image capture so that the copyright status of the image and the name of the owner are “baked into” the file. Having the information already in the image file saves time later, because most popular workflow tools, such as Adobe Lightroom, will automatically populate their databases with the information in the image metadata file upon import.

Including copyright information in the metadata of your images is a good idea because the information is tied to the image immediately upon its creation. Although virtually all workflow management and image manipulation programs let you add this information later, having it there from the moment of the file’s creation ensures that if you hand off image files without any post processing (or to a third party that handles post processing for you), the images are still identified as yours.

Integrity issues with metadata

As I discuss more in Chapter 6, image metadata, including the copyright information, can easily be changed or removed. Unfortunately, this has become common practice on many social media sites, which strip out the metadata automatically when you upload an image. This means that if a user downloads a particular file down the road, he or she will have no idea where it came from and no way of attributing the photographer. Worse, a user with bad intent could take an image file and replace the copyright information with his or her own. This doesn’t have any legal effect on your copyright, but it makes it much harder for people to track you down.

Import Considerations

The next place to ensure that your images are properly protected is during the import into your workflow software. Programs like Lightroom let you make batch changes to images, and the metadata associated with those images, during the import process, so you only have to define the settings once for the entire import. Of course, one of Lightroom’s strengths is that it makes heavy use of presets, so you can accelerate your workflow
even more by establishing a standard metadata preset—complete with the relevant copyright information—to apply automatically on import. Here’s how:

1. In Lightroom, from the File menu, choose Import Photos and Videos.

2. On the right-hand side of the large dialog that appears, look for the Apply During Import panel and select New from the Metadata drop-down list (or select Edit Presets if you want to add copyright information to an established metadata preset), as shown in Figure 2.1.

![Figure 2.1 The Apply During Import panel.](image)

The Edit Metadata Presets dialog (shown in Figure 2.2) appears.

![Figure 2.2 The Edit Metadata Presets dialog.](image)
3. Scroll down to the IPTC Copyright and IPTC Creator sections and make sure that the box next to each of those items is checked.

Those check boxes tell Lightroom to overwrite whatever information may already exist in those fields in the images that you’re importing.

**Note**

In case you’re wondering, IPTC stands for International Press Telecommunications Council, which developed a metadata schema for digital images that has become a global standard.

4. In the Copyright field, enter the familiar copyright symbol, ©, followed by the legal name of the copyright owner, which will generally be either your name or your company name.

**Tip**

To create the copyright symbol, press Option-G (Mac) or Alt-0169 (PC). (For the PC shortcut, use the number pad—it won’t work if you use the numbers that run along the top of the keyboard.)

Why not include the date? It is true that under U.S. copyright law, an official copyright notice includes the copyright symbol (or the words copyright or copr.), the date of first publication, and the name of the copyright owner. Because you’re creating a preset to apply to newly imported photographs, I’m assuming that those images have likely not been “published” as defined by the copyright law (more on what that actually means later in this chapter), so including a date in the copyright field is unnecessary.

5. From the Copyright Status drop-down list, select Copyrighted.

This flags the file as a copyrighted image. Some software programs will alert the user to the copyright status when opening the file; in Photoshop, for example, the copyright symbol will appear next to the filename (as shown in Figure 2.3). In addition, some responsible photo labs use the copyright status to identify images that may require special permission to print if they don’t believe the person who submitted the file for printing is the copyright owner.
6. In the Rights Usage Terms field, type “All Rights Reserved.”

This field is really intended for use by photographers who license their images to include the terms of a specific license for a specific user. This allows the licensee to keep the terms connected with the image. So, you might change this field in a particular version or edition of your image file that ends up being licensed to a third party. For now, however, since you’re simply establishing a preset that will apply across the board, you can keep the language generic.

7. In the Copyright Info URL field, type whatever URL will help people find you (to discuss licensing, how to order prints, and so forth).

This is typically the photographer’s own website, but it could also be a social media profile page, a Twitter page, your Flickr page, or something similar. You can list multiple URLs if you like—just separate them with a comma.

**Note**

The information you list here could be made public if you distribute image files that contain this metadata (which is really the whole point of providing the information in the first place—so people can find the owner of the image), so be careful to list only the information that you’re comfortable disclosing. You may want to think twice about including a home address, for example, if you aren’t comfortable having that information out there.
8. In the IPTC Creator section, complete the relevant information—it’s self-explanatory.

Typically, in the Creator field, you put the name of the individual who created the work, even if the copyright is owned under a business name.

Tip
It’s okay to use the same URL for Creator Website as you used for Copyright Info URL.

9. When you’re finished editing the fields, click Create at the bottom of the dialog (or Done if you were editing an existing preset).

Now when you import images into Lightroom, you can select the preset you just created and each of the images will be given the same metadata information.

Using multiple import presets

Lightroom offers you the ability to create multiple metadata presets, which you might want to use if you shoot for different clients or for different purposes. For example, I shoot regularly for myself and my own business, so for those images I use a preset that identifies my company as the copyright owner and me as the creator (refer to Figure 2.3).

Sometimes I also shoot for a client where the contract specifies that the client owns the copyright, so for those images, I have a separate preset that designates me as the creator, but the client as the copyright owner.

Similarly, I sometimes do editing work for clients who provide the underlying images. For those cases, I have yet another preset that specifically leaves the IPTC Copyright and IPTC Creator fields unchanged (by unchecking the boxes described in Step 3 above).

Of course, import presets are a powerful part of Lightroom that can do far more than just bulk copyright metadata. For more on import presets, check out Martin Evening’s excellent book The Adobe Photoshop Lightroom 5 Book: The Complete Guide for Photographers, available from Adobe Press.
Preparing to Register

Recall from Chapter 1 that even though copyright protection arises the moment you create a copyrightable work, like a photograph, in order to maximize your protection under the law, it’s a good idea to register your works with the U.S. Copyright Office. In this section, I discuss how to get your images ready for registration and how to make some key decisions that will determine how you register them. I discuss the nuts and bolts of registration in Chapters 3 and 4.

Published or unpublished?

The first decision you need to make is also perhaps one of the trickiest (and most frustrating) aspects of registering copyrights in photographs: whether the images have been “published” under the law. Because the requirements for registration differ slightly depending on whether you’re registering “published” images or “unpublished” images, it’s a determination that you have to make before starting the registration process.

Copyright law defines publication as

the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.
In the days of film photography, the decision was fairly straightforward: If the images hadn’t yet been distributed to anyone (say, a client or a stock photography agency), then they would be construed as “unpublished.”

But what about works posted on the Internet (say, a personal blog, or a photo-sharing site like Flickr)? On the one hand, it seems like posting images on the Internet might be considered a “distribution of copies,” so under the definition above, it would be considered a publication. But it would also be a “public display,” and the second part of the definition above explicitly excludes public display from the definition of publication.

Although there are various views throughout the copyright community, one dominant school of thought, and the one I follow personally, is that if you post an image to the Internet and encourage or allow users to make copies of the image—either electronically or by purchasing prints or products bearing the image, or something like that—the image is published.

If, however, you make it explicit that making copies is prohibited (through copyright notices or terms of use that expressly limit the user’s rights) and/or take technical steps to prevent people from making copies (through technical measures such as disabling the right-click function; see Chapter 6 for more on techniques for limiting web access), then the images may be unpublished (that is, for public display only).

So, for example, if you post an image to your blog that contains a copyright statement in the footer, your images are probably not published. Similarly, if you post your images to a photo-sharing site and explicitly identify them as copyrighted (most such sites let you specify copyright parameters), then the image is likely not published. If, however, you upload an image to that same site and enable users to order prints or you select one of the Creative Commons licenses that many such sites include, then the image is probably published (see Chapter 6 for more on Creative Commons).

Making the right choice between “published” and “unpublished” is important because if you register your works incorrectly, the registration could be successfully challenged by your opponent in court, and you could lose your eligibility to receive enhanced damages (see Chapter 1).

**CAUTION**

If you’re ever uncertain about whether your works are published or unpublished for purposes of copyright registration, consider speaking with an attorney to help you make a decision and determine the best course of action.
Why does publication status matter?
Although the concept of “publication” might seem arcane, the distinction is important for more than just determining which form to file with the Copyright Office. In fact, it comes up in several places throughout copyright law. For example, whether a work is published or unpublished is a consideration in some fair use cases, and certain limitations on the copyright owner’s exclusive rights apply only to published works (see Chapter 1 for some examples of limitations and exceptions). For works made for hire, the length of copyright protection is determined by the publication date, and publication status also governs the type of deposit materials that a copyright owner is required to submit along with his or her registration (although for most photographers the rules are generally the same regardless of whether the work is published or unpublished).

Determining the filing type
Once you’ve determined whether the work you plan to register is published or unpublished, you can move on to figuring out which registration filing approach you’ll take. The Copyright Office offers three ways by which you can register your images:

- A single image on a single form
- A collection of unpublished images on one form
- A group of published images on one form

A note about Copyright Office fees
The Copyright Office charges fees for many of its services, including registration, to recover some of the cost of providing them. The law provides that the Copyright Office will periodically review its fees and adjust them when necessary, which historically has happened every three years or so. The most recent fee adjustment became effective on May 1, 2014, and the fees I quote in this book are based on that fee schedule.

The latest fee schedule is always on the Copyright Office’s website, so be sure to check it before registering to make sure you have the most up-to-date information.
Note the subtle differences in descriptions: for published works, it’s called a **group**, and for unpublished images, it’s a **collection**. Although the distinction might seem trivial, it’s legally significant, because groups and collections are two separate procedures under the Copyright Office’s regulations and have slightly different requirements. The biggest practical difference between the two bulk registration options is that collections (unpublished) can be filed either online or on paper forms, whereas groups (published) can be filed only on paper forms.

**Table 2.1** offers a summary of your registration options. I go into greater detail on each of these options in the following sections.

### Table 2.1 Summary of Registration Options

<table>
<thead>
<tr>
<th>Filing Type</th>
<th>Paper/eCO</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single image</td>
<td>Either</td>
<td>$55 (online)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$85 (paper)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$35 (single author; single claimant; online)</td>
</tr>
<tr>
<td>Unpublished collection</td>
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<td>$55 (online)</td>
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<td></td>
<td></td>
<td>$85 (paper)</td>
</tr>
<tr>
<td>Published group</td>
<td>Paper only</td>
<td>$65</td>
</tr>
</tbody>
</table>

**A single image**

The most straightforward registration application you can file is for a single published or unpublished image. You can file this kind of application online using the Copyright Office’s online registration platform, aptly called the Electronic Copyright Office (eCO) or by filing a traditional paper form known as Form VA (“VA” stands for “visual arts”). The current cost for filing an application for a single image is $55 for applications filed online and $85 for paper applications.

The Copyright Office offers a discounted rate for what it calls a “single application,” which is an application filed online for a single work by a single author (who is also the copyright owner of the work) and that is not a work for hire. So, if you took an image and you are the sole copyright owner (as opposed to your company, or some other third party) and it is not a work made for hire, then you qualify for the single application fee, which is $35.
Of course, given the volume of images that most photographers produce, even at $35, the cost of registering every image, or even your “keepers” would probably be prohibitively high. Fortunately, the Copyright Office has created two batch-submission options that will allow you to register multiple images on one application, which I discuss next.

**Is batch registration legal?**

Neither of the batch registration options—groups or collections—are in the Copyright Act. Because of this, some attorneys and photographer advocates believe that there is a possibility that if you register your images as groups or collections, a court might conclude that the copyright registrations are invalid.

Here’s the thing: Congress has empowered the Copyright Office to come up with registration practices and procedures, and those practices and procedures are found in the regulations of the Copyright Office and have the force of law. But just as courts have the power to scrutinize laws, they can also scrutinize regulations. At least one recent court case looked favorably on regulations of the Copyright Office, but there’s always some risk that a future court case will yield different results. If you remain skeptical, consult with a copyright lawyer before deciding which registration option to pursue.

**A collection of unpublished images**

You can file a registration application for a collection of unpublished images either online or using paper Form VA. To qualify for treatment as an unpublished collection, you must meet the following regulations of the Copyright Office:

- The collection must bear a single title that identifies the collection as a whole. The title doesn’t have to be anything fancy—it could just be “January 2015 Images,” for example.
- The copyright claimant (that’s you) is the same for all the images and for the collection as a whole.
- All the images are by the same author, or if they are by different authors, at least one of the authors must have contributed copyrightable authorship to each image.

The regulations explicitly say that although you need to complete only one form, the registration of an unpublished collection is deemed to extend to each individual copyrightable element within the collection.
CAUTION

Despite the clear language in the Copyright Office’s regulation, a number of attorneys and other advocates for photographers have taken the position that registering works as an unpublished collection is risky because there is a chance that in the event of an infringement, a court would conclude that the “collection” is a single work and that each individual photograph within the collection is worth only its prorated share of the total damages award. If this concerns you, consider consulting an attorney before filing an application for an unpublished collection, or file individual applications for each of your images.

The registration fee for a group of unpublished images is $55 for an application completed online and $85 for a paper application. There is no limit to the number of images that each unpublished collection may contain.

CAUTION

You cannot mix published and unpublished images together when you register using the Copyright Office’s batch submission options. You must first separate out all your unpublished images and all your published images and prepare separate applications for each group. For more on published images, see the next section.

A group of published images

To file a registration application for a group of published photos, you must use paper Form VA. Although the Copyright Office has been experimenting with accepting group registrations using its online platform, as of now it remains a pilot project. You can find additional information about the project on the Copyright Office’s website at www.copyright.gov.

To be eligible to file an application for a group of published photographs, you must meet the following regulations of the Copyright Office:

• The copyright owner must be the same for each of the images contained in the group.

• The photographer must be the same for each image contained in the group.

• Each photograph within the group must have been published within the same calendar year.
• You must be able to identify the date on which each image within the group was published.

Just like a registration for an unpublished collection, the Copyright Office construes the registration for a group of published photographs to extend to each photograph in the group.

The cost to register a group of published photographs is $65, which is slightly cheaper than a typical paper form for registration.

Registering edited work

Suppose you register your images right as they come off your camera as an unpublished collection. After you register, you edit a handful of images and post them online in a manner that constitutes “publication” as discussed earlier. Do you need to register those edited versions separately?

Under copyright law, the edited versions would constitute “derivative works” of the raw images covered by the unpublished collection. Any infringement of the derivatives would likely also infringe on the underlying works (the images covered by the unpublished collection registration), so your ability to sue and obtain enhanced damages remains intact.

However, to be safe, many photographers will separately register the final versions individually, noting in the appropriate fields on the application form, what makes the edited version different from the underlying raw images that were previously registered. (Chapters 3 and 4 discuss how to do that in more detail.)

For example, suppose a photographer takes three bracketed exposures that were registered as an unpublished collection and subsequently creates a new, tone-mapped high-dynamic-range (HDR) image based on those three images and registers the new HDR image separately. The second registration would be appropriate as long as

• There was sufficient additional authorship in the HDR image.

• The registration application properly notes that the underlying images were previously registered.

• The registration application describes the nature of the additional authorship that was added (for example, tone mapping, color correction, compositing, retouching, and so on).
Building routine registration practices

So far, I’ve discussed the threshold question of publication status and offered some basic parameters of the three major registration options, and some thoughts about registering raw images versus final, edited versions. But how does this information translate into daily practice?

My own personal practice is to register images immediately after they come off the camera, so there is no question as to whether the images are published or unpublished. I call this, somewhat uncreatively, the shoot-by-shoot approach, because it requires that I file a new registration every time I come back from a shoot. This works well for me because I have a relatively modest number of shoots, but if you shoot more regularly, this approach could become prohibitively expensive.

Another approach, is the periodic approach, in which you register all the images captured during a particular period of time. Many people who practice the periodic approach register every three months—once per quarter—so that any published images are always registered within three months of publication, as is required to be eligible for enhanced damages (see Chapter 1).

Depending on the volume of images you have, filing two registration applications (one for published, the other for unpublished) every registration period may work out to be less expensive than the shoot-by-shoot approach.

Tip
You need to separate your published images from your unpublished images and register each batch separately (if you have published images).

Finally, there is the individual image approach, which is just as it sounds: You file separate registration applications for each image instead of packaging them in batches. This works for photographers who produce a relatively low volume of images or want to register only those images that they deem commercially viable. Because individual image registrations are the cleanest from a legal perspective—there are no questions as to the effectiveness of the registration procedure (see “Is batch registration legal?”, earlier in this chapter)—some photographers have opted to only register individual images even though it’s more expensive.

Determining which approach is right for you requires a balancing of administrative convenience, legal risk, and cost. If you’re uncomfortable filing batch registrations, filing individual registrations is probably a better
option, but the tradeoff is that your registration expenses will increase dramatically. If you don't want to spend that kind of money, registering in batches is still better than not registering at all.

Only you, in consultation with your financial and legal advisors, can determine what's most appropriate for you and your business. This book explains the process and the law, but ultimately how you implement copyright registration and other rights management practices depends on your individual circumstances.
Copyright law in the United States is founded on the Constitutional goal of “promot[ing] the Progress of Science and useful Arts” by providing exclusive rights to creators. Protection by copyright law gives creators incentives to produce new works and distribute them to the public. In doing so, the law strikes a number of important balances in delineating what can be protected and what cannot, determining what uses are permitted without a license, and establishing appropriate enforcement mechanisms to combat piracy, so that all stakeholders benefit from the protection afforded by copyright.

A 2012 Commerce Department economic study showed that intellectual-property-intensive industries account for tens of millions of jobs and several trillion dollars of our GDP. Among these, copyright-intensive industries contributed 5.1 million jobs and grew by 46.3 percent between 1990 and 2011, outpacing other IP-intensive industries as well non-IP-intensive ones. This vital contribution is a tribute to the Founders’ vision in providing for the protection of creative works.

The reasons to protect creative works go well beyond the economic benefit. America’s writers, musicians, filmmakers, photographers, sculptors and other creators make up the lifeblood of our culture, build new stores of knowledge, and shape how we see ourselves—and how the world sees us as well. Their influence extends beyond our borders; our copyrighted works weave a compelling narrative of the opportunity and possibility of America, and continue to be at the forefront of the global creative marketplace. We must continue to nurture such extraordinary creative resources.

The goals of our national copyright policy and our global Internet policies can and should work in tandem. United States Internet policy has avoided fragmented and prescriptive rules that frustrate innovation and undermine consumer trust. The United States, in collaboration with other stakeholders around the world, supports a model of Internet governance that facilitates transparency, promotes cooperation, and strengthens multistakeholder governance, allowing innovation to flourish while building trust and protecting other important rights and interests. Although copyright laws are territorial and U.S. copyright policy is designed to fit circumstances in the United States, online distribution and debates are global. The United States can demonstrate that our copyright framework provides strong and effective protection, balanced by exceptions that enable uses of copyrighted works in the public interest and supported by appropriate enforcement mechanisms in the digital environment, while it safeguards cybersecurity, privacy, and freedom of expression.

In April 2010, then-Secretary of Commerce Gary Locke launched the Internet Policy Task Force (IPTF), which brings together the technical, policy, trade, economic, and legal expertise of many Commerce bureaus, including the United States Patent and Trademark Office (USPTO), the National Telecommunications and Information Administration (NTIA), the International Trade Administration (ITA), the National Institute of Standards and Technology (NIST), and the Economic and Statistics Administration (ESA). Together, these bureaus have worked in the IPTF to identify leading public policy and operational challenges in the digital economy. In turn, the IPTF has developed approaches to strengthen protections for consumer data privacy, enhance cybersecurity practices, safeguard the global free flow of information, and
ensure balanced and meaningful protection for intellectual property while preserving the dynamic innovation and growth that have made the Internet and digital technology so important to our economy and society. The paper that follows is the latest result of these cross-agency and multistakeholder discussions.

Each of the bureaus of the IPTF offers an important institutional perspective in examining the impact of intellectual property on the U.S. economy. USPTO, as the principal advisor to the President on intellectual property policy, has played an important role in the formulation of copyright policy for the Internet for over two decades. NTIA, in its role as principal advisor to the President on telecommunications and information policies, has worked closely with stakeholders and other parts of government on the full range of online innovation issues. ITA plays an important role both in promoting the importance of intellectual property protection to U.S. consumers and businesses domestically and internationally, and in protecting the flow of data across borders as an instrument of international commerce. ESA provides the rigorous economic understanding of the impact that copyright has on the U.S. economy. And NIST’s work on standards generates the basic research that often results in productive uses for intellectual property and benefits to consumers and offers a proven model of multistakeholder governance.

Ensuring that copyright policy provides strong incentives for creativity, while promoting innovation in the digital economy, is a critical and challenging task. In developing this paper, the IPTF led by PTO and NTIA held more than a dozen listening sessions with interested stakeholders, convened a symposium, received hundreds of public comments, and submitted comments to other agencies on relevant topics. This input has been invaluable to the thinking of the IPTF, and I look forward to the continued involvement of all stakeholders as discussion moves forward. As the Nation embarks on a fresh debate about how best to strike the copyright balance, this Green Paper is an important contribution.

Penny Pritzker
FOREWORD

Copyright protection is a foundation for creative services and products that help to drive much of the U.S. economy. Creative works protected by copyright also enrich our culture and lives in unquantifiable ways. Digital distribution and a proliferation of consumer-friendly devices have given American consumers more choices than ever in how they access and enjoy copyrighted works.

Copyright law has always adapted to technological change, from its origin in response to the development of the printing press, through the revolution of broadcasting via radio and television, and now the transformation of creative works into digital formats available all over the world via the Internet. In 1998, Congress amended the Copyright Act to address issues raised by a rapidly developing Internet by updating rights, exceptions, and enforcement mechanisms through the Digital Millennium Copyright Act (DMCA). Fifteen years after the DMCA’s passage, we face a renewed challenge to assure that copyright law continues to strike the right balance between protecting creative works and maintaining the benefits of the free flow of information.

Digital technology and networks have had a profound effect on how copyrighted works are delivered to the public. The tools available in the digital environment have changed the nature of what creators are able to produce and how they share their works with the public, and the ways the public can access that content and interact with it. Individuals can now access creative works through an increasing variety of legitimate online platforms. Improvements can be made to promote further development of distribution platforms and business models that can reward content creation and use, and to amplify the Internet’s power to ease licensing transactions,

At the same time, there cannot be meaningful protection without enforcement of rights. There is no single solution to the problems of online infringement. Rather, it takes a combination of approaches, including not only legal mechanisms, but also technology, public education, and collaborative efforts among stakeholders. A number of these approaches have been developed in recent years and this report discusses several that we believe hold great promise. In shaping or refining enforcement tools, it is critical to safeguard the benefits that robust information flows have on innovation, knowledge, and public discourse.

Digital copyright issues have long been the subject of passionate debate in Congress, the courts, the press, and the marketplace. The vigor of this debate reflects the economic, social, and political importance of copyright policy as well as the complexity of the underlying legal, economic, and technical questions.

It is time to assess whether the current balance of rights, exceptions and responsibilities – crafted, for the most part, before the rapid advances in computing and networking of the past two decades – is still working for creators, rights holders, service providers, and consumers. The Internet must continue to support a legitimate market for copyrighted works as well as provide a platform for innovation and the introduction of new and dynamic services that drive digital commerce. And we must ensure that free expression, respect for consumer privacy, and cybersecurity are preserved in the online environment. The government can promote progress as a convener of the many stakeholder groups – including creators, industry, and
consumers – that share an interest in maintaining an appropriate balance within the copyright system. NTIA has been engaged in this type of process related to issues identified in its prior paper Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework, and the multistakeholder model is the broad foundation of our approach to policy issues in the Internet context. This same approach was reflected in the Department’s paper, Cybersecurity, Innovation and the Internet Economy.

The Department of Commerce is uniquely positioned to provide continued leadership and to work with others inside and outside government to consider these issues. As early as 1993, the White House formed the Information Infrastructure Task Force, chaired by then-Secretary of Commerce Ron Brown, to develop telecommunications and information policies that would promote development of the Internet. As part of that process, a working group on intellectual property rights examined the protection of creative works online and made recommendations to update the U.S. copyright law for the Internet age in its 1995 report, Intellectual Property and the National Information Infrastructure. Many of the recommendations from that report were subsequently enacted in legislation.

Nearly 20 years later, the valuable works of our creative industries have fueled the growth of digital commerce and new distribution platforms and services, and these new distribution platforms and services have in turn transformed our creative industries. The Department of Commerce – led by the USPTO and NTIA – has a vision of a digital future in which the relationship among digital technology, the Internet, and creative industries becomes increasingly symbiotic: in which the rights of creators and copyright owners are appropriately protected; creative industries continue to make their substantial contributions to the Nation’s economic competitiveness; online service providers continue to expand the variety and quality of their offerings; technological innovation continues to thrive; and consumers have access to the broadest possible range of creative content. We believe these goals are compatible and can be achieved together.

This Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy provides a lens through which to assess current policy related to copyright and the Internet, identifying important issues that are being addressed by the courts and those that are ripe for further discussion and development of solutions. We hope the issues and findings discussed in this paper can serve as a reference for stakeholders, a blueprint for further action, and a beacon for U.S. leadership in the global copyright debates. To contribute further to the Administration’s development of copyright policy, the paper identifies a number of topics on which we will solicit further public comment.

This paper reflects the hard work of the Department’s Internet Policy Task Force spanning several years. We acknowledge Shira Perlmutter, Garrett Levin, Molly Torsen Stech, and Ann Chaitovitz at USPTO, for their role as principal drafters, as well as John Morris, Aaron Burstein, Jade Nester, and Ashley Heineman at NTIA for their many valuable contributions. Numerous others throughout the Department of Commerce assisted in the initial listening sessions and the 2010 symposium that began this process, and provided valuable input to get to this final product.
The Task Force’s analyses recognize a continued set of challenges presented by rapidly changing technology and market conditions. The challenges are significant, but the economic and cultural opportunities are limited only by our collective will and imagination. To realize these opportunities, we will need continued productive engagement from all stakeholders.

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Executive Summary

Copyright law’s history is one of continuous evolution in the face of technological change. But arguably no prior technological change has impacted copyright with a magnitude comparable to the development of the Internet. Never before has there been such widespread and immediate access to such a broad array of creative works; never before have content creators - ranging from individuals to large corporations - been able to reach a global audience so effortlessly and inexpensively; and never before has it been possible for members of the public to create, transform or distribute multiple perfect copies of works seamlessly, without regard to national borders.

How to retain a meaningful copyright system that continues to drive the production of creative works while at the same time preserving the innovative power of the Internet and the free flow of information are questions at the forefront of today’s policy debate. As a broadening array of creators continue to express themselves and share their valuable works with the world, and as the Internet continues to grow in economic, social and cultural relevance, the importance of these questions will only be heightened.

The industries that rely on copyright are today an integral part of the U.S. economy, accounting for millions of jobs and contributing billions of dollars to the G.D.P. Moreover, the creative content they produce contributes to the development of the broader Internet economy, spurring the creation and adoption of innovative distribution technologies. Not only do these industries make important economic contributions, they are at the core of our cultural expression and heritage. It is no exaggeration to say that U.S. music, movies, television shows, computer software, games, writings and works of art have changed the world.

At the same time, the Internet and other networked information technologies have transformed virtually all aspects of our lives, including the market for copyrighted works. Consumers are accessing more and more creative content of all kinds on the Internet in a wide variety of formats; creators of all sizes can reach a broad audience without going through traditional intermediaries; and the growth of online services has been nothing short of remarkable. Some of the technological developments that have fostered this exciting diversity, however, have also given rise to new methods of mass infringement. Addressing this problem is vital to maintaining meaningful incentives for producing creative works, ensuring a level playing field for legitimate services, and promoting the broadest offerings of online content. All stakeholders, from creators to intermediaries to consumers, have an interest in ensuring a healthy online ecosystem. The fundamental question is how best to achieve that end.

Some would argue that copyright protection and the free flow of information are inextricably at odds—that copyright enforcement will diminish the innovative information-disseminating power of the Internet, or that policies promoting the free flow of information will lead to the downfall of copyright. Such a pessimistic view is unwarranted. The ultimate goal is to find, as then-Secretary of Commerce Gary Locke explained, “the sweet spot on Internet policy - one that ensures the Internet remains an engine of creativity and innovation; and a place where we do a better job protecting against piracy of copyrighted works.” Effective and balanced copyright protection need not be antithetical to the free flow of information, nor need encouraging the free flow of information undermine copyright. In fact, as the Supreme Court has
recognized, “the Framers intended copyright itself to be the engine of free expression.”

In 2010, the Secretary of Commerce created the Internet Policy Task Force (Task Force) to provide policy coordination across the Department of Commerce, and to conduct initially a comprehensive review of privacy policy, copyright, global free flow of information, and cybersecurity, and their respective relationships to innovation in the Internet economy. To advance the dual public policy imperative of “combat[ing] online copyright infringement more effectively and sustain[ing] innovative uses of information and information technology,” the Task Force launched a dialogue to contribute to Administration-wide policy positions and to further a global consensus on fostering creativity and innovation online. In 2010, the Task Force held listening sessions with a wide range of stakeholders to understand the current major questions related to online copyright protection as well as the broader impact on innovation in the Internet economy. The Task Force then convened a public meeting on July 1, 2010, to further explore these issues. Subsequently, the Task Force published a Notice of Inquiry (NOI) and received several hundred submissions in response.

The Task Force has closely followed the developments that have taken place since that time, including proposed legislation on online enforcement tools; negotiations of voluntary agreements between various types of intermediaries and content owners; and studies, inquiries and rulemakings by the U.S. Copyright Office of the Library of Congress. Additional input was obtained through reviewing the submissions made to the Office of the Intellectual Property Enforcement Coordinator (IPEC) in connection with the 2013 Joint Strategic Plan for Intellectual Property Enforcement.

Through this process, the Task Force has sought to understand stakeholders’ experiences, the benefits and shortcomings of existing law, and the various initiatives that have been implemented or proposed to address online copyright issues. NOI respondents and symposium participants focused on numerous topics, including: (1) the levels and impact of online copyright infringement; (2) emerging services and business models, both legal and illegal; (3) intermediary roles, responsibilities, and protections; and (4) issues involved in online protection efforts, including experiences with notice and takedown under the Digital Millennium Copyright Act (DMCA), and the problem of repeat infringers.

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2 The Task Force dialogue on online copyright issues, led by the United States Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA), has closely consulted with the Office of the Intellectual Property Enforcement Coordinator (IPEC) in the Office of Management and Budget, and other components of the Executive Office of the President.


The Task Force has taken into account the views expressed in the public meeting, submitted comments, and listening sessions, and is now issuing this paper to stimulate further public discussion on a number of specific topics that were either raised through those avenues or that have emerged subsequently. The paper does not purport to provide an exhaustive catalog of all issues relating to copyright in the online environment, but outlines the major issues that are making their way through the courts, merit further attention, or require solutions. With respect to those issues not currently being addressed elsewhere, the paper proposes next steps—some involving potential legislative changes, but many based on voluntary private sector initiatives.

The Task Force’s recommendations fall into three broad categories and can be summarized as follows:

1) Updating the balance of rights and exceptions.
   a) The Task Force urges Congress to better rationalize the public performance right for sound recordings. We reiterate the Administration’s support for extending the right to cover broadcasting, and urge that any reassessment of the appropriateness of different rate-setting standards for different types of digital music services take into account the impact on creators and right holders as well as on different types of services;
   b) The Task Force will solicit public comment and convene roundtables on issues related to the creation of remixes and the first sale doctrine in the digital environment; and
   c) The Task Force will support and provide input to the Copyright Office as it moves forward with its work on updating the library exception in Section 108 and examining the issues of orphan works and mass digitization.

2) Assessing and improving enforcement tools to combat online infringement and promote the growth of legitimate services while preserving the essential functioning of the Internet.
   a) The Task Force repeats the Administration’s prior call for Congress to enact legislation adopting the same range of penalties for criminal streaming of copyrighted works to the public as now exists for criminal reproduction and distribution;
   b) The Task Force will solicit public comment and convene roundtables regarding the application of statutory damages in the context of individual file-sharers and secondary liability for large-scale online infringement;
   c) The Task Force will establish a multi-stakeholder dialogue on how to improve the operation of the DMCA’s notice and takedown system;

6 We do not address various broader or newly emerging topics, among them: the term of copyright protection; jurisdiction and choice of law issues; implied license; the scope of statutory licenses for cable and satellite retransmissions; certain limitations and exceptions not specific to the Internet environment; and the copyright implications of data mining and 3D printing.
d) The Task Force supports the Copyright Office’s improvement of the DMCA database of designated agents, as well as its examination of possible small claims procedures that can assist individual creators and SMEs in enforcing their rights online;

e) The Task Force supports and encourages the development of appropriate voluntary private sector initiatives to improve online enforcement, and will monitor and evaluate the effectiveness of such initiatives to determine whether additional action should be considered; and

f) The Task Force encourages enhancing public education and outreach efforts to inform consumers about both rights and exceptions and to encourage the use of legitimate online services.

3) Realizing the potential of the Internet as a legitimate marketplace for copyrighted works and as a vehicle for streamlining licensing.

a) The Task Force will provide input into any Congressional review of music licensing, particularly with respect to the mechanical license for musical compositions;

b) The Task Force supports the Copyright Office’s work in improving the registration and recordation systems and supports the provision of enhanced incentives for using these systems; and

c) The Task Force will solicit public comment and convene roundtables regarding an appropriate role for the government, if any, to help to improve the online licensing environment.

As the Task Force continues to examine these policy areas, it will coordinate its efforts closely with other key government actors, including the IPEC and the U.S. Copyright Office. The IPEC's work to promote voluntary best practices and the Copyright Office’s various studies and comment processes are referred to throughout this paper.

Section I of the paper provides an overview of the intersection of copyright and the Internet, noting the tremendous opportunities and challenges that have arisen over the past decades. Section II outlines efforts to maintain an appropriate balance in copyright law, as rights and exceptions continue to be updated in response to technological change. It describes the major ways in which the law has been amended to address digital developments, and identifies areas where it may be appropriate to consider additional changes. Section III addresses how rights can be meaningfully enforced in the digital environment while ensuring that the Internet remains a robust platform for innovation, a diversity of business models, and economic growth. It outlines existing civil and criminal enforcement mechanisms, describes gaps or shortcomings as well as efforts that have been made to address them, and calls for solutions to be found. Section IV examines the state of licensing in the online marketplace, notes areas where there are improvements to be made, and proposes some steps that the government might take to further the private sector's efforts.
Copyright law grants exclusive rights to authors in order to encourage the production of creative works, to the benefit of society as a whole. These exclusive rights are balanced by a range of limitations and exceptions that permit some uses of copyrighted works without the need for authorization. Copyright has been a vital contributor to U.S. cultural and economic development for more than two hundred years, fostering the production and dissemination of the valuable expression that has put America at the forefront of the global creative marketplace.

“[N]othing is more important to American prosperity than jumpstarting our engine of innovation.” Both American creativity and the Internet economy are at the heart of that engine, and the relationship between the two has motivated the Department of Commerce’s inquiry into this issue. The industries that rely on copyright law are today an integral part of our economy, accounting for 5.1 million U.S. jobs in 2010—a figure that has grown dramatically over the past two decades. In that same year, these industries contributed 4.4 percent of U.S. GDP, or approximately $641 billion. And the demand for content produced by our creators contributes to the development of the broader Internet economy, spurring the creation and adoption of innovative distribution technologies.

As copyright continues to grow in importance, the parallel rise of digital technologies has presented new opportunities, as well as a host of complex issues. Governments, including their judicial branches, along with private sector interests around the world

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7 Washingtonian Pub’g Co. v. Pearson, 306 U.S. 30, 36 (1939). The “ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

8 In some contexts, limitations and exceptions may be constitutionally required. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (“In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations,” including the idea/expression dichotomy and fair use).

9 As President Obama has noted, “Our single greatest asset is the innovation and the ingenuity and creativity of the American people. It is essential to our prosperity and it will only become more so in this century.” Remarks by the President at the Export-Import Bank’s Annual Conference (Mar. 11, 2010), available at http://www.whitehouse.gov/omb/intellectualproperty/quotes/.


12 Id. at 45.

13 The economic growth of the Internet “would not exist without equally strong creative content produced by America’s authors, artists, and other creative workers.” Remarks by Lawrence Strickling, Assistant Secretary of Commerce for Communications and Information, Internet Policy Task Force Symposium on Copyright Policy, Creativity, and Innovation in the Internet Economy (July 1, 2010), available at http://www.ntia.doc.gov/speechestestimony/2010/opening-remarks-lawrence-e-strickling-assistant-secretary-commerce-communic-0.
have been grappling with these issues for over twenty years. Their efforts represent
the continuation of a long process; the history of copyright is integrally entwined with
and has always been shaped by technological change.

The impetus for the first copyright laws was the revolutionary technology of the
printing press. In the course of the 20th century, copyright confronted new
technologies ranging from player piano rolls, to motion pictures, television and
radio, to photocopy machines, computers and VCRs. Each of these developments
provoked great anxiety as to the continued viability of copyright, and led to various
statutory amendments. The development of the Internet is the current iteration of this
evolutionary process—one that is both necessary and healthy for a vital copyright
system. We are again in the midst of vigorous debate about the proper boundaries of
copyright protection and enforcement.

Despite this history, it must be acknowledged that digital technologies have presented
challenges – as well as opportunities – of an unprecedented magnitude, and at an
unprecedented pace. Never before has it been possible for individuals to create and
disseminate multiple perfect copies of works virtually instantaneously and essentially
cost-free. Moreover, a rich and expanding repertoire of content can be made available
anywhere there is access to the Internet, bypassing the historical limits of national
borders.

In the early days of public use of the Internet, these developments were already on the
horizon. At that time, questions were even raised about the extent to which the
Internet should be subject to any legal regulation, including copyright law. In 1995,
the Clinton Administration’s Intellectual Property Working Group issued a report on
Intellectual Property and the National Information Infrastructure. The Report

14 WILLIAM F. PATRY, 1 PATRY ON COPYRIGHT § 1.5 (2012).
15 See White-Smith Music Publ’g Co. v. Apollo, 209 U.S. 1 (1908).
Accessories Co., 5 F.2d 411, 411-12 (6th Cir. 1925).
17 See, e.g., Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973).
(1978).
20 See John Phillip Sousa, The Menace of Mechanical Music, 8 APPLETON’S MAG. 278 (1906); TIME: Copying
v. Copyright, TIME, May 1, 1972, at 62 (quoting leading copyright scholar Melville Nimmer as saying “the
day may not be far off when no one need purchase books” because of the use of the photocopier); Barbara
21 See, e.g., John Perry Barlow, The Economy of Ideas: A framework for patents and copyrights in the Digital
com/doc/ipnii/ipnii.pdf. The NII Report dismissed the view of the Internet as a regulation-free zone as
follows: “[A]ctivity on the Internet takes place neither in outer space nor in parallel, virtual locations.
Satellite, broadcast, fax and telephone transmissions have not been thought to be outside the jurisdiction
of the nations from which or to which they are sent. Computer network transmissions have no
distinguishing characteristics warranting such otherworld treatment. Further, such a legal free-for-all
would transform the [Internet] into a veritable copyright Dodge City. As enticing as this concept may seem
to some users, it would hardly encourage creators to enter its confines.” Id. at 15.
described copyright law’s past adaptation to new technologies, identified the challenges of the digital environment, and made a number of recommendations for legislative changes.\textsuperscript{23} But even this comprehensive report could not predict all of the issues that we face today. As noted by the then-Assistant Secretary of Commerce and Commissioner of Patents and Trademarks:

There is much that we do not – and cannot – know about how the (Internet) will develop. Technology is advancing at such an incredible pace that issues will certainly continue to arise in the future, perhaps demanding more comprehensive legislation.\textsuperscript{24}

The pace of technological change has only continued to increase since that early phase of legal analysis and adaptation.

The flip side to the challenges presented by the Internet is the fact that it has enabled the creation of vibrant, innovative marketplaces of unprecedented scope and convenience. This potential was recognized as early as 1995, and is now being realized.

Both within and outside of the traditional content publishing and distribution industries, a wide range of exciting new models for the enjoyment of copyrighted works has emerged in recent years, some of which have achieved widespread consumer acceptance. One striking development has been what some have called the “democratization of publishing” – the ability of individual authors, musicians, videographers, and other artists to publish directly to a global audience, regardless of whether they are seeking to make money or simply have their creations seen or heard. The online marketplace for copyrighted works is still, however, a work in progress. It is not yet clear which of these models will prove economically viable, and existing offerings are neither consistent in catalog depth nor seamless for purposes of broadband licensing. Additional work needs to be done to ensure that licensing can extend smoothly to the full range of content in all sectors and media, for users large and small, and across borders.

Also on the horizon is the opportunity to streamline the process of licensing for both businesses and consumers, through the broader online availability of rights information, and the provision of automated, online platforms for contracts, payments and delivery. This could permit more efficient development of new businesses and enable microlicensing potentially to the benefit of all.

At the same time, piracy remains a formidable challenge.\textsuperscript{25} Since the NII Report, the

\textsuperscript{23} The NII Report recommendations included: creating a public performance right for sound recordings; amending the library exceptions to permit broader use of digital technology; permitting certain reproductions and distributions of works for the visually impaired; adjusting the requirements for criminal copyright infringement to address large-scale infringement not motivated by profit; and providing legal protection for technological protection measures and copyright management information. Many of these changes were ultimately adopted in some form into U.S. law, as described below.

\textsuperscript{24} Statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks on S. 1284 and H.R. 2441 before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, United States House of Representatives and the Committee on the Judiciary, United States Senate (Nov. 15, 1995).

\textsuperscript{25} Use of the term “piracy” in the context of copyright infringement traces back to the early development of the publishing industry in England. See Justin Hughes, Copyright and Incomplete Historiographies: Of
threat of rampant infringement over the Internet has not abated: today, however, much of that infringement is taking place through technologies that were unforeseen in 1995, particularly peer-to-peer networks and cyberlockers. While the extent of the losses caused by online infringement is hard to calculate with certainty, the proliferation of unlicensed sites and services making content available without restriction or payment impedes the growth of legitimate services.

The time is ripe to take stock once again of the landscape for copyright in today’s digital environment. The issues to be examined include whether updates may be needed to the current balance of rights and exceptions; whether adequate tools exist to allow rights to be meaningfully and appropriately enforced; and how the conditions for online licensing can best be improved. Preserving copyright law is not an end in itself; our goal is to ensure that the Internet remains both an engine of creativity and innovation and an environment where copyrighted works are adequately protected against piracy. By doing so, copyright can continue its role as an “engine of free expression,” a time-tested means to promote the production and dissemination of creative works.

The Task Force believes that the core principles of U.S. copyright law remain fundamentally sound. Many updates have already been made to adapt to digital technology, and we describe them below. The precise boundaries of these provisions will continue to evolve as the courts apply them to new factual contexts; where issues are making their way through the courts, and no definitive interpretation has emerged, further action may be unnecessary or premature. Nevertheless, we have identified a number of areas where new solutions are needed or desirable. As to each, the appropriate process and technique may differ. This paper describes ongoing


21 A number of industry studies have shown high estimated costs from piracy. See, e.g., U.S. Government Accountability Office, GAO-10-423, Intellectual Property Observation on Efforts to Quantify the Economic Effects of Counterfeits and Pirated Goods 21 (Apr. 2010). Some of these estimates have been questioned, however, and the GAO has noted that “estimating the economic impact of IP infringements is extremely difficult.” _Id._ at 15. The GAO Report states that there is not likely to be a one-to-one substitution between legitimate and pirated content, although some degree of substitution is generally acknowledged. _Id._ at 17.

28 _Id._ at 19 (explaining that although difficult to quantify, “counterfeiting and piracy is a sizeable problem, which affects consumer behavior and firms’ incentives to innovate”).


30 The constitutional clause authorizing Congress to enact intellectual property laws, art. I. § 8, cl. 8, articulates its purpose as promoting the “Progress of Science and useful Arts.” When this clause was crafted, the term “science” was synonymous with “knowledge” and “learning,” whereas “useful Arts” referred to technological inventions. See Edward Walterscheid, The Nature of the Intellectual Property Clause 125-26 (2002); Karl B. Lutz, Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution, 32 J. PAT. OFF. SOC’Y 83, 87 (1950). To avoid confusion, this paper will refer to the constitutional goal of the copyright system as promoting progress in the “creative arts.”

31 On the legislative side, the Register of Copyrights has recently called for a “comprehensive review” of U.S. copyright law. See Maria A. Pallante, _The Next Great Copyright Act – Twenty-Sixth Horace S. Manges Lecture_ (Mar. 4, 2013) (“Manges Lecture”). The Chairman of the House Judiciary Committee has launched
initiatives in some of these areas, and for others, either proposes a path for future work or seeks comments on the way forward. Finding solutions can enable us to continue fostering the valuable contributions that a vibrant copyright ecosystem can provide to society as a whole.

Finally, all of these developments take place within an international context. The United States is a signatory to a number of international copyright treaties and trade agreements, which must be taken into account when considering revisions to U.S. law. Moreover, most of the issues facing copyright law in the digital environment are not unique to the United States and are being considered in jurisdictions and forums around the world. These debates and experiences can be useful resources and help inform our thinking. Although copyright laws are territorial, the Internet is inherently global; an effective copyright system will therefore require close cooperation with other nations. As we continue to shape our copyright policy, the United States will continue to provide international leadership on these issues, promoting the importance of a transparent and inclusive process as well as the need to find an appropriate balance both within copyright law and in its relationship to the core values of free expression and privacy, while avoiding cybersecurity risks.

II. Maintaining an Appropriate Balance

A. General

From its inception, copyright law has balanced rights and exceptions in the service of promoting the creative arts. As the law is updated to accommodate technological change, this relationship requires ongoing adjustment. This does not mean, of course, that every change in rights must give rise to a corresponding change in exceptions, or vice-versa. It is also important to acknowledge that while an appropriate balance

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32 Berne Convention for the Protection of Literary and Artistic Works (1971); WIPO Copyright Treaty (WCT) (1996); WIPO Performances and Phonograms Treaty (WPPT) (1996) (together the WCT and WPPT are often referred to as the “WIPO Internet Treaties”). The United States is also a Member of the World Trade Organization and has undertaken obligations pursuant to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994). The United States has also entered into a number of bilateral free trade agreements and plurilateral agreements that include copyright obligations.


34 See supra note 30.
remains the goal, there can never be such a thing as a perfect equilibrium in a complex, dynamic system, and the process of calibration will never be complete.

Since the mid-1990s, the rights and exceptions in U.S. and international copyright law have been amended several times to respond to digital technologies. This Section will describe these adaptations, many of which are still in the process of judicial interpretation, and discuss additional ones that have more recently been proposed for consideration.

B. Updates to Rights

In the United States, the most notable adjustments to copyright rights in the digital space have been the creation of a digital performance right for sound recordings; the application of the reproduction right to temporary digital copies; and the establishment of legal regimes regarding technological adjuncts to copyright, namely technological protection measures (TPMs) and rights management information (RMI). At the international level, there has also been explicit recognition of a “making available” right—i.e., the right to control making works available on demand to members of the public. Each of these adjustments represented an attempt to ensure that copyright owners retain the ability to exploit their rights effectively in the digital environment.

1. The Digital Performance Rights in Sound Recording Act of 1995

Sound recordings were not granted federal copyright protection until 1972, and then copyright owners were granted only a limited set of rights: reproduction, distribution, and adaptation. Unlike owners of other works including musical compositions, they did not enjoy a right to control and be compensated for the public performance of their works.

In 1995, Congress partially remedied this discrepancy by providing such a right, but limited to the digital context. The Digital Performance Right in Sound Recordings Act (DPRA) created a new exclusive right for owners of sound recordings to perform their works publicly by means of a digital audio transmission. Congress determined that a

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35 Some early modifications in the United States related to the special characteristics of digital physical media, namely the prohibition on commercial lending of computer software based on the determination that such lending led to the making of illegal copies. See Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990), and the Audio Home Recording Act, Pub. L. No. 102-563, 106 Stat. 4237 (1992), which established a complex set of rights and responsibilities of device makers and the content industry to address the new technology of digital audio recording devices and contained an exception for certain non-commercial home recording of music.


37 Cf. the broader set of rights granted to other categories of works, which include rights of public display and performance. 17 U.S.C. § 106. The initial intention of protecting only certain rights in sound recordings was to focus on prohibiting unauthorized copying of physical copies of sound recordings, a problem that had been separately addressed under each states’ laws prior to federal recognition of copyright in sound recordings. See H.R. REP. NO. 487, at 2-3 (1971).

digital performance right was necessary in recognition of the fact that “digital transmission of sound recordings is likely to become a very important outlet for the performance of recorded music in the near future.”

The digital performance right was qualified by a number of restrictions, most notably the creation of a statutory license for certain categories of non-interactive transmissions. This statutory license has fostered the growth of Internet radio (or webcasting) and satellite radio. The royalty rates are set by the Copyright Royalty Board, subject to statutorily defined standards.

As the market for digital transmission of sound recordings continues to mature, and streaming becomes an increasingly important means of enjoying music, questions have been raised as to different obligations for different types of services using sound recordings, and disparities in rate-setting standards for those digital services that are subject to the statutory license. Of particular concern in the context of the growing digital audio market is the fact that there is still no public performance right when sound recordings are used by over-the-air FCC-licensed broadcasters. As a result, over-the-air broadcasters enjoy a competitive advantage over emerging digital services.

For over thirty years, the Administration and Copyright Office have made repeated calls to create a public performance right for the broadcasting of sound recordings. Apart from the inability to obtain compensation in the United States, this omission has had a real impact on revenues received from abroad. While broad public performance rights are enjoyed by owners of sound recordings in most other countries, U.S. sound recording owners and performers have been unable to collect remuneration for the broadcasting of their works in those countries, due to the lack of reciprocal protection here.

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33 In the last Congress, legislation was proposed in response to these questions. One bill sought to address the rate disparity for different services based on different rate-setting standards. See Internet Radio Fairness Act, H.R. 6480, S. 3609, 112th Cong. Another bill revisited the broader issue of the disparity between the digital audio services that are required to pay a performance royalty for sound recordings and terrestrial broadcasters with no such obligations. See Interim FIRST Act, available at http://nadler.house.gov/sites/nadler.house.gov/files/documents/NADLER_153_xml.pdf.
35 This lack of payment is a result of how the United States fulfills international obligations related to public performance rights. Although the United States is a signatory to the WPPT, because our public performance right is limited only to certain digital transmissions, other signatories to the WPPT withhold payment of royalties for performances of U.S. sound recordings on broadcast radio in their countries. Moreover, the United States is not a signatory to the International Convention for the Protection of Performers, Producers of Phonogram Recordings and Broadcasting Organizations (“Rome Convention”), so countries that are signatories to only the Rome Convention (and not the WPPT) do not pay royalties for
The Task Force believes that the overall framework of rights for the public performance of sound recordings should be revisited and better rationalized. In particular, the Administration continues to support a broadcasting right for sound recordings. With respect to the rate-setting standards for digital services, we urge that any reconsideration should focus broadly on the interests of all involved parties, taking into account the impact on creators and right holders as well as on different types of services. As Congress considers these issues, the Department of Commerce will provide ongoing input.

2. The Right of Reproduction In Temporary Copies

The right to reproduce a work in copies is the first and most fundamental of the bundle of rights that make up a copyright. In the online environment, this right is even more central, as copies are made in the course of virtually every network transmission of a digital copy. Temporary copies may be a key aspect of the value of the use in some circumstances, but merely incidental in others.

The ability to control temporary copying in digital devices has long been important to rights owners. For software in particular, consumers increasingly engage in the exploitation of software they receive over a network without ever knowingly storing a permanent copy on their hard drive. Temporary copies are also prevalent in the context of streaming sound recordings and video, where “buffer copies” are a technologically necessary step in the delivery of content to the consumer.

It has long been clear in U.S. law that the reproduction right is not limited solely to the making of “permanent” physical copies. The statutory definitions cover any fixation “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” In the seminal 1993 case MAI Systems Corp. v. Peak Computer, Inc., the Ninth Circuit applied these definitions to hold that when a program is loaded into RAM, a copy is created. In a 2001 Report, the Copyright Office confirmed its agreement, noting that “[a]lthough it is theoretically possible that information . . . could be stored in RAM for such a short
period of time that it could not be retrieved, displayed, copied or communicated, this is unlikely to happen in practice.\(^50\)

While the central premise of the MAI decision has been consistently upheld,\(^51\) U.S. courts continue to refine in what circumstances a reproduction may be too short-lived to qualify as a copy.\(^52\) Even if a copy is made, of course, it may not be infringing. The Copyright Act contains several specific limitations permitting temporary copies, including those made to allow the ordinary use or repair of a computer\(^53\) or for purposes of re-broadcasting,\(^54\) and ephemeral recordings used by non-interactive audio services.\(^55\) Temporary reproductions may also qualify as fair use in appropriate circumstances.\(^56\) The Copyright Office has stated that a fair use case could be made for buffer copies that are made in the process of streaming content because, although the use is not transformative and is for a commercial purpose, the reproduction is made “solely to render a performance that is fully licensed” and “facilitates an already existing market for the authorized and lawful streaming of works,” especially where they are made internally solely to enable an otherwise lawful use.\(^57\) Further certainty could be provided through the adoption of a new statutory exception.\(^58\)

This issue has received significant international attention. The World Intellectual Property Organization (WIPO) Internet Treaties explicitly confirm that the reproduction right as well as the exceptions thereto apply fully in the digital environment, and that


\(^{52}\) See, e.g., *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 129-30 (2d Cir. 2008), cert. denied, 557 U.S. 946 (2009) (holding that buffer copies existing for no longer than 1.2 seconds are not fixed and therefore do not qualify as copies under the Copyright Act); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (noting that an ISP that acts as conduit for users’ material does not engage in acts of reproduction because the copies are not fixed for more than transitory duration).

\(^{53}\) 17 U.S.C. § 117(c).

\(^{54}\) 17 U.S.C. § 112(a).

\(^{55}\) These ephemeral copies are subject to a statutory license, the rates and terms of which are set in conjunction with the statutory license for the digital public performance of sound recordings under Section 114.

\(^{56}\) See, e.g., *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006), aff’d sub nom, *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1169 (9th Cir. 2007); *Field v. Google*, 412 F.Supp.2d 1106, 1118 (D. Nev. 2006); see also 4 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 13.05[G], at 13-280 (“To the extent that infringers afford access to others’ copyrighted works via making those works accessible in users’ RAM, then liability should follow . . . . On the other hand, to the extent that RAM copies appear in the background and are not accessed, are created automatically, or exist solely to minimize unnecessary bandwidth usage of otherwise noninfringing conduct, then fair use should be given maximal latitude.”).

\(^{57}\) Copyright Office Section 104 Report *supra* note 50 at 133-40.

\(^{58}\) See Maria Pallante, Manges Lecture *supra* note 31 at 11-12. See also Copyright Office Section 104 Report *supra* note 50 at 141-46 (in the context of music licensing, recommending the adoption of a specific exception for temporary buffer copies).
the right extends to storage in an electronic medium.\textsuperscript{59} In implementing these treaties, the European Union (EU) specified that the right covers “direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.”\textsuperscript{60} Again, however, the broad coverage of the right does not mean that all reproductions require authorization. The Directive also contains a mandatory exception for certain “[t]emporary acts of reproduction . . . , which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use,” which have no “independent economic significance.”\textsuperscript{61} Although many countries have, like the United States, determined that their existing reproduction right covers temporary reproductions, some have amended their laws to explicitly clarify the coverage of such copies.\textsuperscript{62} And the United States’ bilateral free trade agreements incorporate obligations to extend the reproduction right to temporary storage in any manner or form.\textsuperscript{63}

3. The Making Available Right

On-demand delivery has become a principal means of distributing copyrighted works through digital networks. To ensure that copyright owners could control this means of exploitation, the 1996 WIPO Internet Treaties introduced at the international level an explicit “making available” right.\textsuperscript{64} In order to resolve potential ambiguity in the


\textsuperscript{61} \textit{Id.}, at art. 5(1) (brackets in original). \textit{See also Infopaq Int’l A/5 v. Danske Dagblades Forening}, European Court of Justice Case C-302/10 (Jan. 17, 2012). The ECJ stated that this exemption must be interpreted strictly, and that because most protected works have economic value, an act of temporary reproduction is only permitted if it does not enable the generation of an additional profit (for the user) going beyond that derived from lawful use of the protected work.

\textsuperscript{62} \textit{See}, e.g., Israeli Copyright Act of 2007 at § 12(4) (IL027); Mexican Federal Law on Copyright at art. 16(VI).

\textsuperscript{63} \textit{See}, e.g., United States-Australia Free Trade Agreement, Chapter on Intellectual Property Rights, art. 17.4.1: “Each Party shall provide that the following have the right to authorise or prohibit all reproductions, in any manner or form, permanent or temporary (including temporary storage in material form): (a) authors, in respect of their works; (b) performers, in respect of their performances; and (c) producers of phonograms, in respect of their phonograms.”

\textsuperscript{64} Several decades before the Internet, copyright treaty negotiators were already laying the groundwork for a “making available” right. \textit{See} Peter S. Menell, In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 \textit{J. COPYRIGHT SOC’Y USA} 1, 50-51 (2011). In 1971, the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, provided that Contracting States “shall protect producers of phonograms . . . against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.” 25 U.S.T. 309, 888 U.N.T.S. 67 at art. 2 (Oct. 29, 1971). Article 1 defines “distribution to the public” to mean “any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.” \textit{Id.} at art. 1(d) (emphasis added).
existing copyright treaties, and at the same time to leave open the manner in which countries could implement the obligation, the right was formulated to cover the making available of works to the public “in such a way that members of the public may access these works from a place and at a time individually chosen by them.” In countries where the “making available” right has been explicitly adopted, it has been interpreted to cover the placement of a work on the Internet where it can be accessed by individual members of the public.

When the United States implemented the WIPO Internet Treaties in the DMCA, it did not include an explicit “making available” right, as both Congress and the Administration concluded that the relevant acts were encompassed within the existing scope of exclusive rights. In addition to the existing reproduction and public performance rights, the distribution right, adopted in the 1976 Copyright Act, applied to digital transmissions as well as the distribution of physical copies. And the legislative history indicates that this right was intended to incorporate the prior law’s “publication” right, which included the mere offering of copies to the public.

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63 WCT supra note 32, art. 8; WPPT, supra note 32, art. 10. “It is irrelevant whether copies are available for the user or whether the work is simply made perceptible to, and thus usable by, the user . . . . One of the main objectives . . . is to make it clear that interactive on-demand acts of communication are within the scope of the provision.” Memorandum Prepared by the Chairman of the Committee of Experts, CRNR/DC/4 at 51 (Aug. 30, 1996), in Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, at 204 (1999). The final wording was intended as an “umbrella solution,” allowing countries to choose by what right or combination of rights in their national laws it would be implemented. MIHALY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET C8.06 (Oxford University Press 2002). Neither a “distribution right” model nor a “communication right” model satisfied all the WIPO delegates because different legal regimes interpreted the terms “distribution” and “communication” differently.

64 See, e.g., Polydor Ltd v Brown, No. HC 05C02035, [2005] EWHC 3191(Ch) (UK High Ct. Chancery Division, 18 Nov. 2005); Order in Interlocutory Injunction Proceedings, No. 308 O 58/06 (Civ Chamber 8, Hamburg Landgericht, 25 Jan. 2006); Order in Interlocutory Injunction Proceedings, No. 28 O 634/05 (Köln Landgericht, 23 Nov. 2005); Judgment, No. 95 Ds 1653 Js 15556/04 (57/04) (Kottbus D. Ct., 24 May 2004); Judgment, No. 461 Cs 509 Js 1607/02 (Fürth D. Ct., 29 Mar. 2004).

65 See H.R. REP. NO. 105-551, pt. 1, at 9 (1998) (“The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law.”); S. REP. NO. 105-190, 105th Cong., 2nd Session, at 11 (1998) (“The Committee believes that in order to adhere to the WIPO treaties, legislation is necessary in two primary areas – anticircumvention of technological protection measures and protection of the integrity of rights management information . . . . This view is shared by the Clinton administration.”); Statement of Bruce Lehman, Assistant Secretary of Commerce for Intellectual Property, Hearing on WIPO Copyright Treaties Implementation Act (H.R. 2281) and On-Line Copyright Liability Limitations Act (H.R. 2180) before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong., 1st Sess. (Sept. 16, 1997).

66 Notably the legislative history from 1965 made reference to the potential for the “transmission of works by . . . linked computers, and other new media of communication” that “may be expected to displace the demand for authors’ works by other users from whom copyright owners derive compensation.” Supplementary Register’s Report on the General Revision of the U.S. Copyright Law 14 (1965).

67 The right to “distribute” first emerged in the “Preliminary Draft for Revised U.S. Copyright Law” in late 1962, and was substituted for “publish” to avoid the confusion that had developed surrounding the term “publication” and courts’ attempts to avoid the harsh effects of “publication” without proper notice (forfeiture of federal copyright protection). See generally Menell supra note 64 at 39-43; Benjamin Kaplan, Publication in Copyright Law: The Question of Phonograph Records 103 U. PA. L. REV. 469, 488-89 (1955).

68 See Menell supra note 64 at 57; see also 2-8 Nimmer on Copyright § 8.11[B][4][d]. At the time, the right to “publish” was understood to encompass the offering of copyright works to the public, and there was no requirement to prove actual distribution of copies. Id. See David O. Carson, Making the Making Available
Since that time, a number of U.S. courts have addressed the “making available” right, primarily in the context of individuals uploading a work to a shared folder on a computer connected to a peer-to-peer network. A number of courts have concluded that the distribution right incorporates the concept of “making available” reflected in the WIPO Treaties. Some others have disagreed. All of these cases, however, have focused solely on the scope of the distribution right and predate the recent academic scholarship described above, reviewing previously unanalyzed legislative history.

4. Technological Adjuncts to Copyright Rights

Technological advances can also provide tools for right holders to engage in digital self-help. As the Senate Judiciary Committee explained in considering the DMCA, “copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.” Rather than seeking to lock up their works and keep them off the Internet, copyright owners can use digital technologies to control their manner and terms of use. As expressed in the phrase that became widespread in the 1990s, “the answer to the machine is in the machine.”

But the machine alone may be insufficient, as there will always be those who find ways to evade technological controls. Accordingly, governments have put in place legal safeguards to enhance the efficacy of these tools, in the hope of avoiding endless technological cat and mouse games and allowing energies to be channeled into more productive endeavors. While those determined to circumvent may never be completely dissuaded, the goal of the DMCA was to deter infringement, and tools that enable infringement, sufficiently to give breathing room to the legitimate market.

Two types of technological tools used as adjuncts to copyright rights are now protected under U.S. and international law: TPMs and RMI.

a) Technological Protection Measures (TPMs)

TPMs are technological tools designed to prevent the unauthorized use of or access to
works in digital form. TPMs include access controls, such as cryptographic locks, passwords and digital signatures, or use controls, such as a digital lock that prevents the copying of a particular film or computer program. They can serve the function not only of preventing infringement but also of enabling the existence of varied business models, making it possible for content to be delivered in different ways on different terms and price points.

The late 1990s saw the enactment of laws protecting TPMs used in connection with copyrighted works. This idea was first proposed in 1995 in the NII Report, building on earlier laws directed at specific categories of works or devices,\(^76\) and adopted in general terms in the WIPO Internet Treaties, which require contracting parties to provide “adequate legal protection” and “effective legal remedies” against circumvention of TPMs.\(^77\)

The DMCA fleshes out the specifics in U.S. law. It prohibits not only the act of circumvention but also the manufacture or distribution of circumvention devices and services—the source of much greater damage to right holders.\(^78\) TPMs are defined broadly to include both access controls and use controls, whether used separately or in combination.\(^79\)

One challenging implementation issue was to ensure that TPMs are not deployed in such a way as to impede acts permitted under fair use and other copyright exceptions. To this end, the DMCA reflects a careful balance. First, there is an explicit distinction between the act of circumventing access controls and the act of circumventing use controls; the former is prohibited but the latter is not.\(^80\) This distinction recognizes that copyright exceptions may permit someone to use a work in ways not authorized by the copyright owner, but exceptions do not permit unauthorized access to a work. In addition, there is a provision stating that the protection of TPMs will not affect the other limitations or defenses to copyright infringement, including fair use.\(^81\) Finally,

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\(^76\) NII Report supra note 22, at 230-36. Among the early laws cited were: The Audio Home Recording Act, which added provisions that required digital audio recording devices to use a copy control system and prohibited circumvention of that system, 17 U.S.C. § 1002, and the Communications Act, which included a provision prohibiting the unauthorized decryption of satellite cable programming, 47 U.S.C. § 605(e)(4). In 1991, the EU had also issued a directive that required Member States to prohibit "any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program." Council Directive on the Legal Protection of Computer Programs, at art. 7(1)(c), 91/250/EEC (May 14, 1991).

\(^77\) WCT, supra note 32, art. 11; WPPT, supra note 32, art. 18.

\(^78\) The DMCA regulates two classes of activity: (1) circumvention – the act of descrambling a scrambled work, decrypting an encrypted work, or otherwise disabling, removing, or avoiding a technological measure, 17 U.S.C. § 1201(a)(3)(A); and (2) trafficking – the manufacture, distribution, sale, or offering to the public of devices, tools, or technologies that enable circumvention. 17 U.S.C. §§ 1201(a)(2), (b)(1).

\(^79\) 17 U.S.C. §§ 1201(a), (b)(1).

\(^80\) With respect to access controls, both the act of circumvention and the trafficking in circumvention technologies are prohibited. With respect to use (or copy) controls, the act of circumvention is not prohibited but trafficking is. See also U.S. Copyright Office, The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary 3-6 (Dec. 1998), available at http://www.copyright.gov/legislation/dmca.pdf.

\(^81\) 17 U.S.C. § 1201(c)(1).
there are a number of specific exceptions to the prohibitions on circumvention, as well as a triennial rule-making process to establish additional exceptions for circumvention of access controls where needed to accommodate permitted uses (discussed below at pp. 26-27).

To avoid inappropriate liability for multipurpose devices such as personal computers, the prohibition on circumvention extends only to those that: (1) are “primarily designed or produced” to circumvent TPMs; (2) have only limited commercially significant uses other than for circumvention; or (3) have been marketed as circumvention tools. The law also includes a “no mandate” provision, clarifying that technology developers are under no obligation to proactively design their products to accommodate any particular technological measure.

In implementing the WIPO Internet Treaties, many other countries have enacted similar laws. Generally, these laws cover both access and copy controls, prohibit the act of circumvention, and avoid liability for multipurpose devices. The areas of greatest variation relate to the definition of TPMs, whether the act of trafficking in circumvention tools is separately prohibited, and how to deal with impacts on legitimate uses, with a range of approaches adopted including safeguard mechanisms similar to the DMCA rule-making. TPM provisions modeled on the DMCA are also included in all subsequent U.S. free trade agreements.

In the years since the DMCA’s passage, the anti-circumvention provisions have been the subject of litigation. Although complete analysis of the case law is beyond the scope of this paper, a few aspects are worth mentioning. First, the prohibition on circumvention has been upheld in the face of First Amendment and fair use challenges. And second, courts have generally rebuffed attempts to use the prohibition to further anti-competitive purposes related to the sale of consumer goods rather than to the goal of protecting copyright.

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85 See, e.g., United States-Australia Free Trade Agreement art. 17.4.7.
86 See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 453-59 (2d Cir. 2001).
87 See Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004) (rejecting claim by garage door manufacturer that the sale of a universal garage door opener circumvented the technological measure that controlled access to the computer software that operated the garage door); see also Lexmark Int’l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 549 (6th Cir. 2004) (rejecting similar claim in context of interoperable printer cartridges). But see MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F.3d 928, 952 (9th Cir. 2011) (finding defendant liable for trafficking in technology that circumvented access controls used by online video game to prevent players from using unauthorized software to advance through the game faster).
b) Rights Management Information (RMI)

An additional technological adjunct to copyright is RMI, information about a protected work that enables its licensing. In the digital environment, RMI often takes the form of machine-readable metadata – “data about data.”88 Its availability is valuable for both owners and users, giving factual information that can facilitate legal uses of content. Its manipulation or deletion, on the other hand, can lead to false conclusions about proper payees and permitted uses, with an effect equivalent to common fraud.

The 1996 WIPO Treaties require legal protection for RMI, defined as:

information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.89

The implementing provision in the DMCA makes it illegal to provide or distribute false RMI with the intent to induce, facilitate or conceal copyright infringement, or intentionally to remove or alter it with knowledge or reasonable grounds to know that doing so will have that effect.90 Other signatories to the WIPO Internet Treaties have adopted similar provisions, some essentially transposing the treaty language into national law.91

The importance of RMI is intensifying as more copyrighted works and associated data become available online, with a corresponding need for consistency and completeness for licensing purposes. Legal protection can help to ensure that this information remains reliable as online licensing mechanisms continue to develop (as explored below in Section IV). In addition, the desire for attribution on the part of authors (even those who are not concerned about compensation) may be heightened in the online environment. Laws protecting the author’s name from falsification, alteration or removal can serve this function too.

5. New Challenge: The Meaning of “Public Performance”

Another set of issues relating to the scope of rights has arisen in the context of new online services enabling consumers to stream entertainment content produced by third

89 See WCT, supra note 32 art. 12(2); WPPT, supra note 32, art. 19(2).
90 17 U.S.C. § 1202. The statute uses the term “copyright management information,” and defines it more precisely than the WIPO Treaties, including various carve-outs for public performances by radio and television broadcast stations. It also contains an exception for law enforcement, intelligence and other government activities, and limitations on liability with respect to certain transmissions by broadcast stations and cable systems.
91 See EU Copyright Directive art. 7; Australian Copyright Act of 1968 arts. 116B-116D; Canadian Copyright Act art. 41.22; Copyright Law of the People’s Republic of China art. 48(7); Japanese Copyright Law arts. 2(1)(xxi), 113(3), 120(b)(iii); Civil Code of the Russian Federation art. 1300. RMI provisions are also included in many U.S. FTAs. See, e.g., United States-Australia Free Trade Agreement art. 17.4.8.
parties into their homes. In recent years a number of licensed online video streaming services have launched, and many cable television providers offer extensive on-demand catalogs to their subscribers. Other services have launched without licenses, using technology developed to transmit individual streams from individually-made copies, rather than broadcasting to the public from a single source copy. These services, which rely on recent case law in the context of a cable operator with underlying content licenses, pose a challenge to the traditional dividing lines between public and private performance, and raise a host of questions. If any consumer can stream the content she wants on-demand, is this act “public” as defined by the Copyright Act if the technology is structured so that the stream comes from a copy made by a third party for each individual? Does it make a difference if the consumer already has legal access in another form to the content being streamed? Does it matter how the source copies are made, and by whom? Such interpretive tensions in the face of changing delivery models are the inevitable result of a system based on a bundle of specific rights, each drafted in the context of then-existing technologies.

Courts are grappling with this issue and it remains to be seen how it will be resolved. And while the answers may require careful parsing of statutory language and legislative history, the underlying policy question is which businesses will benefit to what extent from new technologies that meet the consumer’s desired enjoyment of content. The result of these cases could affect, for example, the viability and scope of new licensed business models such as online video subscription services. To the extent that judicial decisions undermine a meaningful public performance right, Congressional action may be needed.

C. Updates to Exceptions

Digital technologies have also given rise to a need to update copyright exceptions. Such updates must be approached against the backdrop of the general obligation to comply with the “three-step test” of international law: exceptions to copyright must be limited to certain special cases, and must not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the right holder. At the same time, it is clear that existing exceptions can be extended into the digital

92 Cartoon Network, 536 F.3d 121.
94 17 U.S.C. § 106(4). A public performance right is required by a number of international treaties which the United States has ratified, generally labeled as the right of “communication to the public.” See, e.g., Berne Convention supra note 32, arts. 11, 11bis, 11ter, 14, 14bis; TRIPS Agreement supra note 32, arts. 9, 14; WCT supra note 32, art. 8.
95 Berne Convention, supra note 32, art. 9(2); see also TRIPS Agreement, supra note 32, art. 13; WCT, supra note 32, art. 10; WPPT, supra note 32, at art. 16; Beijing Treaty on Audiovisual Performances at art. 13(2); Panel Report, United States – Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000). Free trade agreements between the United States and other countries likewise include the obligations of the three-step test. See, e.g., United States-Australia FTA art. 17.4.10(a); Dominican Republic-Central America-United States FTA art. 15.5.10(a); U.S.-Singapore FTA art. 16.4.2(a).
environment, and new ones adopted as appropriate. In the U.S., several long-standing exceptions have been recalibrated through legislative amendments or judicial interpretation, and new ones adopted or considered.

1. The Fair Use Doctrine

The fair use doctrine, developed by the courts and codified in the 1976 Copyright Act, is a fundamental linchpin of the U.S. copyright system. Along with the idea/expression dichotomy, the fair use doctrine is a critical means of balancing “the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.” It is also a vital “built-in First Amendment accommodation[]” in copyright law. Because fair use requires an assessment of the “fairness” of the use in question, based on a balancing of several factors, it is inherently fact-intensive. Accordingly, in any area where there is not yet established precedent, it may be difficult for prospective users of copyrighted works to predict whether a fair use defense will succeed or fail. The corresponding advantage of fair use is its flexibility; the doctrine is highly adaptable to new technologies and has already played an important role in the online environment. Fair use has been applied by the courts to enable, among other things, the use of thumbnail images in Internet search results, caching of web pages by a search engine, and a digital plagiarism detection service.

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96 WIPO, Agreed Statements Concerning the WIPO Copyright Treaty, Agreed Statement concerning Article 10 (WIPO Doc. No. CFNF/DC/96) (1996) (“It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”); WIPO, Agreed Statements Concerning the WIPO Performances and Phonograms Treaty, Agreed Statement concerning Article 16 (WIPO Doc. No. CFNF/DC/96) (1996).

97 17 U.S.C. § 107. Whether a particular use of a copyrighted work qualifies as fair use requires a court to consider all relevant factors, including: (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit education purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of, the copyrighted work. Most other countries do not have a comparable fair use doctrine, but rely on specific defenses sometimes in combination with the generally narrower concept of “fair dealing.” See Paul Goldstein & Bernt Hugenholtz, International Copyright: Principles, Law and Practice 362-64 (2d ed. 2010); see also Jonathan Band & Jonathan Gerafi, The Fair Use/Fair Dealing Handbook (Mar. 2013) http://infojustice.org/wp-content/uploads/2013/03/band-and-gerafi-2013.pdf.

98 Sony, 464 U.S. at 429.


The status of several types of common digital uses remains unsettled, however. While time-shifting of over-the-air broadcast programming has been held to be fair use, similar consumer activities known as “format-shifting” and “space-shifting” that involve the copying of entire works to permit personal use on different types of devices have not yet been definitively addressed by U.S. courts. It is an open question whether having paid for enjoyment of a work in one format or location should eliminate the need to pay again for its enjoyment in a different format or location.

Over the years, as the courts have defined the contours of fair use, there have been several public and private initiatives aiming to provide greater specificity and predictability to its application. At the time of enactment of the 1976 Copyright Act, a set of guidelines for educational users (“Classroom Guidelines”) were adopted and approved by Congress. Once digital technologies became prevalent, the Working Group on Intellectual Property Rights convened a Conference on Fair Use (CONFU) in 1994 “to bring together copyright owner and user interests to discuss fair use issues and, if appropriate and feasible, to develop guidelines for fair uses of copyrighted works by librarians and educators.” After a four-year process, no consensus was achieved on the overall scope of fair use guidelines, although one set of such guidelines was developed for educational multimedia. CONFU also resulted in proposals for fair use guidelines for digital images and distance learning that were circulated for discussion. Despite the lack of consensus, the guidelines and proposals that came out of that process remain useful resources.

More recently, others have undertaken efforts to develop fair use guidelines for various user communities. American University’s Center for Social Media, in

subscription news clipping service that used algorithm similar to search engines to locate and excerpt news stories).


103 A.V. v. iParadigms, LLC, 562 F.3d 630, 637-45 (4th Cir. 2009).

104 Sony, 464 U.S. at 429. The scope of time-shifting as fair use is currently being challenged in litigation between major broadcast networks and the Dish satellite service involving a feature of its in-home recorders that allows consumers to automatically skip commercials during playback. Such ad-skipping features raise additional considerations beyond those in Sony given the potential impact on the advertising-funded model for broadcast television. See Fox Broad. Co., Inc. v. Dish Network, L.C.C. -- F. F.3d --, 2013 WL 3814917 (9th Cir. July 24, 2013).

105 See Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendations of the Register of Copyrights 162-66 (Oct. 2012), available at http://www.copyright.gov/1201/2012/Section_1201_Rulemaking%20_2012_Recommendation.pdf. In many other countries, these types of consumer activities are treated as “privy抄y,” generally exempted from liability in return for remuneration (“levies”) paid to right holders by the manufacturers of the devices or media used to make the copies. See EU Copyright Directive at art. 5(2)(b). Japan, Canada and Australia also have similar levy systems. For information about the various private copying schemes around the world, see WIPO, International Survey on Private Copying (2012), available at http://www.wipo.int/freepublications/en/copyright/1037/wipo_pub_1037.pdf.


108 Id. at 17.
conjunction with the University’s Washington College of Law, has created a set of tools for creators, teachers, and researchers to better understand the application of fair use to their particular disciplines. The Copyright Advisory Office established at Columbia University in 2008 has collected and developed resources on the relationship between copyright law and the work of the university community, including a fair use checklist. And the College Art Association recently announced a major grant to develop a code of best practices for fair use “in the creation and curation of artworks and scholarly publishing in the visual arts.”

The Task Force supports private efforts to explore the parameters of fair use, and notes that best practices produced with input from both user groups and right holders can offer the greatest certainty. To further assist in providing guidance to the creative community, the IPEC’s 2013 Joint Strategic Plan for Intellectual Property Enforcement proposes that the Copyright Office in coordination with the Administration publish and maintain an index of major fair use court decisions to serve as a helpful resource.

2. Library Exception

One specific exception that has already been updated once relates to library preservation and research activities. In 1998, the DMCA amended Section 108 of the Copyright Act to allow libraries and archives to take advantage of digital technologies when engaging in preservation activities. Libraries and archives are now permitted to make up to three copies or phonorecords in digital as well as analog formats, for purposes of preservation and security or for deposit for research use in another library or archive. The amendment imposed restrictions on the use of any digital copies made, in order to ensure that they are not freely distributed outside library premises.

By 2006, however, there was concern that the amendments had been outstripped by technology and needed further updates. Libraries and archives were concerned about the impact digital technologies were having on their abilities to properly serve their constituents. Issues included the scope of works covered by Section 108, the ability of libraries to use outside contractors with specialized expertise in emerging digital

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109 See [http://www.centerforsocialmedia.org](http://www.centerforsocialmedia.org). The Center, working with stakeholders in various areas, has developed guidelines and codes for academic and research libraries; poetry; open course ware; media literacy education; online videos; documentary filmmakers; scholarly research in communication; and dance-related materials. For example, the code of best practices for academic and research libraries was created in conjunction with the Association of Research Libraries. See [http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices](http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices).

110 See [http://copyright.columbia.edu/copyright](http://copyright.columbia.edu/copyright). Other online resources available from the Copyright Advisory Office are a Copyright Quick Guide, fair use case summaries, materials on distance education, links to other online resources, including major fair use guidelines issued during the period 1976-1998, and a blog on current developments.


technologies, and the ability to capture online content for preservation purposes. Right holders and publishers, on the other hand, wanted any exceptions to be confined to certified institutions to help maintain and ensure the security of any digital copies.

To help guide the discussion of how best to transition into the digital era and to ensure that Section 108 did not become technologically irrelevant, the Copyright Office convened an independent Study Group. In its final Report, the Study Group recommended a number of legislative changes to update the exceptions for libraries and archives, and noted that additional changes might be necessary. In the interim, one library group has developed a set of guidelines for video preservation under Section 108, which may prove to be a useful resource.

Although the recommendations of the Study Group have not yet been acted on, the Copyright Office has recently reopened its consideration of Section 108, and will be making recommendations going forward. The Task Force supports the Copyright Office’s efforts to ensure that libraries and archives can benefit from the use of current technologies while safeguarding the rights of right holders. We note that an updated Section 108 could provide a positive model for international discussions at WIPO and elsewhere.

3. Distance Education

Updates have also been made to the exceptions in the Copyright Act dealing with distance education, amending it to better enable the use of digital technologies. A 1999 report to Congress by the Register of Copyrights recommending an exception for digital distance education became the basis for the Technology, Education, and

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114 The Section 108 Study Group Report 31-94 (March 2008), available at http://www.section108.gov/docs/Sec108StudyGroupReport.pdf. Among other items, the Report recommended that museums should be included in Section 108 eligibility; a new exception should be added to permit certain qualified libraries and archives to make preservation copies of at-risk published works prior to any damage or loss; a new exception should be added to permit libraries and archives to capture and reproduce publicly available Web sites and other online content for preservation purposes and to make those copies accessible to users for private study, research or scholarship; and libraries and archives should be permitted to make a limited number of copies, as reasonably necessary, to create and maintain a single replacement or preservation copy.

115 Id. at 95-112.


117 As part of this process, the Copyright Office conducted a symposium in February 2013 on Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform. See Revising Section 108: Copyright Exceptions for Libraries and Archives, U.S. Copyright Office, http://www.copyright.gov/docs/section108/.


Copyright Harmonization (TEACH) Act of 2002. Under the TEACH Act, which amended sections 110(2) and 112(f) of the Copyright Act, instructors may use a wider range of works in distance learning environments; students may participate in distance learning sessions from virtually any location; and participants enjoy greater latitude when it comes to storing, copying and digitizing materials. In order to benefit from these provisions, academic institutions must comply with a set of criteria intended to protect against potential piracy of digital content and to preserve the viability of markets for educational materials.

In the past ten years, digital distance education in the United States has flourished. It has been reported, however, that few institutions have taken advantage of the TEACH Act exception in part due to its technological requirements. The development of the distance education market may instead be the result of some form of licensing, reliance on fair use, or a combination of both. The Register of Copyrights has recently urged congressional review of copyright issues related to higher education, including distance education.

4. Blind, Visually Impaired and Other Persons with Print Disabilities

Digital technologies can also be an important means of providing access to copyrighted works to the visually impaired. A 1996 amendment to the Copyright Act established a new exception to promote such access; the Chafee Amendment provided that an “authorized entity,” defined as “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities,” could reproduce or distribute certain works in specialized formats, including digital formats, exclusively for use by such persons. More than fifteen years later, it may be time for further updates. The Register of Copyrights recently noted that some aspects of Section 121 “appear ill-suited to the digital world and could benefit from comprehensive review by Congress.”

In addition, exemptions to the prohibition on circumvention of TPMs to ensure access to e-books by the visually impaired have been repeatedly granted in the DMCA rule-

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120 Pub. L. 107-273, Sec. 13301.
123 Maria Pallante, Manges Lecture supra note 31 at 19.
makings discussed below, based on findings that some TPMs have been developed and deployed in ways that prevent such access.\textsuperscript{126}

At the international level, WIPO adopted a treaty in June 2013 to improve access to published works for the blind, visually impaired and other individuals with print disabilities.\textsuperscript{127} The treaty is intended to promote the international availability of accessible e-books and other digital formats as well as traditional formats such as braille. The United States played a leadership role in these negotiations.

5. DMCA Anti-Circumvention Exceptions

The DMCA’s prohibitions against circumvention of TPMs contain a number of specific, detailed exceptions. One allows nonprofit libraries, archives and educational institutions to circumvent technological measures in order to make a good faith determination of whether to acquire a copy of a work that is not reasonably available in another format.\textsuperscript{128} Others allow circumvention in specific circumstances for federal law enforcement and intelligence activities,\textsuperscript{129} reverse engineering of a computer program,\textsuperscript{130} encryption research,\textsuperscript{131} preventing minors from accessing material on the Internet,\textsuperscript{132} or protecting personally identifying information.\textsuperscript{133}

In addition to these enumerated exceptions, a new rule-making procedure was established as a safety valve against the potential application of TPMs in such a way as to prevent otherwise lawful uses. The Librarian of Congress is authorized (based on a public fact-gathering process and the recommendation of the Register of Copyrights upon consultation with NTIA) to designate certain classes of works as exempt for a three-year period from the prohibition against the act of circumventing access control measures.\textsuperscript{134} This mechanism has operated to identify a number of circumstances in which an exemption is appropriate.\textsuperscript{135} Upon demonstrating that the anti-circumvention

\textsuperscript{126} The exemption was first proposed in the 2003 rulemaking, and has been adopted in some form by the Library of Congress in each subsequent rulemaking. See Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 77 Fed. Reg. 65260, 65262-63 (Oct. 26, 2012).


\textsuperscript{128} 17 U.S.C. § 1201(d).

\textsuperscript{129} 17 U.S.C. § 1201(e).

\textsuperscript{130} 17 U.S.C. § 1201(f).

\textsuperscript{131} 17 U.S.C. § 1201(g).

\textsuperscript{132} 17 U.S.C. § 1201(h).

\textsuperscript{133} 17 U.S.C. § 1201(i).

\textsuperscript{134} Specifically, the Librarian has the authority to exempt users who "are, or are likely to be in the succeeding three-year period, adversely affected . . . in their ability to make noninfringing uses . . . of a particular class of copyrighted works." 17 U.S.C. § 1201(a)(1)(C). Exemptions are not authorized, however, for the ban on trafficking in circumvention devices or services. As noted above, there is no prohibition on circumventing use controls.

\textsuperscript{135} A similar safety valve mechanism has been established in a number of other countries. In the EU, for example, the Copyright Directive requires Member States to take appropriate measures to ensure that
prohibition has had or is likely to have a substantial adverse impact on a non-infringing use of a particular class of works, proponents have succeeded in obtaining several exemptions in each of the rulemaking procedures since enactment of the DMCA. Over the years, new exemptions have been added, while others have expanded, contracted, or expired.

Some of these exemptions have raised policy issues going beyond the scope of copyright, as technological protections for software have been relied on to limit the interoperability or functioning of consumer devices. Most recently, the decision not to continue the exemption for cell phone unlocking as applied to newly purchased phones has raised controversial issues of telecommunications policy. The Administration has made clear its position “that consumers should be able to unlock their cell phones,” while respecting the process undertaken by the Librarian of Congress. The Administration and Library of Congress agree that the DMCA rulemaking process “was not intended to be a substitute for deliberations of broader public policy” relating to this telecommunications issue.

right holders make available to beneficiaries of certain exceptions the means to benefit from them, where right holders have not already done so voluntarily. See Copyright Directive at art. 6(4). How countries implement these requirements is a question of national law. In the United Kingdom, a process has been established whereby a user may file a complaint with the Secretary of State, who will then open an investigation to determine whether there is a voluntary agreement to enable a permitted act related to the underlying work and, if one does not exist, will require the copyright owner to ensure that the user can use the work under the relevant exception. See U.K. Copyright Designs and Patent Act (CDPA) at § 296ZE.


137 See Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64574 (Oct. 27, 2000); Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62011, 62013-14 (Oct. 31, 2003); Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472, 68473-77 (Nov. 27, 2006); Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43825, 43827-34 (July 27, 2010); Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260, 65262-71 (Oct. 26, 2012). The five current exemptions relate to: (1) motion pictures on DVDs or delivered through online services circumvented for the purpose of criticism or comment in certain types of works and for certain educational purposes; (2) motion pictures on DVDs or delivered through online services circumvented for the purpose of research and development of captioning or descriptive audio technologies for persons with certain disabilities; (3) computer programs that enable wireless telephone handsets to execute lawfully-acquired software applications for purposes of interoperability (smartphone “jail-breaking”); (4) computer programs that enable wireless telephone handsets acquired before late January 2013 to connect to an alternative network (smartphone “unlocking”); and (5) literary works distributed in e-book format to permit use of assistive technologies for the blind, visually impaired, deaf, or hard of hearing.


140 Statement from the Library of Congress Regarding White House Statement Today in Response to a Petition on Section 1201 Rulemaking (Mar. 4, 2013), available at http://www.loc.gov/today/pr/2013/13-041.html; see also White House Response supra note 139. Several legislative proposals have since been introduced in an effort to address this issue. See Unlocking Consumer Choice and Wireless Competition
6. Other Issues

a) Remixes

There has been considerable discussion in recent years of the value and copyright treatment of “remixes”\(^\text{141}\) - works created through changing and combining existing works to produce something new and creative.\(^\text{142}\) Often, these works are part of a growing trend of “user-generated content” that has become a hallmark of today’s Internet, including sites like YouTube. Advances in digital technology have made remixing existing works easier and cheaper than ever before and provided greater opportunities for enhanced creativity.\(^\text{143}\) But because remixes typically rely on copyrighted works as source material - often using portions of multiple works - they can raise daunting licensing issues.\(^\text{144}\)

Under current U.S. law, some remixes may qualify as a fair use of the copyrighted material they draw on. They are likely to be considered transformative, taking parts of the original work and altering it with new meaning or purpose,\(^\text{145}\) so the key questions will ordinarily be whether they are commercial, how much they use from any given work, and the extent to which they can serve as a substitute in the market. A body of precedent already exists with respect to fair use claims for quoting the works of others in new works of art. One line of cases involves parody;\(^\text{146}\) others deal with “appropriation art.”\(^\text{147}\) The results have turned in large part on the extent to which the second artist was either transforming or commenting on the source. Music sampling, however, has generally not been excused as fair use, and continues to be the subject of

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\(^\text{141}\) Other terms such as “mashups” or “sampling” are also used, especially with reference to music.


\(^\text{143}\) Among the most well-known works created this way is the Grey Album by the musician Danger Mouse, which combined the vocal tracks of Jay-Z’s Black Album with samples of the instrumental tracks from the Beatles’ White Album.

\(^\text{144}\) The remix itself, assuming a modicum of creativity, should qualify as a derivative work protected by copyright law, but the copyright will not extend to any part in which the preexisting material is used unlawfully. 17 U.S.C. § 103(a).

\(^\text{145}\) Whether, and to what extent, a new use is transformative “is not absolutely necessary for a finding of fair use,” but “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.” Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 579 (1994). Ultimately, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” Id.

\(^\text{146}\) See id.; see also Brownmark Films, LLC v. Comedy Partners, 800 F. Supp. 2d 991, 1000-02 (E.D. Wis. 2011); Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499, 508-11 (S.D.N.Y. 2009).

\(^\text{147}\) Cariou v. Prince, 714 F. 3d 694 (2d Cir. 2013); Blanch v. Koons, 467 F.3d 244, 251-59 (S.D.N.Y. 2006); see also Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 608-615 (2d Cir. 2006); Rogers v. Koons, 960 F.2d 301, 310 (2d Cir.1992), cert. denied, 506 U.S. 934 (1992).
In some contexts, licensing mechanisms have been developed as a less risky alternative to relying on fair use. Particularly promising are those that rely on commercial intermediaries to enable remixes by their individual users. One model is YouTube’s Content ID system, which allows users to post remixes that may be monetized by the relevant right holders. Under this system, however, it is the right holder’s decision whether to allow the posting. Another tool is the Creative Commons license (discussed in more detail below at p. 88) through which creators can authorize remixes of their works subject to certain provisos. Other online licensing mechanisms (discussed below at pp. 87-89) may also be available as alternatives for licensing specific content quickly and easily.

In addition, best practices and industry-specific guidelines have been developed to help artists looking to use existing works make informed choices, including a code of best practices specifically for creating online videos. Despite these alternatives, a considerable area of legal uncertainty remains. The question is whether the creation of remixes is being unacceptably impeded. There is today a healthy level of production, but clearer legal options might result in even more valuable creativity. Is there a need for new approaches to smooth the path for remixes, and if so, are there efficient ways that right holders can be compensated for this form of value where fair use does not apply? Can more widespread implementation of intermediary licensing play a constructive role? Should solutions such as microlicensing to individual consumers, a compulsory license, or a specific exception be considered? Are any of these alternatives preferable to the status quo, which includes widespread reliance on uncompensated fair uses? The Task Force will convene a series of roundtables to examine this issue.

b) Orphan Works and Mass Digitization

The Internet’s exciting potential for making available comprehensive collections of works has highlighted the problems of locating the owners of copyright in obscure or older works and enabling access to the full range of the world’s cultural and historical heritage.

i) Orphan Works

Orphan works are copyrighted works whose owners cannot be identified or located,

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149 For a description of the Content ID system and its operations see YouTube – Content ID, http://www.youtube.com/t/contentid.

150 See Creative Commons – About The Licenses, http://creativecommons.org/licenses/.

making it impossible to negotiate terms for their use.\textsuperscript{152} The development of comprehensive digital resources necessarily entails the inclusion of large numbers of works, some of which will be orphaned. Although difficult to quantify, the number of orphan works appears to be substantial, at least in the context of library and archive collections.\textsuperscript{153} This is not a new issue, but the extent of the problem has surely grown, given the abandonment of copyright formalities (discussed below at pp. 91-92) and the extension of copyright terms; there are simply more older works, and works without clear indicia of ownership, that are protected by copyright.\textsuperscript{154}

U.S. law contains a few provisions that can ease the ability to make specific uses of orphan works in some circumstances.\textsuperscript{155} But “[w]here the proposed use goes beyond an exemption or limitation to copyright . . . the user cannot reduce the risk of copyright liability for such use, because there is always a possibility, even if remote, that a copyright owner could bring an infringement action after that use has begun.”\textsuperscript{156} As the Copyright Office recently noted, “[t]his outcome is difficult if not impossible to reconcile with the objectives of the copyright system and may unduly restrict access to millions of works that might otherwise be available to the public (e.g., for use in research, education, mainstream books, or documentary films).”\textsuperscript{157}

In a 2006 Report, the Copyright Office endorsed a legislative solution based on limiting remedies against good faith users of orphan works. Legislation was introduced in 2006 and again in 2008 that closely tracked the Report’s recommendations.\textsuperscript{158} The legislation would have permitted the use of orphan works when the user had made “a qualifying search, in good faith, to locate and identify the owner of the infringed

\textsuperscript{152} U.S. Copyright Office, Report on Orphan Works at 2 (2006), available at \url{http://www.copyright.gov/orphan/orphan-report.pdf} (“Orphan Works Report”). The Copyright Office described the most common obstacles to successfully identifying and locating a copyright owner as including inadequate identifying information on copies of works; inadequate information about copyright owners due to changes in ownership or changes in the copyright owner's circumstances; limited existing copyright ownership information sources; and difficulties researching copyright information.


\textsuperscript{155} See, e.g., 17 U.S.C. §§ 108(h), 115(b), 504(c)(2).

\textsuperscript{156} Orphan Works Report \textit{supra} note 152 at 1.


copyright” and provided attribution where feasible.\textsuperscript{159} Although the user could be liable for infringement if the copyright owner later appeared, any damages would have been limited to a reasonable licensing fee based on what a willing buyer and willing seller would have agreed to in advance.\textsuperscript{160} The goal was to put copyright owners and potential users in the positions they would have occupied in a normal marketplace negotiation, if the copyright owner had been identified and located prior to the use of the work.\textsuperscript{161} Although the 2008 bill attracted much interest and support, it did not ultimately become law.\textsuperscript{162}

Since that time, the issue has also been confronted in U.S. courts. In a copyright infringement lawsuit brought by publishers and authors against Google, a proposed settlement of the publishers’ claims included provisions affecting orphan works. The case involves Google’s scanning of millions of copyrighted works in the collections of several major research libraries in order to create an online, searchable library. Although the U.S. government applauded some of the practical advantages of the settlement, including the creation of a registry by which authors could claim their works as well as increased access for the general public and people with print disabilities, it ultimately opposed the proposed settlement because certain aspects were at odds with the basic premises of copyright law. The settlement was ultimately rejected by the district court.\textsuperscript{163} The court explained that “questions of who should be entrusted with guardianship over orphan works, under what terms, and with what safeguards, are matters more appropriately decided by Congress than through an agreement among private, self-interested parties.”\textsuperscript{164}

Outside the United States, a number of countries have either enacted or recently proposed orphan works legislation. Canada has had such legislation since 1985, offering government-issued licenses for the use of orphan works on a case-by-case basis.

\textsuperscript{159} Shawn Bentley Orphan Works Act of 2008 at § 2. The bill set out requirements for a “qualifying search,” based around the principle of a “diligent effort that is reasonable under the circumstances,” and that included searching the Copyright Office’s records and other sources of copyright ownership information. \textit{Id.} The Copyright Office would also have been instructed to create and maintain category-specific recommended practices to help guide searches. \textit{Id.}

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} See Peters supra note 154.

\textsuperscript{162} The Shawn Bentley Orphan Works Act of 2008 passed the Senate by unanimous consent on September 26, 2008, and was referred to the House Committee on the Judiciary, where a similar bill (H.R. 5889) was also pending. \textit{Orphan Works Legislation Pasess Senate by Unanimous Consent, Moves to House, 76 PATENT, TRADEMARK, \\& COPYRIGHT J. 754 (Oct. 3, 2008).} The House failed to act before Congress adjourned. Orphan works legislation has not been introduced in Congress since 2008.

\textsuperscript{163} \textit{Authors Guild v. Google Inc.}, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011).

\textsuperscript{164} \textit{Id.} The publishers subsequently settled their claims against Google, without addressing the orphan works issue. Another ongoing lawsuit involves a collaborative effort by five major universities to create a shared digital library – the HathiTrust Digital Library. \textit{See Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 447-49 (S.D.N.Y. 2012).} The HathiTrust Digital Library would provide complete access to digitized orphan works, while only permitting certain limited uses of digitized works for which the author is known. \textit{Id.} The district court recently determined that the uses of the non-orphan works qualified as fair uses or were permitted under Section 121, but did not reach the questions related to the orphan works because the defendants had suspended that aspect of the project and the claims were therefore not ripe. \textit{Id.} at 455-56, 458-66.
basis. Hungary, Japan, Korea, and India all have some form of government or compulsory licensing scheme for orphan works, and China is considering similar legislation. In the Nordic countries, the technique of extended collective licensing has been used to permit the licensing of orphan works through collective management organizations. The U.K. recently passed a law to permit government licensing of orphan works, although the details of implementation will not be finalized this year.

Treatment of orphan works is now being harmonized across Europe. In October 2012, the EU adopted a directive on orphan works, which is to be implemented by all Member States by October 29, 2014. The Orphan Works Directive will allow certain public interest entities to make limited use of specified categories of orphan works “only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection.” A diligent search to locate the copyright owner is required in the Member State of first publication or broadcast. But once a work is deemed orphaned in one Member State it will be deemed orphaned throughout the EU, with a list of such works to be maintained in a single registry. If the owner subsequently appears, she will be entitled to fair

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168 Extended collective licensing permits collective management organizations to extend the effect of the licenses they grant to all works in the sector they represent, even without having authorization to do so, as long as they represent a large enough percentage of the works in that sector (generally subject to each owner’s ability to opt out of the representation). See Consolidated Act on Copyright 2010, No. 202, art. 50-51 (2010) (Denmark); see also Copyright Act, No. 404, §§ 13–14 (2010) (Finland).


171 Id. at art. 1(1) (The covered entities are “publicly accessible libraries, educational establishments and museums, as well as . . . archives, film or audio heritage institutions and public-service broadcasting organisations”).

172 See id. at 6.

173 See id. at art. 3 & Annex.

174 Id. at arts. 3 & 4.
In October 2012, the U.S. Copyright Office returned to the issue with a Notice of Inquiry calling for public comments on (1) changes in the legal landscape since 2008 with respect to using orphan works on an occasional or case-by-case basis, and (2) solutions for the new issue of the use of orphan works in the context of mass digitization. The Task Force believes that the time is ripe to address the orphan works issue, and to ensure that the United States can play a leadership role in shaping international thinking. At the domestic level, the Task Force will support and provide input to the Copyright Office as it examines the issue of orphan works.

**ii) Mass Digitization**

“Mass digitization” can be defined as the conversion of analog works into digital copies on a mass scale. Many historical collections of copyrighted works exist in analog form in libraries and archives, and others could be newly amassed through the use of scanning technologies. Such projects have the potential to provide greatly enhanced access to works that have not yet been widely distributed and to reach new users. As a result, mass digitization presents significant economic opportunities in addition to cultural and societal benefits. But given the large numbers of works involved, many of which are protected by copyright, individual licensing negotiations will not always be feasible. As to the orphan works in existing or future collections, new legislation could ease the path to move ahead with individual uses, but the typical requirement of diligent search may be overly burdensome in high volume.

Another component of the mass digitization problem involves works that are not orphaned, but are “out-of-commerce”—i.e., no longer commercially distributed. On the one hand, the owners of these works are likely to be known (although possibly difficult to locate); on the other hand, the works themselves by definition have little commercial value justifying individual negotiations for use in mass digitization. Facilitating such use can benefit all by enabling access that otherwise would not exist.

Steps have been taken in Europe to ease the digitization of out-of-commerce works. In 2011, the European Commission fostered a Memorandum of Understanding (“MOU”) between libraries, publishers, writers, and other artists, making it possible for European libraries and cultural institutions more easily to acquire licenses to digitize out-of-commerce books and journals. And France has enacted legislation that allows

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175 Id. at art. 6(5).


178 Memorandum of Understanding, Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (Sept. 20, 2011), available at [http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf). The MOU’s principles include: (1) institutions seeking to use out-of-commerce works must publicize the project and initiate a stakeholder dialogue with right owners and collectivizing societies; (2) institutions should seek voluntary licenses, specifying commercial or non-commercial uses; (3) collective management organizations can only negotiate licenses if they represent a substantial number of affected authors and publishers; and (4) right holders may opt out of collective management.
its national library to build a public database of books published in France in the 20th century that are not currently being distributed or published in print or digital formats.\(^{179}\)

Several mass digitization projects have already been initiated by public institutions in the United States and elsewhere, focusing primarily on public domain materials.\(^{180}\) Other broader projects have led to high-profile litigation, with still-uncertain outcomes.\(^{181}\)

In October 2011, the Copyright Office released an analysis of the legal issues involved in mass digitization.\(^{182}\) The Copyright Office noted that mass digitization and dissemination may serve important public interest goals that could justify restricting or limiting certain copyright rights.\(^{183}\) One relevant factor will be the commercial nature of the project; while this may not undermine the public benefit to be gained, it may change the appropriate reach of copyright limitations and exceptions.\(^{184}\)

Furthermore, to the extent that a mass digitization project is global or even multijurisdictional in nature, fair use will not resolve the issue because the doctrine is specific to the United States.\(^{185}\) The Copyright Office did not offer specific

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\(^{179}\) Anyone wishing to use an out-of-commerce work may apply to have the work listed in the national database. Once a work is listed, the right holder has six months to opt-out of collective management. If the right holder does not opt out, collective management organizations issue renewable, five-year, non-exclusive licenses to make listed works available, subject to payment of a licensing fee. After ten years on the list, if a right holder has not claim a work, French libraries and archives will be permitted to digitize and provide access to the works. \textit{See Loi n° 2012-287 du 1er mars 2012 relative à l’exploitation numérique des livres indisponibles du xxe siècle} [Law Number 2012–287 of March 1, 2012, on the Digital Exploitation of Unavailable Books] art. 134–1 (2012) (Fr.), available at http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=4D8B77A47AA211DE6F336FD22AA18F60.tpdjo09v_2?cidTexte=JORFTEXT000025422700&dateTexte=20121016; \textit{see also} International Federation of Reproduction Rights Organisations, \textit{French Parliament Passed Law on Out of Commerce Works on 22nd February 2012}, (Mar. 3, 2012), available at http://www.ifrro.org/content/french-parliament-passed-law-out-commerce-works-22nd-february-2012.


\(^{181}\) While aspects of one particular project have been held to constitute fair use, they did not involve access by the general public to full texts of works with known authors. That decision is now on appeal. \textit{Authors Guild, Inc. v. HathiTrust}, 902 F. Supp. 2d 445, 447-49, 458-66 (S.D.N.Y. 2012) \textit{appeal docketed}, No. 12-4547 (2d Cir. Nov. 14, 2012); \textit{see also Authors Guild, Inc. v. Google Inc.}, -- F.3d --, 2013 WL 3286232 (2d Cir. July 1, 2013) (vacating class certification to authors' in claims related to Google Books Project, because district court failed to consider merits of fair use defense before certifying the class of plaintiffs).

\(^{182}\) Mass Digitization Report \textit{supra} note 180.

\(^{183}\) \textit{Id.} at 14.

\(^{184}\) \textit{Id.} at 13.

\(^{185}\) \textit{Id.} at 25.
recommendations, concluding instead that:

Issues about the intersection between copyright law and new technologies . . . would benefit from further discussions among all stakeholders. Among the pertinent questions are the following: the objectives and public policy goals of mass digitization projects, the interplay among library exceptions, fair use, and licensing, and the ability of public and private actors to work together.\(^{186}\)

In October 2012, as noted above, the Copyright Office requested additional public comment on the use of orphan works in mass digitization.\(^{187}\) The Task Force supports this initiative and believes that the broader issues involved in mass digitization should also be addressed. As the Copyright Office continues to examine the question of mass digitization, including those issues raised in its October 2011 report, the Task Force will provide input.

c) **The First Sale Doctrine**

Another limitation on rights that has raised issues in the digital environment is the U.S. first sale doctrine (elsewhere referred to as “exhaustion of rights”).\(^{188}\) The first sale doctrine, as codified in the Copyright Act, allows the owner of a physical copy of a work to resell or otherwise dispose of that copy without the copyright owner’s consent, by limiting the scope of the distribution right.\(^{189}\) This doctrine, which originated to ensure a consumer’s control over her tangible physical property, enables the existence of libraries and second-hand markets in records and books. But the copyright owner’s remaining exclusive rights, notably the right of reproduction, are not affected.

As a result, the first sale doctrine does not apply to the distribution of a work through digital transmission where copies are created implicating the reproduction right.\(^{190}\) In a 2001 Report, the Copyright Office considered whether the first sale doctrine should be amended to extend to digital transmissions. It concluded that an extension was not advisable, given the fundamental differences between the transfer of a single physical

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\(^{186}\) *Id.* at 40.

\(^{187}\) Orphan Works NOI *supra* note 157.

\(^{188}\) The first sale doctrine is technically a restriction on the scope of the distribution right, rather than an exception.

\(^{189}\) 17 U.S.C. § 109. The law also enables the rental of copies of works, such as DVDs of movies and television shows, but contains a carve-out prohibiting the rental of computer programs and sound recordings, except in limited circumstances by nonprofit libraries or educational institutions. *Id.* at § 109(b).

\(^{190}\) Section 104 Report, *supra* note 50 at 78-79. Cf. EU Copyright Directive art. 3(3) (providing that the right of communication to the public and making available to the public “shall not be exhausted by any act of communication to the public or making available to the public”); see also *id.* at Recitals 28-29 (“Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.”). See also Capitol Records, LLC v. Redigi Inc., -- F. Supp. 2d --, 2013 WL 1286134 at *1-2, 9-11 (S.D.N.Y. Mar. 30, 2013) ("Redigi") (rejecting the application of the first sale doctrine to a service that allows individuals to resell digital music files because of the necessary reproductions involved in the transaction).
copy and a transmission over online networks. The Office stressed the fact that digital transmission creates a perfect copy of the work, unlike the imperfect quality of a used physical copy, with a greater potential impact on the market, and also increases the risk of piracy by enabling the easy proliferation of further copies.191

Proponents of a digital first sale doctrine have argued that the extension of the doctrine would have pro-competitive effects, with a resale market competing with the market for new sales and keeping prices lower.192 They also seek to preserve the traditional benefits of users sharing works with friends or family, and students being able to purchase less expensive copies of textbooks. They suggest that concerns about the proliferation of copies could be addressed by a requirement that the original copy of the work be destroyed, either voluntarily by the sender or through automated technology. In its 2001 report, the Copyright Office acknowledged this suggestion, but dismissed it as unworkable.193 Ultimately, the Copyright Office concluded that the marketplace should be given an opportunity to address the concerns raised by advocates of a digital first sale doctrine “before Congress alters the balance of rights and exceptions in the Copyright Act.”194

Another relevant question is defining what constitutes a sale that is capable of exhausting rights. Increasingly, business models for certain types of works may structure the transaction as a license rather than a sale, avoiding application of the first sale doctrine. This has long been the case for software and is now becoming more common for e-books.195 If ultimately this becomes the only way in which a particular type of work is offered to consumers, the result could be to render the first sale doctrine meaningless for that type of work. Such concerns may lead courts or policy makers to reinterpret what constitutes a “license” or to expand the scope of the first sale doctrine.196

191 Section 104 Report supra note 50 at 96-101.
192 Id. at 20-21, 86-87, 100.
193 Id. at 97. The district court in ReDigi, supra note 190, found that the unauthorized reproductions of the music files were not protected by first sale, even though the original file was deleted from the seller’s computer. ReDigi, 2013 WL 1286134, at *9-11. The court noted that ReDigi had launched a new version of its service during the litigation that purported to transfer the file without ever storing it on the seller’s computer, but did not rule on the new version’s legality because of an undeveloped factual record on its operation. Id. at *2 n.3.
194 Section 104 Report supra note 50 at 101.
196 The European Court of Justice recently found exhaustion of rights in software licenses that granted the “right to use that copy for an unlimited period”, where the maximum number of authorized users under the license had not been met. UsedSoft GmbH v. Oracle Int’l Corp, European Court of Justice Case C-128/11 (July 3, 2012). The Court concluded that the licensing transactions constituted the equivalent of sales, stating that “[t]he making available by Oracle of a copy of its computer program and the conclusion of a user license agreement for that copy are thus intended to make the copy usable by the customer, permanently, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which it is the proprietor.” Id. at ¶ 45. The ECJ required, however, that the original purchaser of the software must “make his own
In the context of cross-border transactions, the relationship between the first sale doctrine and the importation right of U.S. law (defined in the Copyright Act as part of the distribution right) has been the subject of litigation. Differing interpretations in the courts were recently resolved by the Supreme Court in a holding that goods lawfully made and purchased with the authorization of the copyright owner anywhere in the world can be resold within the United States. While the case did not directly raise the issue of online application of the first sale doctrine, the Court’s decision could have an impact on the ability of right holders to offer their works at different prices and different times in different countries, and may result in legislative reexamination of the doctrine as a whole.

Since the Copyright Office’s examination of the digital first sale doctrine in 2001, much has changed. In a world of increasingly digital distribution, the traditional field of application of the first sale doctrine may disappear, and the resale market become obsolete. The question is whether there is a way to preserve the doctrine’s benefits, allowing the equivalent of sharing favorite books with friends, or enabling the availability of less-than-full-price versions to impecunious students. Will the market provide these opportunities, and if so, how? And are there any changes in technological capabilities that would alter any of the Copyright Office’s 2001 conclusions?

The Task Force believes that this is an area that deserves further attention. The USPTO, in collaboration with the Copyright Office, will solicit public comments and hold a series of roundtables regarding the relevance and scope of the first sale doctrine in the digital age.

D. Conclusion and Next Steps

- Over the past two decades, the rights and exceptions in copyright law have been repeatedly amended to respond to developments in digital technology.

- Many of these updates are in the process of being interpreted by the courts, and should be left to evolve unless and until there is a need for legislative correction.

- As to some issues, however, consideration should be given to further action. Work is already underway in Congress or the Copyright Office on several of these issues. The Task Force recommends the following steps:

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199 See Maria Pallante, Manges Lecture *supra* note 31 at 17-18 (discussing the possibility of Congressional review of the first sale doctrine “in the digital context” and potential policy and technology considerations).
The Task Force urges Congress to better rationalize the public performance right for sound recordings. We reiterate the Administration’s support for extending the right to cover broadcasting, and urge that any reassessment of the appropriateness of different rate-setting standards for different types of digital music services take into account the impact on creators and right holders as well as on different types of services;

The Task Force will solicit public comment and convene roundtables on issues related to the creation of remixes and the first sale doctrine in the digital environment; and

The Task Force will support and provide input to the Copyright Office as it moves forward with its work on updating the library exception in Section 108 and examining the issues of orphan works and mass digitization.

III. Keeping Rights Meaningful in the Online Environment

A. General

Even the most state-of-the-art and well-balanced copyright system would have little value if rights could not be enforced. As was predicted in the 1990s, the Internet has proved to present both an exciting opportunity and a daunting challenge for copyright owners. At the same time that it has opened a vast range of new markets and delivery methods, it has given consumers unprecedented tools to reproduce, alter and immediately transmit perfect digital copies of copyrighted works around the world, and has led to the rise of services designed to provide these tools. Today these include P2P file-sharing services and cyberlockers—which have a range of legitimate uses but also have become major sources of illegal content.

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202 Cyberlockers, such as Hotfile and Mediafire, have become increasingly popular in the past few years, allowing users both to store and to share large files, often operating as cloud-based services. Users can post the URLs for the files that they have uploaded onto blogs or “link farms” that aggregate such links, which can be found using a search engine. See Roger Parloff, Megaupload and the Twilight of Copyright, FORTUNE, July 11, 2012, available at http://tech.fortune.cnn.com/2012/07/11/megaupload-cyberlocker-copyright/.

203 There is evidence that the bulk of files available on P2P file-sharing networks are infringing. See, e.g., Annemarie Bridy, Is Online Copyright Enforcement Scalable?, 13 VAND. J. ENT’T & TECH. LAW 695-737, 709 (Summer 2011). A sizeable percentage of Internet traffic remains infringement-related. See Christopher S. Stewart, As Pirates Run Rampant, TV Studios Dial Up Pursuit, WALL STREET J. (March 4, 2013) (reporting that
mobile apps have also been developed and made available that foster infringement of
copyrighted works.204

Another source of online infringement today is based beyond our borders. Websites
dedicated to the provision of pirated content can be located anywhere in the world,
and many operate outside the United States.205 Signal piracy involving online video
streaming sites based abroad that retransmit broadcast television station signals in
real time also poses a threat to U.S. businesses.206 Enforcement using existing tools
is significantly more complicated for websites registered and located abroad, raising
jurisdictional, procedural, and logistical difficulties.

Although copyright infringement over the Internet has proven difficult to quantify, it
has resulted in billions of dollars in losses to the U.S. economy – including reduced
income for creators and other participants in copyright-intensive industries.207

antipiracy firm had “detected 5.4 billion instances of pirated content online” in 2009 and 14 billion in
that 23.76% of global internet traffic and 17.53% of U.S. internet traffic is dedicated to the infringement of
non-pornographic copyrighted works), available at http://documents-envisional-com/docs/envisional-
internet_usage-jan2011.pdf; see also Cisco, Visual Networking Index: Forecast and Methodology, 2011–
ns537/ns705/ns827/white_paper_c11-481360.pdf (estimating that file sharing Internet traffic will
increase by 26% between 2011 and 2016); PRS for Music & Google, The six business models for copyright
infringement at 11 (June 2012), available at http://www.prsformusiccom/aboutus/policyandresearch/
researchandeconomics/documents/thetribusinessmodelsofcopyrightinfringement.pdf (reporting 17%
increase in page views of P2P file-sharing networks from 2011-2012); Ed Felten, Census of Files Available
via BitTorrent, Freedom to Tinker https://freedom-to-tinker.com/blog/felten/census-files-available-
bittorrent/ (Jan. 29, 2010) (reporting results of study finding that all of the movie, TV and music torrents
in a sample of 1,021 files were likely infringing).

204 See Sue Zeidler, Hollywood targets “rogue” mobile apps in war on pirated content, Reuters (Feb. 28,
2013) available at http://www.reuters.com/article/2013/03/01/net-us-hollywood-apps-
idUSBRE92003Y20130301.

available at http://ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf; see also
Copyright in the Digital Era supra note 31 at 26.

206 See Piracy of Live Sports Broadcasting over the Internet Hearing before the Committee on the Judiciary,
http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg54075/html/CHRG-111hhrg54075.htm; Organisation for
9789264065437-en; Screendigest, Study on the Socioeconomic Dimension of the Unauthorized Use
of Signals – Part II: Unauthorized Access To Broadcast Content – Cause And Effects: A Global Overview(May
10, 2010). Concerns about signal piracy have led to negotiations toward an international agreement for
the protection of broadcasting organizations. See WIPO, Standing Committee on Copyright and Related

207 While the exact dimensions of online piracy and its impact, and the techniques for its measurement, are
the subject of debate, increasing amounts of data are being amassed from objective sources. U.S.
Government Accountability Office, GAO-10-423, Intellectual Property Observation on Efforts to Quantify
the Economic Effects of Counterfeit and Pirated Goods 8 (2010). Similar efforts are being undertaken
outside the United States. See, e.g., Organisation for Economic Co-Operation and Development, Piracy of
technology/piracy-of-digital-content_9789264065437-en; RAND Europe, Measuring IPR Infringements in
the Internal Market: Development of a new approach to estimating the impact of infringement on sales
(2012), available at http://ec.europa.eu/internal_market/ipreforcement/docs/ipr_infringement-
Virtually every content industry is affected, including the music, motion picture, television, publishing, visual arts, and software industries. Even as legitimate online markets are taking root and growing at an increasing rate,\(^{208}\) traditional markets for physical products continue to shrink, and some of the industries they support are a fraction of their size just ten years ago.\(^{209}\) While some of these changes are a result of the disruptive power of the Internet giving rise to new business models (as discussed below at pp. 77-80),\(^{210}\) online infringement continues to undermine both established industries and emerging businesses. Existing business models should not be preserved for their own sake, but their destruction should not simply be assumed to be a positive development.

The legitimate services made possible by the Internet, which serve to incentivize further creative outputs, cannot fully flourish while faced with unfair competition from illegal sources. Accordingly, effective enforcement is a critical component of a healthy online ecosystem, but the digital environment makes enforcement more difficult for several reasons:

- **Individuals can copy and distribute works in ways that can pose a significant threat to legitimate markets for those works.** In essence, consumers have become competing publishers and distributors of copyrighted content. This ability makes enforcement difficult because of the sheer number of potential defendants, and has led some to question the proportionality of traditional enforcement tools when applied to individuals.

- **Infringement can be both hard to detect and global.** The Internet allows individuals to access and disseminate content from private locations without public attribution, which can make it difficult to trace acts of infringement to their source. Moreover, the global reach of the Internet enables content created in one country to be quickly made available around the world, raising issues of jurisdiction and applicability of

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\(^{210}\) See Copyright in the Digital Era *supra* note 31 at 22 (“The magnitude of these effects on different creative sectors are difficult to quantify, but disruptive changes in traditional supply chains and the destruction of some older business models and enablement of new ones are easy to identify.”); see also Lisa Cameron & Coleman Bazelon, The impact of Digitization on Business Models in Copyright-Driven Industries: A Review of the Economic Issues (Feb. 2013) available at http://brattle.com/_documents/UploadLibrary/Upload951.pdf.
national laws.

- **Public perceptions about infringement may be different in the online environment.** Unauthorized file-sharing and downloading have come to be perceived by some as less immoral and less harmful than the unauthorized taking of physical media, such as shoplifting.211 This shift in attitudes has led to a global debate over appropriate enforcement.

Given these difficulties, there are a number of respects in which the existing array of tools against infringement has become insufficient. The tools for protecting and enforcing rights must keep pace—as with rights and exceptions, they need regular updating.212 These tools too must be well calibrated to ensure a balanced online ecosystem and to safeguard our commitment to free speech, due process, privacy, and cybersecurity.213

In the search for appropriate solutions, it is important to note that legislation may not be the sole or the best avenue available.214 Indeed, no single solution is likely to be enough; a combination of approaches will be needed to create an environment that can sustain a thriving market for legitimate content. Voluntary initiatives and best practices, including those involving cooperation among right holders and intermediaries, offer great promise and continue to be supported as an approach by the Administration. Without doubt, the wide availability of legal alternatives itself has an influence on consumer attitudes and behaviors. And public education is an indispensable element, raising awareness about the purpose of copyright and the availability of legitimate alternatives, and clarifying that online infringement has real consequences.


214 We note that legislation in the area of enforcement has proved particularly difficult over the past few years. See *Combating Online Infringement and Counterfeits Act*, S. 3804, 111th Cong. (2010); *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act* (PROTECT IP Act), S. 968, 112th Cong. (2011); *Stop Online Piracy Act* (SOPA), H.R. 3261, 112th Cong. (2011).
This Section will describe existing enforcement tools; identify the major gaps and shortcomings in the toolbox; and set out a range of potential solutions for addressing these shortcomings, including those pursued so far in the United States and elsewhere.

**B. Existing Legal Tools for Online Copyright Enforcement**

U.S. law provides a number of methods for enforcing copyright online, including both government enforcement and private actions. This Paper will focus primarily on private actions, but will first provide a brief overview of the government's role in online copyright enforcement.

1. **Government Actions**

The U.S. government has taken an active role in seeking to improve online enforcement at home and abroad, particularly in the past few years. The efforts fall into three general categories: (1) coordination and oversight; (2) direct civil and criminal action; and (3) international outreach.

   a) **Coordination and Oversight**

In 2008, Congress established the Office of the Intellectual Property Enforcement Coordinator (IPEC) to coordinate government enforcement efforts. In 2010, the IPEC released its first Joint Strategic Plan on Intellectual Property Enforcement, describing government efforts to improve enforcement, including reducing online piracy, and putting forth a strategy for the future. The most recent Joint Strategic Plan was released in June 2013, and covers the next three years. The Joint Strategic Plan highlights the efforts of the United States to advance a coordinated approach to combating online infringement by increasing law enforcement action, supporting voluntary efforts by the private sector, and increasing consumer awareness.

   b) **Civil and Criminal Enforcement**

A number of civil and criminal enforcement mechanisms have been used by the government to combat online piracy. The Departments of Justice (DOJ) and

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216 2010 Joint Strategic Plan supra note 213. This strategy includes working with trading partners and international organizations, securing supply chains, and improving data collection, among other commitments. Id. at 1-2.

217 See 2013 Joint Strategic Plan, supra note 112.

218 There are also civil enforcement tools available to the U.S. government that apply to the importation of physical goods that have not yet been widely tested in the online context. For example, U.S. Customs and Border Protection has the power to seize pirated or counterfeit goods upon their attempted import or export into the U.S. See, e.g., 19 U.S.C. § 1595(a). And the International Trade Commission can issue exclusion orders against the importation of goods, or cease and desist orders against the sale, marketing, or advertising of goods already imported into the United States, that infringe U.S. patents, trademarks, trade secrets, or copyrights, based on complaints filed by right holders under 19 U.S.C. § 1337 (“Section 337”). The overwhelming majority of Section 337 proceedings arise in the patent context, however, and there is no record of any proceedings related to online copyright infringement.
Homeland Security (DHS) have primary responsibility for such actions, with criminal investigations conducted by the Federal Bureau of Investigation and the U.S. Immigration and Customs Enforcement (ICE).

Seizure and Forfeiture. The DOJ has legal authority to seize property used in connection with copyright infringement.220 Through Operation In Our Sites, a program coordinated by the DOJ and the DHS, domain names of websites used to distribute pirated or counterfeit content have been seized.221 Operation In Our Sites has successfully targeted a number of sites devoted to piracy,222 but there are a number of limitations, including the limited resources available to the Attorney General to carry out the takedowns and jurisdictional issues that restrict seizures to domain names registered with a U.S. registry. As a result, domain names for websites with infringing content that are controlled by foreign registries, even if accessible by and targeted to U.S. consumers, can be very challenging for U.S. authorities to reach. Stemming such international infringement requires cooperation and coordination with other governments.223 It is also important to avoid potential damage from erroneous seizures. Challenges from domain name registrants have resulted in two cases being


221 See National Intellectual Property Rights Coordination Center, Operation In Our Sites, http://www.ice.gov/doclib/news/library/factsheets/pdf/operation-in-our-sites.pdf. When someone tries to access a website at a domain that has been seized, they see a message that notifies them of the seizure and provides educational information about copyright piracy. See, e.g., domain name has been seized by U.S. Immigration and Customs Enforcement, http://tvshack.net/.


dropped and the return of the domain names to the registrants.\textsuperscript{224}

\textbf{Criminal prosecution.} The DOJ also is empowered to bring criminal prosecutions for copyright infringement.\textsuperscript{225} The Computer Crime and Intellectual Property Section (CCIPS) of the Criminal Division implements the Department’s IP prosecution strategies, and provides domestic and international enforcement training.\textsuperscript{226}

In 1997, Congress created criminal liability for reproducing or distributing works of a certain value even if the infringer neither gains nor expects to gain anything of value in return.\textsuperscript{227} And in 2005, Congress created criminal penalties for infringement of works being prepared for commercial distribution.\textsuperscript{228} Both of these provisions are important for effective enforcement, because much online infringement is undertaken without a profit motive by infringers, but still has the potential for significant economic damages.\textsuperscript{229}

One recent high-profile case highlights the potential and the difficulty of government actions against foreign website operators. In January 2012, seven individuals and two corporations were charged in the United States with running an organized criminal enterprise responsible for worldwide online piracy, through the cyberlocker service Megaupload.com and other related sites. According to the indictment, these businesses generated more than $175 million in criminal proceeds and caused more than half a billion dollars in potential damages to copyright owners.\textsuperscript{230} Substantial assistance was provided by law enforcement entities around the world.\textsuperscript{231}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{225} 17 U.S.C. § 506.
\item \textsuperscript{226} See USDOJ, About CCIPS, http://www.justice.gov/criminal/cybercrime/about. There are also 25 specialized Computer Hacking and Intellectual Property (CHIP) Units located in U.S. Attorney Offices throughout the country, and more than 250 specially trained prosecutors with expertise in prosecuting IP and computer crimes (at least one in each Office). USDOJ, Districts with Specialized CHIP Units, http://www.justice.gov/usao/briefing_room/cc/graphics.html.
\item \textsuperscript{227} No Electronic Theft Act (NET Act) Pub. L. 105-147 (1997); 17 U.S.C § 506(a)(1)(B).
\item \textsuperscript{228} Family Entertainment and Copyright Act of 2005, Pub. L. 109-9 (2005); 17 U.S.C. § 506(a)(1)(C). This change was in response to the increasing occurrence of “camcording” new movies upon their release in theatres “followed immediately by either mass duplication and distribution of DVD copies or Internet distribution of the same movie.” H.R.. REP. No. 109-33, at 4 (2005).
\item \textsuperscript{229} A conviction for criminal copyright infringement also triggers mandatory criminal forfeiture, requiring that the defendant forfeit to the United States any property used to commit or facilitate the offense, or property derived from the proceeds. 18 U.S.C. § 2323(b). While this type of proceeding has been used to require forfeiture of domain names for infringing websites, see, e.g., Department of Justice, Defendants Sentenced For Role In Sale of $2.5 Million Worth of Counterfeit Software (Dec. 19, 2008), available at http://www.justice.gov/criminal/cybercrime/press-releases/2008/rushingSent.pdf, criminal prosecution again presents resource issues, limiting the number of websites that can be targeted.
\item \textsuperscript{231} These entities included police and prosecutors from New Zealand, Hong Kong, the Netherlands, the U.K., Canada, Australia, Germany, and the Philippines.
\end{enumerate}
\end{footnotesize}
Such prosecutions can be effective in shutting down sites causing great harm to right holders, creators, and legitimate services, and in sending a strong public message.\textsuperscript{232} Still to be resolved, however, is how to deal with those users who are storing noninfringing content on the sites.\textsuperscript{233} Moreover, this level of resource allocation will not always be feasible. And the Megaupload case presented special circumstances, including the voluntary assistance of multiple foreign law enforcement entities, the availability of an extradition treaty, and Megaupload’s use of U.S. domestic registries, without which prosecution may have been impossible.

An additional hurdle to enforcement is the existence of an anomaly in the coverage of U.S. criminal law. While the willfully infringing reproduction and distribution of copyrighted works can be punished as a felony,\textsuperscript{234} willful violations of the public performance right are punishable only as misdemeanors.\textsuperscript{235} This discrepancy is an increasingly significant impediment. Since the most recent updates to the criminal copyright provisions, streaming (both audio and video) has become a significant if not dominant means for consumers to enjoy content online. The lack of potential felony penalties for criminal acts of streaming disincentivizes prosecution and undermines deterrence.\textsuperscript{236} The Administration and the Copyright Office have both called on Congress to amend the Copyright Act to ensure that illegal streaming to the public can be punished as a felony in the same manner as other types of criminal infringement.\textsuperscript{237} The Task Force now repeats that call.

\section*{c) International Initiatives}

Through bilateral and multilateral negotiations, educational programs and other initiatives, the United States encourages the adoption and implementation of high

\textsuperscript{232} A recent academic study found that the shutdown of Megaupload had an immediate positive impact on digital revenues for major movie studios. See Brett Danaher and Michael D. Smith, \textit{Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales} (March 2013), available at \url{http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229349&download=yes}.

\textsuperscript{233} See, e.g., Graeme McMillan, \textit{EFF Launches 'Megaretretial' Site for Megaupload Users}, \textit{TIME TECH}, Feb. 1, 2012, available at \url{http://techland.time.com/2012/02/01/eff-launches-megaretretial-site-for-megaupload-users/}.


\textsuperscript{235} 17 U.S.C. § 506(a)(1)(A) (offense), 18 U.S.C. §§ 2319(b)(1), (3) (felony punishment only for specified “reproduction or distribution,” all other offenses punishable as misdemeanors).

\textsuperscript{236} SOPA included a provision making illegal Internet streaming a felony. See \textit{SOPA} at § 201. And calls for such legislation have been made previously by the IPEC, Administration’s White Paper on Intellectual Property Enforcement Legislative Recommendations 10 (March 2011), and the Register of Copyrights, Maria Pallante Manges Lecture \textit{supra} note 31 at 13.


standards for copyright protection and enforcement around the world. For example, the Office of the United States Trade Representative (USTR) is charged by Congress with reporting the results of an annual review of the global state of intellectual property rights (IPR) protection and enforcement. This Special 301 Report is an assessment of the adequacy and effectiveness of the protection of IPR by U.S. trading partners. USTR also publishes a “Notorious Markets List” each year, identifying selected markets, including ones on the Internet, that are reportedly engaged in substantial piracy and counterfeiting. The Notorious Markets List highlights markets that facilitate online infringement via “pay-per-download” services, BitTorrent indexing and BitTorrent tracking. Both reports have drawn international attention to the economic harm caused by online piracy and triggered positive changes by both government and non-government actors to improve copyright protection.

The Task Force believes that it is important that the United States continue to work to reduce foreign-based piracy by working to ensure the adequacy and effectiveness of measures against Internet piracy in foreign jurisdictions and by increasing our cooperative efforts with foreign law enforcement.

2. Private Action and Available Remedies

Most online copyright enforcement is handled through private action. Copyright owners have at their disposal a range of possible tools, including lawsuits against the primary infringer or based on theories of secondary liability, as well as procedures short of litigation for removing infringing content from the Internet.

238 Much of this work relates to obligations of international agreements specifically dealing with intellectual property enforcement. The TRIPS Agreement obligates WTO Members to adequately and effectively protect intellectual property rights. TRIPS Section III, supra note 32, at art. 41-61; see also WCT, supra note 32, at art 14; WPPT, supra note 32, at art. 23; AVPT, at art. 20. The bilateral FTAs between the United States and other countries also contain substantive enforcement provisions. See, e.g., U.S.-Australia Free Trade Agreement, Chapter on Intellectual Property Rights, art. 17.11. And the Anti-Counterfeiting Trade Agreement (ACTA), recently concluded but not yet in force, sets forth provisions for a high-level enforcement standard consistent with U.S. law, including issues specific to the digital environment. ACTA, arts. 6-32. The final text of ACTA, so far signed by the United States, Australia, Canada, Korea, Japan, New Zealand, Mexico, Morocco, and Singapore, is available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.


240 See USTR, 2013 Special 301 Report available at http://www.usstr.gov/sites/default/files/05012013%20202013%20Special%20301%20Report.pdf. The 2013 Report highlighted both online infringement challenges in specific markets, such as Ukraine, China, Switzerland, and Russia, and the most recent developments in online piracy, including new technologies and business practices that are evolving to facilitate and monetize copyright theft via the Internet.

Online distribution of copyrighted works necessarily involves numerous acts of reproduction, distribution and/or public performance. Those who engage in these acts without authorization, whether individuals or entities, may be liable for infringement.

**i) Individual File Sharers**

Some right holders have sued individual file sharers for engaging in acts of reproduction and distribution of copyrighted works, particularly those who have uploaded large numbers of files. Prior to December 2008, when it abandoned this approach, the Recording Industry Association of America (RIAA) sued over 30,000 individuals for uploading music files through illegal P2P services. The vast majority were settled out of court, generally for sums in the low thousands. 242

Although some right holders continue to pursue direct infringement suits against individual file-sharers, 243 these lawsuits have generally proven to be not only controversial but also an inefficient method for combating large-scale online infringement. Given the resources required to pursue a lawsuit, only a small fraction of the millions of infringing P2P users can be identified and taken to court. As a result, although these litigation campaigns may have some educational effect, they have not appeared to provide meaningful long-term deterrence. Efforts like the graduated response systems (discussed below at pp. 71-74) coupled with infringement actions against recalcitrant individual file sharers, may ultimately prove more effective.

**ii) Digital Services**

In the online environment, new types of intermediaries play an increasingly important role in the reproduction, distribution, and public performance of copyrighted works. In considering potential legal claims, the distinction between engaging in infringing acts and enabling others to engage in them is not always clear. Several cases, some predating the DMCA, have concluded that a finding of direct infringement against a

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243 The adult entertainment industry has been aggressive in recent years in pursuing such lawsuits. Although questions have been raised about the accuracy with which the correct defendants have been identified, the suits have led to a large number of settlements which may have been motivated in part by the defendants' desire to avoid having their names associated with adult content. See, e.g., MMGIP, LLC v. Does 1–149, No. C 11-02331 LB, 2011 WL 4352110, at *4 n.5 (N.D. Cal. Sept. 16, 2011) (describing the "common arc" for mass copyright infringement cases in this area). Some courts have decried these litigation and settlement practices as potentially abusive and improper. Hard Drive Prods., Inc. v. Does 1–130, No. C-11-2826 DMR, 2011 WL 5573960, at *3 (N.D. Cal. Nov. 16, 2011); K–Beech, Inc. v. Does 1–41, No. V-11-46, 2012 WL 773683, at *5 & n.2 (S.D. Tex. Mar. 8, 2012); Raw Films, Inc. v. Does 1–32, No. 11-CV-2939-TWT, 2011 WL 6840590, at *2 & n.5 (N.D. Ga. Dec. 29, 2011); Third Degree Films Inc. v. Does 1–131, No. 12-108-PHX-JAT, 2012 WL 692993, at *7 (D. Ariz. Mar. 1, 2012). See also Stuart Pfeifer, Lawyers Fined for Online Porn Lawsuits, LOS ANGELES TIMES, May 7, 2013 (quoting the judge as calling Prenda Law and others a “porno trolling collective”), available at http://www.latimes.com/business/la-fi-prenda-porn-sanctions-20130508,0,1738507.story.
service provider requires “some element of volition or causation.” These holdings have heightened the importance of secondary liability theories, discussed below. Direct infringement has still been found where service providers engaged in active, volitional conduct.

b) Secondary Liability

The courts have developed several doctrines of secondary liability, allowing claims against those who participate in various ways in the infringement of others:

- **Contributory liability** requires that the defendant knew or had reason to know of the underlying infringement and caused or materially contributed to it.
- **Vicarious liability** requires that the defendant had the right and ability to control the infringement and derived a financial benefit from it.
- **Inducement liability** requires that the defendant distributed a device or provided a service with the demonstrated purpose of promoting its use for infringement.

Some version of secondary liability exists in laws of most countries, although the legal theories and required elements differ.

In recent years, claims of secondary liability brought against online intermediaries have played an increasingly prominent role in enforcement efforts against digital piracy. Such claims have been the inevitable result of the use of technological

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246 The U.S. Copyright Act grants to copyright owners not only the right to exercise exclusive rights, but also the right “to authorize” their exercise by others. 17 U.S.C. § 106. The inclusion of the right “to authorize” was intended to avoid any questions as to the liability of secondary infringers - those who do not directly exercise the copyright owner’s rights, but “authorize” others to do so. See H.R. REP. NO. 94-1476, at 61, reprinted in 1976 U.S.C.C.A.N. 5674.

247 See Gershwin Pub’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971); Usenet, 633 F.Supp. 2d at 155-56.


advances in digital distribution for large-scale infringement by individuals. Both in the United States and in other jurisdictions, courts have relied on theories of secondary liability to draw lines between legitimate and illegitimate services that provide access to copyrighted content.

Beginning with Napster, a number of unlicensed P2P file-sharing services have been found actually or potentially liable in the United States, despite differences in their structures—generally where they encouraged or profited from infringement while failing to take steps to control it. In a case brought against Grokster, the US Supreme Court in June 2005 unanimously confirmed the existence of a cause of action for inducement of copyright infringement, holding that Grokster could be subject to liability for distributing a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.

Secondary liability claims have also been brought in the United States against other types of online services, including video hosting sites, BitTorrent sites, Usenet.com, which provided access to the USENET network, and cyberlockers. In those cases where the courts have reached the secondary liability issue, the decisions have turned on fact-specific inquiries, with liability where there was evidence that defendants encouraged, promoted, facilitated and profited from the infringing conduct of their users.

In other jurisdictions, similar outcomes have been reached on similar facts, relying on the applicable secondary liability theories. Right holders have prevailed in lawsuits against P2P file-sharing services in Australia, Japan, China, and South Korea; against BitTorrent sites in Sweden, Finland, and the Netherlands; against a Usenet

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251 In 2001, the Ninth Circuit determined that Napster was liable for contributory infringement on the basis of its actual and constructive knowledge of the infringing activities and vicarious copyright infringement because it had a direct financial interest in drawing users to its service. Napster, 239 F.3d at 1019-24; see also In re Aimster Copyright Litig., 334 F. 3d 643, 651-54 (7th Cir. 2003); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 939 (2005); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 985-92 (C.D. Cal. 2006); Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398, 426 (S.D.N.Y. 2011).

252 Grokster 545 U.S. at 936-37.


261 Pirate Bay, Case No. B 4041-09 (Svea Court of Appeal, Nov. 26, 2010).
indexing site in the United Kingdom;\(^{264}\) and against a major social media site in Russia.\(^{265}\)

c) Judicial Remedies

i) Injunctions

Several aspects of the remedies available in litigation have raised particular issues in the online context. Injunctive relief, always an important potential remedy to put a stop to continuing acts of infringement, is particularly critical in online infringement cases, where unauthorized sites or services can cause great financial harm to right holders in a matter of hours through the unrestricted public availability of valuable content.

Injunctions have been granted by numerous courts against various online services found liable for infringement.\(^{266}\) Moreover, the DMCA authorizes right holders to seek injunctions against Internet service providers (ISPs) (referring in the context of the DMCA to a wide range of providers, not only those providing Internet access), even when a service provider qualifies for a safe harbor from monetary damages (as discussed below at pp. 52-54). The DMCA limits the scope of such injunctions according to the service provider's function.\(^{267}\)

The DMCA’s injunctive relief provisions appear to be little used. Indeed, there are no reported cases in the U.S. courts in which an injunction has been granted against a service provider that qualifies for a DMCA safe harbor. This is not surprising for a number of reasons. Most fundamentally, the plaintiff would have to establish a basis for liability on the part of the ISP, an expensive and uncertain proposition given the lack of clear precedent. And injunctions cannot be issued absent notice to the ISP and an opportunity to appear before the court hearing the application for an injunction.\(^{268}\)

\(^{262}\) Finreactor, Supreme Court, Decision of 30 June 2010 nr 1396, KKO:2010:47.

\(^{263}\) BREIN vs. XS Networks B.V., 412217 / HA ZA 12-153 (District Court of the Hague, Oct. 24, 2012).

\(^{264}\) Twentieth Century Fox Film Corp. v. Newzbin Ltd., [2010] EWHC 608 (Ch.) (Mar. 29, 2010).


\(^{266}\) See, e.g., Isohunt II, 710 F. 3d at 1047-49; Napster, 284 F.3d 1091.

\(^{267}\) Injunctions against non-conduit ISPs are limited to: (1) prohibiting access to material residing at a particular online site; (2) terminating a specified user’s account; and (3) other relief that the court deems necessary to block access to material at “a particular online location” but only if the relief is the least burdensome method. 17 U.S.C. § 512(j)(1). Injunctions against conduit ISPs are limited to: (1) terminating a specified user’s account; and (2) blocking access to a specific website outside of the United States. 17 U.S.C. § 512(j)(2).

\(^{268}\) See, e.g., Tony Burch LLC v. Yong Sheng Int’l Trade Co., Case No. 10 Civ. 9336, Doc. 29, Default Judgment and Permanent Injunction Order (S.D.N.Y. May 31, 2011); Gucci Am., Inc. v. Li Case No. 10 Civ. 4974, Doc. 12, Preliminary Injunction and Order Authorizing Expedited Discovery (S.D.N.Y. July 13, 2010).
Even if liability were established, the available relief under the DMCA is narrow. One permissible form of injunction—prohibiting access to material at a particular site—is effectively identical to the statutory requirement that ISPs comply with DMCA takedown notices. The time and expense required to meet the DMCA’s procedural and substantive requirements may make injunctions not worthwhile to pursue.

Foreign-based websites, which may be beyond the jurisdiction of U.S. courts, also present challenges for right holders. The DMCA provides for the possibility of an order requiring an ISP to block access to a foreign website. Only one case has been brought to date seeking such an order, however, and it was voluntarily dismissed when the targeted site went offline soon after the lawsuit was filed.

**ii) Statutory Damages**

For purposes of deterrence, monetary relief is key. Because actual damages for copyright infringement can be difficult to prove, the Copyright Act permits a right holder to elect to seek damages within a statutorily defined range instead. In the online environment, where the scope of the infringing use will often not be ascertainable, making it hard to prove actual damages, the availability of statutory damages is increasingly important. Congress recognized this when it increased the level of damages in the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.

In the decade or so since that congressional action, concerns have been raised about the application of statutory damages in certain contexts. For example, the Copyright Office has reported that the prospect of large statutory damages has deterred people from using orphan works, where they would be willing to negotiate if the owner could be found. As a result, the Copyright Office recommended limiting available monetary relief to only “reasonable compensation,” if an orphan work’s owner appears

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272 Statutory damages normally range from a minimum of $750 to a maximum of $30,000 per work infringed, with the potential to be raised to a maximum of $150,000 upon a finding of willful infringement or lowered to a minimum of $200 upon a finding that the infringer was not aware and had no reason to believe that his or her acts were infringing. 17 U.S.C. § 504(c).

273 Pub. L. No. 106-160, 124 Stat. 3180, 3181; see also 145 Cong. Rec. H12884 (“With the advanced technologies available and the fact that many computer users are either ignorant of the copyright laws or simply believe that they will not be caught or punished, the piracy trend will continue. One way to combat this problem is to increase the statutory penalties for copyright infringement so that they will be an effective deterrent to this conduct.”).

274 Orphan Works Report supra note 152 at 12.
and asserts an infringement claim.\textsuperscript{275}

Another issue involves the potential for huge statutory damage awards against online services because of the volume of works that they make available. While some have warned of a negative impact on investment and innovation,\textsuperscript{276} others point out that a proportionate level of deterrence is necessary against services that have the potential of causing great financial harm, and that the risk of statutory damages may motivate the development of means to prevent infringement.\textsuperscript{277}

Finally, there is the issue of statutory damages awards against individuals making infringing content available online. Much public attention has focused on the size of the awards in the two infringement cases against individual file sharers that have gone to trial. In both cases, after large awards by juries within the statutory range had been reduced by the district courts, they were eventually reinstated by the Courts of Appeals.\textsuperscript{278} These cases have led to calls for further calibration of levels of statutory damages.\textsuperscript{279}

The Task Force reiterates the importance of statutory damages in online copyright enforcement, but believes that there are certain areas where recalibration of their scope may be appropriate. To that end, we will seek public comment and convene public discussions regarding the application of statutory damages in the context of: (1) individual file-sharers; and (2) secondary liability for large-scale online infringement.\textsuperscript{280}

\textit{d) The Role of ISPs under the DMCA}

Additional extra-judicial tools for helping to curb online infringement were created by the DMCA, in provisions relating to the role of Internet service providers.

\textsuperscript{275} \textit{Id.} That suggestion was incorporated in the orphan works bills introduced in Congress. \textit{See}, e.g., Shawn Bentley Orphan Works Act of 2008, S. 2913, at § 2 (2008).


\textsuperscript{278} In the first case, after several retrials, the Court of Appeals for the Eighth Circuit recently affirmed the first jury’s finding of liability and award of $220,000 in statutory damages. \textit{Capitol Records, Inc. v. Thomas–Rasset}, 692 F.3d 899, 911 (8th Cir. 2012), \textit{cert. denied}, 133 S. Ct. 1584 (Mar. 18, 2013). The jury in the first retrial awarded damages of $1.92 million, which the district court reduced to $54,000. The plaintiffs then offered to settle the case for $25,000, which was rejected. \textit{See} Greg Sandoval, \textit{Jammie Thomas Rejects RIAA’s $25,000 Settlement Offer}, \textit{CNET}, \texttt{http://news.cnet.com/8301-31001_3-10442482-261.html} (Jan. 27, 2010). In the second case, the Court of Appeals for the First Circuit reinstated the jury’s award of $675,000 in statutory damages, reversing a decision by the district court to reduce it to $67,500. \textit{Sony BMG Music Entm’t v. Tenenbaum}, 660 F.3d 487, 489-90 (1st Cir. 2011), \textit{cert. denied}, 132 S. Ct. 2431 (2012).

\textsuperscript{279} \textit{See}, e.g., Pam Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 \textit{WM. & MARY L. REV.} 439, 500-09 (Spring 2009); Berg, \textit{supra} note XX; \textit{see generally} Alan E. Garfield, \textit{Calibrating Copyright Statutory Damages to Promote Speech}, 38 \textit{Fla. St. U. L. Rev.} 1 (2010).

\textsuperscript{280} As to statutory damages in the context of orphan works, the Task Force notes that the Copyright Office is currently examining this issue again. \textit{See Orphan Works NOI supra} note 157.
i) General Framework

One particular class of online actor enjoys special protection against either primary or secondary liability claims. In 1998, the DMCA established safe harbors to shield ISPs from unreasonable liability. Service providers that cooperate with right holders in specified ways to curb infringement are immunized from monetary damages—but not injunctive relief.281

The DMCA safe harbors protect providers that comply with certain conditions when they are engaged in one of four covered activities: serving as a conduit for transmitting content (“mere conduit”), caching, hosting, or providing information location tools.282 Where an ISP engages in activities beyond those specified in the statute, such as taking affirmative steps to encourage infringement, it may be exposed to full liability.283

One of the conditions on the availability of a safe harbor is that an ISP, to the extent it is engaging in covered activities going beyond mere transmission, must block or remove infringing content for which it has received a valid notice or is otherwise aware.284 A “put-back” mechanism ensures the ability to restore content that was removed through mistake or misidentification (within 10 to 14 days after receiving a counternotice).285 This structure has essentially created a new, extrajudicial tool – notice and takedown – for curbing infringement.

A similar ISP safe harbor approach has been adopted in most of the U.S.’s major trading partners, including the member countries of the European Union, China, India, Japan, South Korea, Taiwan, and Australia.286

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281 See supra pp. 51-52.

282 The four ISP functions covered by the DMCA safe harbors are: (1) mere conduit activities, such as transmitting email or providing Internet service; (2) caching, or temporary automatic storage for purposes of transmitting data from one person to another; (3) hosting “information residing on systems or networks at direction of users”; and (4) providing “information location tools” such as search engines or hypertext links. 17 U.S.C. §§ 512(a)-(d).

283 See, e.g., U serves F. Supp. 2d at 142, 159 (precluding defendants from asserting safe harbor defenses and finding them liable for direct and secondary infringement); Columbia Pictures Indus., Inc. v. Fung, No. CV 06-5578, 2009 WL 6355911, at *15-16 (C.D. Cal. Dec. 21, 2009) (service provider found ineligible for safe harbors) ("Tsohun t")

284 The provider is also protected from any liability for third-party claims based on its having taken down the material in good faith. 17 U.S.C. § 512(g)(1).


286 See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ("Directive on Electronic Commerce"), arts. 12-15; Regulation On Protection of the Right of Communication Through Information Networks, arts. 14-17, 20-23 (China); Information Technology Act 2000 (as amended by the Information Technology Amendment Act, 2008), §§ 78, 81 (India); Law Concerning the Limits of Liability for Damages of Specified Telecommunications Service Providers and the Right to Request Disclosure of Identification Information of the Senders, art. 3 (Japan); Korean Copyright Act, arts. 102-04; Taiwanese Copyright Act, arts. 90quinquies-90terdecies; Australian Copyright Act § 116AG. U.S. FTAs also generally require such safe harbor provisions. See, e.g., United States-Australia FTA, art. 17.11.29; United States-Korea FTA, art. 18.10.30; United States-Singapore FTA, art. 16.9.22. Canada has adopted (but not yet implemented) a different approach, featuring a “notice and notice” system wherein a right holder can
When the DMCA was enacted in 1998, concerns about online infringement were primarily focused on websites hosting content, and the notice and takedown system was designed with that focus. In that context, the system has generally worked well, subject to the issues discussed below.²²⁷ Later developments have brought new challenges and revealed some ambiguities in application of the DMCA safe harbors, causing difficulties for both right holders and ISPs. Most importantly, unanticipated types of infringing services, such as P2P file-sharing services and cyberlockers, do not fit neatly within the existing framework of the DMCA, and may require new approaches.²²⁸ For example, P2P file-sharing services generally do not involve content hosted by an ISP, and therefore cannot be subject to a DMCA takedown obligation. Other new products and services, such as cyberlockers and those mobile apps that facilitate infringement, may be subject to notice and takedown, but their decentralized nature, lack of searchability, and the scale of infringing content causes problems in application.²²⁹

**ii) Notice and Takedown Issues**

(a) **Knowledge Standard**

Although the DMCA makes clear that there is no affirmative duty for an ISP to monitor for infringing content,²³⁰ a certain level of knowledge of infringement will trigger the need to take action in order to enjoy three of the four safe harbors.²³¹ The requisite

²²⁷ See NOI responses from AT&T, 2, 6; Google, 2, 8-9; NCTA, 3; TechAmerica, 5-6; Library Copyright Alliance, 3; Public Knowledge, 1, 16-21; A2IM, AFM, AFTRA, DGA, IATSE, MPAA, NMPA, RIAA, SAG, 8-9, 30-32 available at [http://ssl.ntia.doc.gov/comments/100910448-0448-01/](http://ssl.ntia.doc.gov/comments/100910448-0448-01/).


²²⁹ For example, cyberlockers are not searchable and right holders must therefore individually locate infringing content, often by visiting other sites on which cyberlocker users post the URLs for their files. See MPAA, RIAA, & NMPA IPEC Submission at 19-20 available at [http://www.mpaa.org/Resources/7960e748-c27e-4745-afe9-1012ce85a4755.pdf](http://www.mpaa.org/Resources/7960e748-c27e-4745-afe9-1012ce85a4755.pdf). On the other hand, some cyberlocker operators not only respond to takedown notices, but have taken active steps to curb infringement through their services. See, e.g., TorrentFreak, RapidShare: Traffic and Piracy Dipped After New Business Model Kicked In, [http://torrentfreak.com/rapidshare-traffic-and-piracy-dipped-after-new-business-model-kicked-in-130109/](http://torrentfreak.com/rapidshare-traffic-and-piracy-dipped-after-new-business-model-kicked-in-130109/) (Jan. 9, 2013). Right holders have also had some success in notifying apps stores, such as Google’s Play Store or the Apple App Store, and having infringement-related apps taken down. See Sue Zeidler, *Hollywood Targets “Rogue” Mobile Apps in War on Pirated Content*, [REUTERS](http://www.reuters.com/article/2013/03/01/net-us-hollywood-apps-idUSBRE92003Y20130301; Joint Submission of MPAA, RIAA, and NMPA to IPEC at 15. Some remain available, however, either in their original form or as copycat applications, or are available through other sites that do not respond to requests from right holders. Joint Submission of MPAA, RIAA, and NMPA to IPEC at 15.


²³¹ The safe harbor for conduit services, or “transitory digital network communications,” as set forth in 17 U.S.C. § 512(a), is not conditioned on a lack of awareness of infringing activity. According to the DMCA’s legislative history, this exemption was intended to codify the holding of *Religious Tech. Ctr. v. Netcom Online Comme’ns Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), that a service provider could not be liable for direct infringement if it takes no “affirmative action that [directly results] in copying . . . works other than by installing and maintaining a system whereby software automatically forwards messages received
knowledge may arise either through a valid notice from a right holder or independently. It includes not only actual knowledge but awareness of “facts or circumstances from which infringing activity is apparent,” referred to as a “red flag” standard. This standard includes both a subjective element, focusing on the ISP’s actual awareness of the facts, and an objective element, focusing on whether the infringement is apparent from those facts. Congress’s goal was to ensure that ISPs were not burdened with the duty of proactively investigating but at the same time could not deliberately turn a blind eye.

In recent years, courts have begun to examine the contours of “red flag” knowledge. Both the Second and Ninth Circuits have held that the burden is on the right holders to demonstrate the requisite level of knowledge, and that an ISP must be aware of specific acts of infringement. Despite these decisions, litigation continues over the appropriate knowledge standard and the consistency of requiring knowledge of specific acts given the statute’s reference to “infringing activity” generally. Moreover, no court has yet determined whether “red flag” knowledge exposes an ISP to monetary damages for only that activity or more broadly to all activity on the site. Resolution of these questions by the courts will provide greater certainty to both right holders and ISPs and enable a clearer understanding of whether the safe harbors are operating as intended.

from subscribers . . . and temporarily stores copies on its system.” Id. at 1368-70; H.R. Rep. 105-551, at 24 (1998).

292 The DMCA sets out a list of requirements for a valid notice that triggers the ISP’s obligation to take action once it is submitted to the ISP’s “designated agent.” 17 U.S.C. §§ 512(c)(3), 512(b)(1)(E), (c) (1)(C), (d)(3).


295 The test is “whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances.” H.R. Rep. 105-551, at 53; S. Rep. 105-190, at 44 (1998).


297 See Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 30 (2d Cir. 2012) (concluding that both the actual and “red flag” knowledge provisions of the DMCA require “knowledge or awareness of specific infringing activity”); Veoh, 2013 U.S. App. LEXIS 5100 at *40-41 (explaining that the “red flag” test places the burden of showing awareness “with the copyright holder rather than the service provider” and that “general knowledge that [a service provider] hosted copyrightable material and that its services could be used for infringement is insufficient to constitute a red flag”); Isohunt II, 710 F.3d at 1043-44 (finding defendant ineligible for safe harbors because of his “red flag” knowledge).

298 See 17 U.S.C. §§ 512(c)(1)(A)(i), (ii); see also supra note 297. A leading scholar has suggested that one reading that would, “give content to both provisions of the statute is to construe the ‘actual knowledge’ subparagraph to refer to knowledge of specific infringing items, whereas the ‘red flag’ subparagraph refers to generalized knowledge.” 3-12B Nimmer on Copyright § 12B.04.

299 See Isohunt II, 710 F.3d at 1043 n. 20. The Isohunt Court did not resolve this question because it found the defendants ineligible for the safe harbor as a result of “receiv[ing] a financial benefit directly attributable to the infringing activity” and having “the right and ability to control such activity.” under 17 U.S.C. § 512(c)(1)(B). Isohunt II, 710 F.3d at 1044-46. The court held that when an ISP is ineligible for safe harbor protection under this provision of the DMCA, it “loses protection with regard to any infringing activity using the service.” Id., at 1046.
After more than a decade of experience with the DMCA notice and takedown system, right holders and ISPs alike have identified respects in which its operation can become unwieldy or burdensome. On one side, there are complaints that the system is too resource-intensive and requires constant re-notification as to the same content; on the other, that the volume has become too high, and notices may be inaccurate or otherwise misused.

On the right holder side, the system is most effective for large entities or organizations. Many individual creators or small and medium-sized enterprises (SMEs) do not have the resources to engage in the ongoing monitoring and notification process required by the DMCA.  

For all types of right holders, concerns are expressed about the brief effective lifespan of takedowns. The DMCA requires that the content be taken down only from the specific location identified in the notice. That limitation, coupled with the lack of any affirmative duty to monitor by ISPs, leads to infringing content often being quickly put back up on the same site. Right holders report that they find themselves in a game of “whack-a-mole”—a never-ending cycle of sending notices about infringing content that may be taken down, only to reappear a short time later in a new location on the same website. They have therefore called for an understanding that notice and takedown should mean notice and staydown—once a given piece of content has been notified as being infringed on the site, it should not be permitted to be put back up. This would require the use of technology to flag copyright content that has been notified and removed, and subsequent blocking of the flagged content. While such a system could be imposed via legislation, implementation would raise a number of technical and legal challenges. Voluntary cooperation between ISPs and right holders would offer a more flexible way of addressing this problem.

On the ISP side, concerns center on the volume of DMCA takedown requests, which has

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300 See Christopher S. Stewart, As Pirates Run Rampant, TV Studios Dial Up Pursuit, WALL STREET J., March 4, 2013 (reporting that owner of small independent film distributor “found more than 903,000 links to unauthorized versions of her films” with estimated losses of “over $3 million in revenue” and a cost to send takedown notices of “over $30,000 a year”). As the Independent Film & Television Alliance (IFTA) noted, “[w]ithout substantial financial resources to utilize digital content protection technologies such as scanning and electronic notification services on an ongoing basis . . . the current notice and takedown provisions are an insufficient mechanism for many independent producers leaving them with no real alternative protection tools.” IFTA, Comments in Response to the USPTO & NTIA NOI on Copyright Policy, Creativity, and Innovation in the Internet Economy, at 5 (Dec. 10, 2010), available at http://ssl.ntia.doc.gov/comments/100910448-0448-01/attachments/IFTA%20Submission%20to%20DOC%20NOI%20Copyright%20Policy.pdf. See also Copyright Alliance, Comments in Response to the USPTO & NTIA NOI on Copyright Policy, Creativity, and Innovation in the Internet Economy, at 15 (2010), available at http://ssl.ntia.doc.gov/comments/100910448-0448-01/attachments/Copyright%20Alliance%20filling%20in%20Internet%20Policy%20Task%20Force%20NOI%20on%20Copyright%2012%2001%202010.pdf (“Independent artists and creators find great frustration with a notice-and-takedown approach to enforcing their own rights online. [An independent filmmaker . . . estimates she spends more than two hours daily sending notices to parties engaged in infringement, with mixed results. . . . The time consumed in this daily exercise is time that could be spent creating her next film.

302 See id. at 19.

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increased significantly. Google, which as a provider of “information location tools” under the DMCA may receive more takedown requests than any other entity, reports that the number of such requests it receives for Google Search on a weekly basis has climbed into the millions. As right holders have noted, even those numbers fail to reflect the full scope of infringing content available through search results given volume limitations on the automated processes for submitting requests.

One of the primary contributors to the overall volume of notices may be the “whack-a-mole” problem described above. Another may be the increased reliance by many right holders on automated systems to help them locate infringing content and submit takedown requests. Because the large amount of infringing content on the Internet makes individual review of each item infeasible, large right holder organizations find it necessary to use automation. Moreover, content stored on certain services, such as cyberlockers, is not directly searchable; right holders must locate infringing URLs through other sites that aggregate links and then send takedown notices directly to the cyberlockers, adding a step to the process.

Other concerns about the notice and takedown system relate to erroneous infringement claims, which can affect third party interests as well as those of the ISP. In some cases, such as with DMCA take-downs of political advertisements, the goal of the takedown request may have little to do with copyright. The extent of inaccurate notices is subject to dispute, but is very small in relation to the many millions of notices sent. Some errors may be caused by the use of automated systems (particularly in those cases where the results are not verified by human review). In the case of deliberate abuse, the DMCA provides a legal remedy, enabling damage claims against any person who “knowingly materially misrepresents under this section ... that

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301 See Google Transparency Report, Removal Requests, Copyright, http://www.google.com/transparencyreport/removals/copyright/ (reporting 3.5 million requests received during the week of December 10, 2012; this number is only for takedown requests directed toward Google Search, not any other Google products such as YouTube); see also TorrentFreak, RIAA Set For Historic 10,000,000th Google URL Takedown, http://torrentfreak.com/riaa-set-for-historic-10000000th-google-url-takedown-130204/ (Feb. 4, 2013).


303 See Comments of MPAA, NMPA & RIAA to IPEC supra note 289 at 19-20.


306 Google reports, for example, that it “removed 97% of search results specified in requests” between July and December 2011, see Google, Google Transparency Report FAQ http://www.google.com/transparencyreport/removals/copyright/faq. Notably, Google reviews takedown notices and does not remove links for a number of reasons, including “not having ... enough information about why the URL is allegedly infringing; not finding the allegedly infringing content referenced in the request; deducing that the copyright removal process is being used improperly ... or fair use.” Id.
material or activity is infringing.” Courts have interpreted this language to require subjective measurement of the copyright owner’s bad faith; to require that a material misrepresentation “affect[] the service provider’s” response to a DMCA letter; and to require copyright owners to consider, in certain circumstances, whether a given use qualifies as fair use.

All of these problems taken together may be undermining the benefits of the notice and takedown system. One potential solution to ease the burdens involved and improve results could be to create best practices for identifying infringing content and sending notices, for takedown procedures, and for ensuring that infringing content once removed does not immediately reappear. This would benefit right holders, ISPs and end users alike, by supporting a more efficient and reliable notice and takedown system. To that end, the Task Force will convene a multi-stakeholder dialogue involving right holders (both large and small), ISPs, consumer representatives and companies in the business of identifying infringing content, on how to improve the operation of the notice and takedown system.

As to the issue of individual right holders and SMEs lacking the resources to effectively utilize the DMCA takedown mechanism, a possible alternate remedy may be created through a separate small claims procedure. The U.S. Copyright Office is undertaking a study at the request of Congress to assess whether and, if so, how, the current legal system hinders or prevents copyright owners from pursuing infringement claims with a relatively small economic value; and to recommend potential changes in administrative, regulatory, and statutory authority. While the study is not limited to claims involving online infringement, an alternative procedure could be useful for such claims when they involve small entities or small-scale infringements, lessening the need to rely on the DMCA notice and takedown process. The Copyright Office has published three Notices of Inquiry, held a series of public hearings in November 2012, and is scheduled to issue a final report to Congress in September 2013. The Administration supports this effort and will continue to work with the Copyright Office on this issue.

309 17 U.S.C. § 512(f)(1). Damage claims are also available for knowing misrepresentations “that material or activity was removed or disabled by mistake or misidentification.” Id.

310 Rossi v. Motion Picture Ass'n of Am., 391 F.3d 1000 (9th Cir. 2004).


(c) Database of Designated ISP Agents

A separate problem relates to the availability of accurate information on where to send a takedown notice. To be eligible for a DMCA safe harbor, service providers must identify an agent for receiving notices of claimed infringement, and provide contact information both on their own websites and to the U.S. Copyright Office.\(^{316}\) Although the Copyright Office removes an old designation and replaces it whenever new information is provided, there is no obligation for ISPs to provide updates. Because many do not in fact do so, the database is not current and reliable.\(^{317}\)

To improve the situation, the Copyright Office is proposing to implement an electronic process to replace the existing system, where filings are made either via mail or in-person.\(^{318}\) The Copyright Office would require all ISPs to file new designations of agents within one year after new regulations go into effect, and thereafter to update and/or verify the accuracy of their information on a regular basis.\(^{319}\) The Task Force supports the Copyright Office’s efforts to address this issue. As its technical capacity evolves, the Copyright Office database could become an interactive portal for DMCA notices.

### iii) Additional Enforcement Tools: Termination of Repeat Infringers’ Accounts and Subpoenas

As part of the overall bargain of the DMCA, two other tools were created to assist right holders: an obligation for ISPs to adopt and implement a policy to terminate the accounts of repeat infringers in appropriate circumstances,\(^{320}\) and a streamlined subpoena procedure to obtain identifying information about individual infringers.\(^{321}\) Since enactment of the DMCA, both have given rise to problems of interpretation,

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\(^{316}\) 17 U.S.C. § 512(c)(2). The statute requires the name, address, phone number, and e-mail address of the agent, as well as any other contact information the Register of Copyrights deems appropriate.  *Id.*

\(^{317}\) In 2010, the Software & Information Industry (SIIA) conducted a study to determine the accuracy of the contact information in the Copyright Office’s database and found a number of problems with out-of-date or unreliable information. SIIA, Comments in Response to the USPTO & NTIA NOI on Copyright Policy, Creativity, and Innovation in the Internet Economy, at 21-22. *Available at* [http://ssl.ntia.doc.gov/comments/100910448-0448-01/attachments/SIIACommentsOnTaskForceQuestions.pdf](http://ssl.ntia.doc.gov/comments/100910448-0448-01/attachments/SIIACommentsOnTaskForceQuestions.pdf). The SIIA sent out sample e-mails to designated agents listed, and nearly half were returned as undeliverable. Of those that were deliverable, many went without a response. *Id.* at 22.


\(^{320}\) 17 U.S.C. § 512(i)(1)(A). Compliance with this provision is a condition for eligibility for any of the safe harbors, along with not interfering with standard technical measures, *id.* at § 512(i)(1)(B), and designating an agent to receive notices of claimed infringement, *id.* at § 512(c)(2). Several other countries have adopted similar provisions regarding the termination of repeat infringers’ accounts. *See, e.g.*, Copyright Act of 1968 § 116AH (Australia); Copyright (Network Service Provider) Regulations 2005 § 8 (Singapore); Korean Copyright Act art. 102(1)(1) (South Korea). Other governments, including those of France, the U.K., New Zealand, and Taiwan, have adopted laws that allow for termination of repeat infringers’ accounts in the context of a graduated response system, discussed *infra* pp. 71-74.

\(^{321}\) 17 U.S.C. § 512(h).
making these provisions less useful to right holders than originally anticipated.

A service provider must meet three requirements under this provision: “(1) adopt a policy that provides for the termination of service access for repeat copyright infringers in appropriate circumstances; (2) implement that policy in a reasonable manner; and (3) inform its subscribers of the policy.”322 As to the termination of repeat infringers’ accounts, the legislative history shows that Congress believed that a “realistic threat” of losing internet access must exist as a deterrent for repeated or flagrant infringement.323 Unfortunately, three key phrases in the statute – “repeat infringer,” “appropriate circumstances,” and “reasonably implement” – have been subject to inconsistent interpretations in the courts.

Most critically, there is no clear definition of when a user must be considered a “repeat” infringer. Although some courts have said that several notices of infringement from a copyright owner alone are sufficient,324 others have disagreed.325 Requiring repeat judicial findings of infringement before a subscriber could be terminated would arguably render the statutory remedy superfluous. One leading commentator has suggested that someone could be considered an infringer either based on a court finding or if the ISP has actual knowledge of infringing conduct (beyond a right holder notice).326

Several courts have addressed the question of whether a policy has been reasonably implemented, with little consistency other than the general principle that a policy ought to carry some meaningful potential of leading to termination.327 With respect to “appropriate circumstances,” the legislative history makes reference to “different degrees of on-line copyright infringement, from the inadvertent and noncommercial, to the willful and commercial.”328 At least one court has relied on that passage to conclude that an ISP may take such considerations into account when deciding whether the circumstances are appropriate to result in termination.329 Ultimately, questions will remain about the contours of this requirement until there is either more

322 Ellison v. Robertson, 357 F.3d 1072, 1080 (9th Cir. 2004).
326 Nimmer on Copyright § 12B.10(B)(3)(c).
327 See, e.g., Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1109 (9th Cir. 2007); In re Aimster Copyright Litig., 252 F. Supp. 2d 634, 659 (N.D. Ill. 2002) aff’d, 334 F.3d 643, 655 (7th Cir. 2004); Ellison v. Robertson, 357 F.3d 1072, 1080 (9th Cir. 2004); UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099, 1116 (C.D. Cal. 2009); Flava Works, Inc. v. Gutter: No. 10 C 6517, 2011 WL 3203399, at *10 (N.D. Ill. July 27, 2011) rev’d on other grounds 689 F.3d 754 (7th Cir. 2012).
329 Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1176-77 (C.D. Cal. 2002) (noting that the types of appropriate circumstances leading to a duty to reasonably implement termination would “appear to cover, at a minimum, instances where a service provider is given sufficient evidence to create actual knowledge of blatant, repeat infringement by particular users, particularly infringement of a willful and commercial nature”).
development in the case law or alternative solutions are provided through stakeholder-negotiated understandings. Collaborative public-private efforts could help develop standards for the termination of repeat infringers, including the possibility of having a third party verify repeat infringement.

The subpoena provision of the DMCA allows right holders to obtain the identity of an alleged infringer from an ISP, in order to be able to bring a lawsuit for direct infringement.\(^3\) Courts have held that this subpoena provision does not apply to requests for the identities of P2P users of conduit ISPs, but only to users of hosting or linking ISPs.\(^4\) This result has been critiqued by some as contrary to the intention of the drafters, and the Register of Copyrights has urged that the DMCA be amended to reverse it.\(^5\) Since those decisions, right holders have instead relied on the mechanism of subpoenas issued under Federal Rule of Civil Procedure 45 to obtain identifying information of individual P2P users.\(^6\)

### C. Potential New Tools

A number of possible solutions have been identified to address the gaps and shortcomings in existing legal tools. As to problems relating to the scope of remedies and to application of the DMCA safe harbors, several initiatives have been proposed above. As to other problems, a number of solutions have already been adopted or are underway in the U.S. and elsewhere, whether in the form of legislation, private agreements or informal cooperation. But most are still in the early stages, making it difficult to assess their degree of success.

Considerable progress in curbing online infringement has been made in recent years through stakeholder cooperation. All participants in the digital economy have both a responsibility and much to gain from working together to enable a functioning marketplace, by educating the public, curbing infringement, and promoting legitimate uses of copyrighted material. Right holders can achieve positive returns, and intermediaries can lower their risk of liability and potentially enhance the competitiveness of their commercial offerings. Although some problems ultimately may require legislative solutions, voluntary initiatives are an important component of devising new ways to protect copyrights in the digital environment. The Task Force

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30 17 U.S.C. § 512(h).


encourages stakeholders to take part in existing initiatives or to develop others relevant to their own sectors.\textsuperscript{334}

The potential solutions described below – website blocking, content filtering, a “follow the money” approach, search engine demotion and delinking, and graduated response – have all been proposed or adopted in some form to address the problems of P2P file-sharing and websites dedicated to piracy, but could assist in curbing infringement in other contexts as well. While each may offer benefits, they also raise a number of concerns that would need to be resolved.

1. **Website Blocking**

One proposed method for addressing websites dedicated to piracy, and the one that has generated the most controversy recently, is directing ISPs to block the public’s access to them. Restricting U.S. access to foreign-based websites dedicated to piracy could serve to reduce infringing traffic.\textsuperscript{335} As discussed above, while under current law injunctions requiring ISPs to block foreign websites are theoretically available, they have not been sought by right holders for a number of reasons.\textsuperscript{336}

In 2011, the U.S. Congress considered legislation along these lines. The PROTECT IP Act introduced in the Senate, and the Stop Online Piracy Act (SOPA) introduced in the House, would have provided for expanded government and private enforcement actions directed toward blocking websites dedicated to piracy.\textsuperscript{337} While the bills

\textsuperscript{334} In enacting the DMCA, Congress also acknowledged the importance of voluntary agreements in addressing technological developments, conditioning ISP safe harbors on accommodating “standard technical measures” that have been “developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.” \textsuperscript{17} U.S.C. \textsuperscript{\textsection} 512(i)(1), (2). Congress recognized “technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age” and “strongly urge[d] all of the affected parties expeditiously to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals.” S. Rpt. 105-190, at 52. Although no measures have yet been identified under the DMCA provision, increasing stakeholder cooperation may lead to such a result.

A number of voluntary initiatives have already been developed, as described below. In July 2013, ICANN released a new agreement for domain name registries issuing generic top-level domains (gTLDs). Under the agreement, registries must require registrars to prohibit domain name holders from engaging in “piracy” and “trademark or copyright infringement” and to provide “consequences for such activities including suspension of the domain name.” \textit{See} ICANN, New gTLD Registry Agreement, Specification 11.3.a (July 2, 2013)\textit{ available at} http://newgtlds.icann.org/en/applicants/rgb/agreement-approved-02jul13-en.pdf. The IPEC has also stated the intent to encourage dialogue with domain name registrars and others to explore whether they might develop voluntary best practices to respond to piracy. \textit{See} 2013 Joint Strategic Plan \textit{supra} note 112 at 36.

\textsuperscript{335} The primary focus of potential solutions is on foreign-based websites, which, as described above at 40, present the most significant challenges to existing enforcement tools. \textit{See} Statement of Maria Pallante, Register of Copyrights before the Committee on the Judiciary (Nov. 16, 2011), \textit{available at} http://www.copyright.gov/docs/regstat111611.html; \textit{see also} MPAA, RIAA, & NMPA IPEC Submission \textit{supra} note 289 at 13 (noting that websites dedicated to piracy “increasingly avoid any contacts with the U.S. but are nevertheless readily accessible to the U.S. market”).

\textsuperscript{336} \textit{See} supra pp. 51-52.

differed in various respects, as initially introduced, both would have authorized the Attorney General to pursue an injunction directing ISPs that offer “last mile” Internet access services (as well as certain DNS server operators) to block access to and redirect users away from a foreign infringing site. Slightly, the original versions of the bills contained provisions that would have required ISPs to respond to DNS queries by pointing users not to the requested websites but instead to an Attorney General notice.

While the bills were supported by many right holders, the website blocking provisions provoked strong opposition, with unprecedented online activism from individuals, companies, and civil society. Some raised concerns that the DNS filtering provisions could engender threats to speech, security, and stability on the Internet, while leaving contraband goods and services accessible online. The Administration shared some of these concerns, particularly with respect to the security implications of DNS redirection. Although consideration was given to removing the provisions related to ISP injunctions while retaining the provisions on the “follow the money” approach (discussed below at 67-70) ultimately both bills were withdrawn.

Outside of the United States, some form of website blocking has been used as a tool against copyright infringement in a number of countries in recent years. In the EU, Article 8(3) of the Copyright Directive requires that Member States “ensure that

338 SOPA at § 102; PROTECT IP Act at § 3. One fundamental difference between the two bills was in how they defined the targeted websites. The PROTECT IP Act would have allowed for actions against websites “dedicated to infringing activities,” defined to cover sites with no significant use other than engaging in, enabling, or facilitating copyright infringement, circumvention of TPMs or RMI, or the sale, distribution, or promotion of counterfeit goods and services. SOPA’s private right of action would have been limited to actions against sites “dedicated to theft of U.S. property,” a more expansive category that would have permitted actions when the operator of the site “is taking, or has taken, deliberate actions to avoid confirming a high probability of the use of the U.S.-directed site to carry out” copyright infringement or circumvention of TPMs and RMI. SOPA at § 103(a)(1).


rightholders are in a position to apply for an injunction against intermediaries whose
services are used by a third party to infringe a copyright or related right.” The
Directive does not specify any particular technique to be required by such an
injunction. Courts in several Member States have applied their national legislation
implementing this provision to issue orders requiring ISPs to block access to specific
infringing websites, sometimes through DNS blocking, sometimes through IP blocking,
and sometimes without specifying the method. Blocking orders have also been
issued in several non-EU countries.

The Task Force reiterates the Administration’s view that “while . . . online piracy by
foreign websites is a serious problem that requires a serious legislative response,” we
“will not support legislation that reduces freedom of expression, increases
cybersecurity risk, or undermines the dynamic, innovative global Internet.” We
believe that solutions must be found, legislative or otherwise, but the values of free
speech and cybersecurity must not and need not be compromised. It is critical to
ensure that these values are appropriately accommodated in any legislation, court
order or voluntary action.

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Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, art. 8(3).
Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market
of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, at art. 11 (“Member
States shall also ensure that rightholders are in a position to apply for an injunction against
intermediaries whose services are used by a third party to infringe an intellectual property right, without
prejudice to Article 8(3) of Directive 2001/29/EC.”). In contrast to the DMCA, no finding of infringement
by the service provider is necessary to obtain an injunc

345 See The Netherlands, Stichting BREIN v. UPC Nederland B.V., Court of the Hague (Civil Division), Case
379 (Ch) (Feb. 28, 2013); U.K., Dramatica Entertainment Ltd. v. British Sky Broad. Ltd. [2012] EWHC 1152
(Ch) (May 2, 2012); U.K., Twentieth Century Fox Film Corp. v. British Telecommun'ns PLC. [2011] EWHC 1981
(Ch.) (July 28, 2011); Belgium, VZW Belgian Anti-Piracy Federation v. NV Telenet, Hof van Beroep [Court of
Appeal] Antwerpen, docket No. 2011/8314 (Sept. 26, 2011); Denmark, Telever v IFPI Denmark, Supreme
Court of Denmark, case 153/2009, (May 27, 2010) (; Denmark, IFPI Denmark v. Tele2 A/S Byret [City
Court] Copenhagen, docket No. F1-15124/2006 (Oct. 25, 2006); Austria, Constantin Film v UPC,
Commercial Court of Austria (May 13, 2011); Finland, IFPI Finland v. Elisa Corp., docket No. H 11/20937,
Helsinki District Court (Oct. 26, 2011); Germany, Columbia Pictures Inds., Inc. v. CB3ROB Ltd., 310 O
154/10, Landgericht Hamburg, 10th Civil Chamber (May 6, 2010); Greece, Ellinadiko.com & Music-
Bazaar.com, Athens Court of First Instance, Decision no. 4658/2012 (Nov. 7, 2011); Italy, Pirate Bay; Court
of Cassation, Third Criminal Chamber, Docket No. 40884/08 (Sept. 29, 2009); Sweden, Columbia Pictures
Indus. Inc. v. Portlane AB, Swedish Court of Appeal (May 4, 2010); see also Lukas Feller, Website Blocking
Injunctions under EU and U.S. Copyright Law—Slow Death of the Global Internet or Emergence of the Rule

346 India, Sagarika Music Pvt. Ltd. v. Dishnet Wireless Ltd., GA No. 187, CS No. 23 (Jan. 27, 2012 & Feb. 6,
2012); Israel, HttnShare.com, CSCE 3485/08, 000167/07, Haifa District Court (Feb. 25, 2008); Turkey,
(Sept. 17, 2007).

347 Victoria Espinel, Aneesh Chopra, & Howard Schmidt, Combating Online Piracy while Protecting an Open
and Innovative Internet, WhiteHouse.gov, https://petitions.whitehouse.gov/response/combating-online-
2. Content Filtering

Another tool that could be effective in curbing online infringement is filtering. Filtering can be done in different ways by different types of services, primarily at either the network or website level.

ISPs can at least in theory filter at the network level by screening all incoming network traffic to look for unique identifying marks, which could be assigned to each piece of digital content, to determine whether transmissions are authorized. As with website blocking, content filtering raises potential policy concerns related to privacy and free expression, primarily because of the possibility of the misidentification of non-infringing content and the difficulty in distinguishing between authorized and unauthorized uses. Such filtering could also raise technical concerns caused by increased “latency” (or delay) in content delivery caused by the filtering system. Any evaluation of these concerns will depend on the particular nature and implementation of the filtering technologies at issue.

Although there have been no reported cases on network-level filtering in the U.S., the European Court of Justice has struck down as overbroad under E.U. law an order requiring a Belgian ISP to install a filtering system that would monitor all communications on its network to prevent the infringement of musical works (although the court implied that a more limited filtering order might be permissible). Content filtering for online websites and services has met with more success to date. The major voluntary initiative to date that incorporates filtering relates to online sites that host user-generated content (UGC). The Principles for User Generated Content Services (the “Principles”), developed in 2007, were established by a group of private companies, including copyright owners and UGC services, in order “to foster an online environment that promotes the promises and benefits of UGC Services and protects

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350 Id. at 26-27.

351 Filtering generally relies on one of two different technologies, watermarking or fingerprinting, and can in theory be done either at the website or network level. See Rosenblatt supra note 348 at 21-25.

352 Case C-70/10, Scarlet v. Sabam [2011] at ¶¶ 47-53, 55 (rejecting the injunction because it had “no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also future works that have not yet been created at the time when the system is introduced” and would therefore “require that ISP to install a complicated, costly, permanent computer system at its own expense”).

353 User-generated content (“UGC”) has been defined as “i) content made publicly available over the Internet, ii) which reflects a certain amount of creative effort, and iii) which is created outside of professional routines and practices.” Organisation for Economic Co-Operation and Development, Participative Web: User-Created Content 4 (2007). A large number of websites and internet services feature substantial volumes of UGC. Id. at 9.
the rights of Copyright Owners.” Among other things, the Principles require UGC services to filter content actively and to ensure that their filtering technology is up-to-date. Many companies with an online presence have adhered to the UGC principles since they were first adopted.

There are also steps that individual companies can and do take to minimize infringement through their services. These can involve fingerprinting and other technologies for identifying copyrighted material, allowing it to be filtered or appropriately used under a license. Many websites employ voluntary filtering, including a number of services that are not signatories to the Principles. The most well-known is YouTube’s Content ID digital fingerprinting system, which allows right holders to submit metadata and reference files for content they own, which are compared to videos posted on YouTube. Right holders can choose to monetize the infringing files, block them, or obtain statistics on their use. Other companies offer services to fingerprint and identify copyrighted material or to “crawl” the web to find copyrighted content.

One potential constraint on such voluntary action may be a concern that voluntary filtering could result in a finding of sufficient knowledge or control of infringing activity to place the service provider outside the DMCA safe harbors. But as most filtering is accomplished through automated processes, the courts have rejected arguments that its implementation prevents safe harbor eligibility. In fact, taking such action to curb infringement can help in avoiding a finding of secondary liability. For example, the Supreme Court in Grokster noted that the service’s failure to implement a copyright filter was evidence of its intent to induce infringement. Filtering has also been imposed as a remedy in litigation against P2P services as well as sites that host or maintain pointers to infringing content. Courts in the United States

354 The Principles provide that copyright owners and UGC services should cooperate with regard to creating “content-rich, infringement-free services,” to which end they “should cooperate in the testing of new content identification technologies and should update these Principles as commercially reasonable, informed by advances in technology, the incorporation of new features, variations in patterns of infringing conduct, changes in users’ online activities and other appropriate circumstances.” Principles for User Generated Content Services, http://www.ugcprinciples.com/.

355 Id., at ¶ 3.


357 See YouTube, Content ID, http://www.youtube.com/t/contentid.


362 Grokster, 545 U.S. at 939. See also Lime Group, 784 F. Supp. 2d at 429-31; Usenet, 633 F. Supp. 2d at 153. In the Australian case against P2P file-sharing service Kazaa, the court highlighted Kazaa’s failure to implement available filtering technology. Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd, [2005] FCA 1242.
have issued injunctions requiring online services to filter out the content or pointers.

The Task Force encourages stakeholders to continue to work together to develop identification and filtering systems that are consistent with rights to due process and free expression. While filtering technology is already being deployed in a number of contexts, more can be done to improve its efficiency and accuracy. Considerable promise is offered by rapidly improving technologies for the identification of online content, which may permit more granular and tailored applications.

3. “Follow the Money” Approach

One different and promising approach against websites dedicated to piracy focuses on stemming the cash flow they need to survive.363 Payment processors and ad networks in particular are major contributors to the ability of the sites to earn a profit.364

a) Payment Processors

Websites that profit from infringing material typically rely on payment processors to process their sales. Use of well-known payment processors provides such websites with an appearance of legitimacy, and consumers may be misled into thinking the site is lawful. These websites’ operations could be substantially disrupted if their relationships with payment processors were severed. Payment processors have taken steps to accomplish this result in the United States and elsewhere.

Banks and payment processors have voluntarily initiated programs under which they crawl the internet for certain violations of their rules; this now includes intellectual property rights violations.365 In addition, in June 2011, a group of leading payment processors in the United States finalized a set of best practices to investigate complaints and stop processing transactions for sites that distribute counterfeit and pirated goods. Under these best practices, reached with the support of the

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363 This approach was included in both SOPA and the PROTECT IP Act, and received significantly less opposition than the controversial provisions on website blocking. Both bills would have allowed the Attorney General and right holders to obtain orders requiring payment processors and advertisers to cease doing business with websites dedicated to piracy. See SOPA at §§ 102(c)(2)(C)-(D) & 103(b)(1)-(2); PROTECT IP Act at §§ 3(d)(2)(B)-(C) & 4(d)(2)(A)-(B).


365 For example, Visa has implemented a policy whereby any transaction entered into the Visa system must be legal in both the Cardholder’s jurisdiction and the Merchant Outlet’s jurisdiction. Mastercard has implemented a program to endeavor to prevent signing merchants who have a history of illicit behavior. The program, called MATCH, helps assess risk prior to a member signing a merchant. See http://www.mastercard.com/ca/company/en/security_risk.html. In the areas of online gambling and online child pornography, mechanisms have been set up, through legislation and public-private partnerships, to ensure that users understand that the activity they are engaging in is unlawful, and are deprived of a convenient way to pay for their illicit activities. See, e.g., The Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5363.
Administration, the payment processors have created a mechanism easing the way for right holders to bring infringement complaints. They will state on their websites that their services will not be provided to companies that sell infringing products, and they will conduct an investigation and determine what action is appropriate when sent a request via email.

A public/private initiative on this issue has led to meaningful results in the UK. The International Federation of the Phonographic Industry (IFPI) has partnered with MasterCard, Visa, PayPal, a leading prepaid card service, the UK phone payment service regulator, and the City of London Police in a program designed to curb online music piracy. As of December 2011, 24 music services had lost their payment processing and an additional 38 websites were under investigation.

b) Online Advertisers

Many websites that sell or provide access to pirated content profit from advertisers paying for banner ads. They also may appear legitimate to consumers because the advertisements are from reputable businesses. Denying infringing websites access to lucrative advertising has the potential to starve them of funds and substantially curtail their operations.


368 In the UK, payment processors face potential liability under the Proceeds of Crime Act if they have been notified of a website’s illegal activity and continue to provide payment processing services. See PhonepayPlus, Provision of illegal music downloads using premium rate service billing, http://www.phonepayplus.org.uk/For-Business/Code-and-Help/Code-Compliance-Updates/Provision-of-Illlegal-Music-Downloads-Using-Premium-Rate-Service-Billing.aspx. See IFPI, PayPal works with police and industry to tackle copyright infringing websites (July 21 2011), http://www.ifpi.com/content/section_news/20110721.html. Best practices have also been developed to help identify infringing websites prior to notification from right holders. See also IFPI, Recording industry welcomes support by payment providers to tackle illegal online sale of unlicensed music (Mar. 2, 2011), http://www.ifpi.com/content/section_news/20110302.html; IFPI, PhonepayPlus works with premium rate industry to combat infringing websites (Nov. 2, 2011), http://www.ifpi.org/content/section_news/20111102.html; IFPI, Paysafecard works with police and industry to tackle pirate music websites (Dec. 14, 2011), http://www.ifpi.com/content/section_news/20111214.html.

369 See IFPI, PhonepayPlus works with premium rate industry to combat infringing websites (Nov. 2, 2011), http://www.ifpi.org/content/section_news/20111102.html.

370 Another type of advertising that can confuse consumers into thinking websites dedicated to piracy are legitimate is “sponsored links”; links to websites that are displayed as a secondary result when a user searches keywords in a search engine. The links that are directly responsive to the user’s search are considered “organic.” The sponsored links are generally displayed to the user because the owner of the website has purchased one or more of the keywords used by the searcher so that its link will be displayed when that keyword is used. Sponsored links may lead to both legitimate websites and websites distributing primarily pirated material. Right holders have been responding to concerns about sponsored links to pirated material primarily through trademark law. See, e.g., Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144 (4th Cir. 2012).
Several private initiatives have been launched that should further this goal.\textsuperscript{371} In 2010, the Interactive Advertising Bureau (IAB) created the Networks & Exchanges Quality Assurance Guidelines to standardize the information that advertising networks and exchanges provide to potential advertisers.\textsuperscript{372} To be certified according to the Guidelines, networks and exchanges must inventory sites with content that is prohibited from sale, including infringing material.\textsuperscript{373} The certification program will help legitimate advertisers limit the placement of their online ads to legitimate websites.

These Guidelines were followed by a Statement of Best Practices to Address Online Piracy and Counterfeiting issued by the Association of National Advertisers (ANA) and the American Association of Advertising Agencies (4A’s) in May 2012, which was supported by the Administration.\textsuperscript{374} The Statement advises marketers to include language in their media placement contracts and insertion orders to prevent ads from appearing on sites dedicated to infringement.

In July 2013, the Administration announced that a number of leading ad networks, with the support of the IAB and the Administration, had developed a set of voluntary best practices designed to cut off advertising revenue for websites dedicated to piracy.\textsuperscript{375} The signatories agree to be certified under the IAB’s Networks & Exchanges Quality Assurance Guidelines or otherwise maintain an independent vetting and auditing process and to accept and process notices from right holders alleging infringement by websites that participate in the ad network.\textsuperscript{376}


\textsuperscript{373} IAB Comments at 4.


Steps have also been taken by individual entities. In June 2011, the largest worldwide
digital advertising spender, GroupM, announced the creation of a list of 2,000 websites
hosting illegal or pirated content, which it will not use for advertising for its clients.377
According to one report, the list of banned websites has allowed GroupM to stop an
estimated $5 million of spending on those sites.378 Other efforts are underway to
develop helpful tools to assist advertisers in avoiding transactions with websites
dedicated to piracy, such as a methodology for ranking websites based on
infringement-related risk factors.379
Discussions also continue in the advertising industry about other approaches to the
piracy problem, including improved access to information about infringing sites.380
The Administration will continue to work to facilitate additional best practices that will
help reduce the profitability of online infringement.381

4. Search Engines

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
business. According to surveys, a significant amount of Internet traffic to websites is
driven by the first page of search results,382 and the top results provided by large
search engines often include many sites offering unauthorized copyrighted content.383

Technologies are being designed that can avoid unintentional infringement by
consumers who simply click on the top links in their search, without deliberately
seeking illegal content. For example, Google now excludes certain queries related to


380 Bachman supra note 378.


382 See Collin Cornwell, The Importance of Page-One Visibility (2010), available at http://www.icrossing.com/sites/default/files/page-one-visibility.pdf (finding that over 95% of site traffic arising from search engines derives from the first page of search results); Danny Goodwin, Top Google Result Gets 36.4% of Clicks, Search Engine Watch, http://searchenginewatch.com/article/2049695/Top-Google-Result-Gets-36.4-of-Clicks-Study (Apr. 21, 2011) (reporting results of studies finding that the top search results receive the most clicks).

383 According to research done in England in 2010, 23% of consumers regularly download music illegally using a search engine as their means to find the content. Harris Interactive (Sept. 2010). Research in New Zealand highlights that 54% of users who illegally downloaded music said they found the unauthorized music through a standard search engine. Ipsos MediaCT (Oct. 2011). The International Federation of the Phonographic Industry (IFPI) found that searches for the top five artists in November 2011’s Billboard Top 100 chart plus the term “mp3” (the dominant file format for digital music) resulted in the vast majority of results on the first page, on average more than 70%, constituting infringing sites. IFPI, Digital Music Report 2012, at 24, available at http://www.ifpi.org/content/library/DMR2012.pdf.
copyright infringement from its Autocomplete function, which uses algorithms to suggest complete search terms as soon as a user starts typing.\textsuperscript{384} This policy has resulted in the exclusion of notorious infringing services like The Pirate Bay from Autocomplete results.\textsuperscript{385} Search engines can also promote and/or demote certain listings within their search results. Google, for example, has begun to incorporate the number of valid DMCA takedown notices directed at a website in its search algorithm, essentially demoting repeat bad actors to lower positions in the results.\textsuperscript{386} It remains to be seen whether this approach will be effective.\textsuperscript{387}

Another possibility is eliminating direct links from search results while still leaving information about the site visible, a process known as “delinking.” This can limit unintentional consumer infringement by requiring the affirmative step of entering an address manually, rather than by a simple click of the mouse.

In the United Kingdom, a private sector group has proposed a voluntary code of practice for search engines that includes a number of these approaches, including the demotion of infringing sites in search engine rankings and boosting links to sites with legitimate content.\textsuperscript{388} The UK government has chaired these discussions between right holders, internet companies and other stakeholders.\textsuperscript{389}

5. \textbf{Graduated Response}

One approach to curbing infringement that has gained ground internationally in recent years has been “graduated response.”\textsuperscript{390} This approach addresses infringing uses that cannot be reached through notice and takedown, as they do not involve content hosted by an ISP. It is designed to reach individual users of unauthorized P2P file-sharing and other decentralized services, in a less punitive, more scalable and educational way than bringing lawsuits.

\textsuperscript{384} See Google, \textit{Inside Search: Autocomplete}, \url{http://support.google.com/websearch/bin/answer.py?hl=en&answer=106230} (explaining without elaboration that Google excludes “a narrow class of search queries related to pornography, violence, hate speech, and copyright infringement”).


\textsuperscript{387} One recent study by the recording industry has been skeptical. See RIAA, \textit{Google’s Move to Demote Pirate Sites – Is it Really Working?} \url{http://riaa.com/blog.php?content_selector=riaa-news-blog&content_selector=riaa-news-blog&blog_selector=Googles-Move-&news_month_filter=2&news_year_filter=2013} (Feb. 21, 2013).


\textsuperscript{389} \textit{Id}.

\textsuperscript{390} Early versions of this approach were sometimes referred to as a “three-strikes” system, based on the fact that they would impose a penalty of termination of a user’s account after three warnings. As the approach has evolved, this terminology has become inapt, as different versions require different numbers of warnings and the penalties involved are generally less draconian. See, e.g., Peter K. Yu, \textit{The Graduated Response}, 62 FLA. L. REV. 1373, 1379-80 (2010).
While graduated response systems vary, they share the following common attributes: Right holders participate in public peer-to-peer networks to find Internet Protocol (IP) addresses that are being used to share their works without authorization. They then provide the addresses and information regarding the date and time of the infringement to the appropriate ISP. The ISP notifies the subscriber responsible for the account associated with that IP address that the account has been identified as engaging in infringing conduct. These initial notifications generally convey educational messages that provide the subscriber with information about how to secure her account and where to find legitimate services. If the same account is identified again, the warnings are escalated (or “graduated”). After a certain number of warnings, if the subscriber persists in ignoring them, there will normally be consequences of some sort to deter further infringement.

In the United States, the existing DMCA obligation to terminate accounts of repeat infringers has been supplemented by a voluntary Copyright Alert System spelling out a process for handling repeat infringement short of termination. In July 2011 a group of content owner representatives and major Internet service providers entered into an agreement aimed at addressing infringement taking place over P2P file-sharing networks. The agreement created a common framework and best practices for alerting and educating subscribers about copyright infringement and taking measures to deter those who ignore repeated alerts. The Copyright Alert System is being implemented by the Center for Copyright Information (CCI), and began operating in February 2013. The Administration has encouraged this type of private agreement and supported this initiative.

Some U.S. universities have also adopted an internal graduated response program to comply with the U.S. Higher Education Opportunity Act (HEOA) of 2008, which requires them as a condition of federal funding to develop copyright enforcement plans that

392 There is some evidence that service providers are voluntarily becoming more active in identifying and removing infringing content because it is in their interest to do so. See, e.g., Annemarie Bridy, Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement, 89 OR. L. REV. 81 (2010); Jeremy F. DeBeer & Christopher D. Clemmer, Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?, 49 JURIMETRICS (Oct. 2009).
394 See CCI, Memorandum of Understanding, Copyright Alert System, at § 4 (July 6, 2011), available at http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf; see also CCI, Copyright Alert System FAQs http://www.copyrightinformation.org/resources-faq/copyright-alert-system-faqs. The Copyright Alert System has three components—notice to the ISP, a series of escalating alerts to the subscriber, and the imposition of a range of possible mitigation measures within the discretion of the ISPs.
395 CCI, Copyright Alert System Set to Begin http://www.copyrightinformation.org/uncategorized/copyright-alert-system-set-to-begin/. The CCI’s mission also includes educating the public about the laws governing the online distribution of copyrighted works and collecting and disseminating data regarding online infringement and the lawful means available to obtain copyrighted works. MOU, supra note 394, § 1 & Attachments A, B and D.
include technology-based deterrents to infringement. This can be a valuable educational tool to encourage college students to engage in legal consumption of copyright works online, and best practices have been developed to assist institutions in implementing their plans.

Several governments, including those of France, the United Kingdom, New Zealand, Taiwan, and South Korea, have incorporated some form of graduated response into their domestic laws. The process and elements vary from country to country, and the ultimate sanctions can include temporary suspension of the account, capping of bandwidth, monetary fines, or disclosure of information sufficient to allow the filing of a lawsuit. A private graduated response program has also been adopted in Ireland, based on settlement of a lawsuit between Ireland’s largest ISP and the Irish Recorded Music Association.

397 The HEOA conditions participation in federal financial aid programs on certification that the participating institution has developed plans to effectively combat the unauthorized distribution of copyrighted material, including through the use of a variety of technology-based deterrents. 20 U.S.C. § 1094(a)(29)(A).


399 France’s graduated response system, overseen by the High Authority for the Distribution of Works and the Protection of Rights on the Internet (HADOPI), was the first. Loi n° 2009-1311 du 28 octobre 2009 [Law No 2009-1311 of 28 October 2009] (France) JO, 29 October 2009, 18290 art 7, amending Code de la Propriete Intellectuelle [Code of Intellectual Property] (France) art L335-7. HADOPI processes complaints of copyright infringement, sends warnings to accused infringers, and after the third warning may refer the case to a court for judicial review. The ultimate sanctions to be applied by the court originally included temporary suspension of the specific account used to infringe, but in July 2013 that sanction was eliminated, leaving in place the possibility of fines. See Rhonda Richford, France Drops Key Part of Controversial Anti-Piracy Law, HOLLYWOOD REP., July 9, 2013, available at http://www.hollywoodreporter.com/news/france-drops-key-part-controversial-582266.

Digital Economy Act 2010 (UK) c 24.

Copyright (Infringing File Sharing) Amendment Act 2011 (NZ).

Copyright Act of Taiwan, art. 90quinquies.

Korean Copyright Act art. 133bis, 133ter.

In New Zealand, sanctions may include monetary damages up to $10,000 or eventually account termination. Copyright (Infringing File Sharing) Amendment Act 2011 at 1220, 122R (NZ); see also James & Wells, Controversial Copyright (Infringing File Sharing) Amendment Bill Passed into Law, http://www.jaws.co.nz/media-centre/2011/4/14/controversial-copyright-infringing-file-sharing-amendment-bill-passed-into-law.aspx (Apr. 14, 2011). In the U.K., the most recent proposed code would allow a right holder to seek a court order to learn information about the subscriber sufficient to pursue a direct infringement suit following the third notification to a subscriber in one year. See Ofcom, Online Infringement of Copyright and the Digital Economy Act 2010: Notice of Ofcom’s Proposal to Make by Order a Code for Regulating the Initial Obligations (June 26, 2012), available at http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf. And in South Korea, ISPs can be ordered to suspend accounts. Korean Copyright Act arts. 133bis, 133ter.

As with the Copyright Alert System launching in the United States, the Irish graduated response system is overseen by private parties. Under this system, a subscriber’s account can be suspended for 7 days after a third notice and for up to a year if infringement continues. Eircom, eircom Statement on Illegal File Sharing. http://pressroom.eircom.net/press_releases/article/eircom_statement_on_illegal_file_sharing/.
Graduated response systems may be preferable to existing legal remedies in a number of respects. They provide useful information and offer an opportunity for infringers to reform without suffering any consequences, and they safeguard the subscriber’s identity from the copyright owner’s scrutiny. If they work well, they should serve as educational campaigns, deterring infringement and avoiding the need to apply penalties. They are not, however, without their critics. Chief among the concerns expressed are ensuring adequate due process, the potential for overbroad coverage, and the proportionality of the sanctions.\textsuperscript{406} The Task Force believes that all of these concerns should be appropriately accommodated in any graduated response system.\textsuperscript{407} If this is done, when combined with other approaches aimed at illegal sites and services, graduated response can make a meaningful contribution to moving consumers to legal options. We note that there are already initial indications of a positive impact in countries that have implemented this approach.\textsuperscript{408} The Task Force is encouraged by the progress that has been made through the cooperative efforts of right holders, ISPs, payment processors, ad networks and search engines to develop the voluntary initiatives discussed in this section. We encourage interested stakeholders to continue identifying and developing voluntary solutions that benefit all parties and that are consistent with the principles of privacy, free speech, competition, and due process. The Task Force will provide assistance to the IPEC as needed to help foster further developments in this area. Moreover, as requested in the IPEC 2013 Joint Strategic Plan, the USPTO will institute studies, based on public input and with the assistance of other relevant agencies, examining the effectiveness of voluntary initiatives in curtailing online infringement.\textsuperscript{409}

D. Public Education and Outreach

One important component of efforts to curb online infringement is increased public


\textsuperscript{407} See Victoria Espinel, \textit{Working Together to Stop Internet Piracy}, WhiteHouse.gov, \url{http://www.whitehouse.gov/blog/2011/07/07/working-together-stop-internet-piracy} (July 7, 2011). The Copyright Alert System in the United States, for example, provides opportunities for appeal and arbitration, addresses only residential accounts (and not, for example, Internet cafes), and permits a range of moderate responses within the discretion of each individual ISP. See CCI, \textit{What is a Copyright Alert?} \url{http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert}.


education and outreach, both domestically and internationally. Such educational efforts should be balanced to include information about both rights and exceptions. Many right holder organizations, user groups and other stakeholders have developed educational materials for parents and teachers regarding the value of copyright and to help educate young people about how to legally access content online and use copyrighted materials. Right holders have engaged in public awareness campaigns, with public service announcements about the impact of copyright infringement.

Nonprofit and educational organizations too are increasingly focusing on copyright education, including the benefits of fair use, working with a variety of audiences.

The U.S. Government has also been active in providing public education in the digital space, including on copyright issues. In addition to HEOA (discussed above at 72-73) this includes a number of initiatives by the U.S. Copyright Office and the USPTO’s Global Intellectual Property Academy (GIPA). And enforcement actions themselves can serve to raise public awareness of the line between legal and illegal Internet uses, and the risks associated with infringing sites.

Finally, another promising tool for raising awareness is the identification for consumers of websites that offer legal content, extrapolating from existing certification programs that verify the legitimacy of media manufacturing plants. One example of such a program is the UK-based Music Matters, which provides a “trustmark” to inform consumers that the marked websites are licensed. Similar programs exist in France and Japan. This information can help consumers identify


414 The Content Delivery and Security Association (CDSA), for example, established the first Anti-Piracy Certification and Compliance Program for the manufacture of optical media (CDs, DVDs, and CD-ROMS), analog media (tape and vinyl), and virtually every recording media format. See CDSA, Copyright and Licensing, http://www.cdsaoonline.org/copyright-and-licensing-verification-program.


the wide variety of legal services available online. It can also be used by advertisers to make placement decisions or by search engines to raise a website's status in search results.

E. Conclusion and Next Steps

- **There are a number of legal tools already available to address online infringement.** Government actions like *Operation In Our Sites*, and private enforcement through litigation and DMCA remedies provide effective avenues to combat many types of infringement.

- **Current tools have a number of gaps and shortcomings, making them ineffective in some contexts.**

- **It is important to find workable fixes for these gaps and shortcomings.** While online infringement will never be eliminated entirely, the goal is to curb it sufficiently to support robust legitimate markets for copyrighted content.

- **There is no “silver bullet”; any successful plan to curtail online infringement will be multi-faceted.** It will be necessary to rely on a combination of legal tools, technology, private sector cooperation, and public outreach and education, along with the continued development of appealing legal offerings.

- **The Task Force recommends a number of steps to be taken to address the issues raised in this Section:**
  - The Task Force urges Congress to enact legislation adopting the same range of penalties for criminal streaming of copyrighted works as now exists for criminal reproduction and distribution;
  - The Task Force will solicit public comment and convene roundtables regarding the application of statutory damages in the context of individual file-sharers and secondary liability for large-scale online infringement;
  - The Task Force will establish a multi-stakeholder dialogue on how to improve the operation of the DMCA’s notice and takedown system;
  - The Task Force supports the Copyright Office’s improvement of the DMCA database of designated agents and its examination of possible small claims procedures to assist individual creators and SMEs in enforcing their rights online; and
  - The Task Force supports and encourages the development of voluntary private sector initiatives to improve online enforcement, and will monitor and evaluate the effectiveness of such initiatives to determine whether additional action should be considered.
  - The Task Force encourages enhancing public education and outreach efforts to inform consumers about both rights and exceptions and to encourage the use of legitimate online services.
COPYRIGHT, POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY

IV. Ensuring an Efficient Online Marketplace

The Internet has enabled the development of a vastly improved copyright marketplace, both by making more works available to more people in new and diverse ways, and by streamlining the process of licensing. These two aspects are intertwined: improving the efficiency of licensing should lead to increased availability of content through a wider range of services, and the more robust the online market becomes, the more incentive there will be to further improve licensing mechanisms. This Section will examine the Internet’s growing use as a distribution platform and some of the issues that have been identified as hindering its full potential. It will then describe the evolution of online licensing mechanisms, and conclude by suggesting ways in which the government may facilitate the further development of this marketplace.

A. Delivering the World’s Creativity to Consumers Legally

Great strides have already been made toward fulfilling the Internet’s promise, with legitimate services delivering a wide variety of works in a wide variety of formats. Yet there is still more to do. Consumers increasingly expect to have access online to the full range of content available in physical media, anywhere in the world. Today, some creative sectors have made more progress than others in fulfilling that expectation.

Moreover, the link between market development and piracy cannot be overlooked. Despite the increasing number of legitimate online services, such services continue to be hobbled by unfair competition from unlicensed ones. Many legitimate services are not yet profitable; others may have the potential for much greater growth. As discussed above, effective enforcement can create a more level playing field, enabling new business models to attract investment and thrive.

The converse is also true: the availability of licensed offerings is an important element in combatting online infringement. Providing consumers with attractive legal avenues to enjoy copyrighted content in the manner of their choosing decreases the lure of illegitimate services. Some promising indications of this effect are already being seen. For example, a 2011 survey in the United States found that “[o]f the 30% of Americans who have ‘pirated’ digital music files, 46% indicated that they now do so less because of the emergence of low-cost legal streaming services . . . . The comparable figure for video . . . is 40%.”417 And 40% of a survey group who had downloaded music via P2P

file-sharing networks in 2011 reported having stopped or downloaded less music in 2012; the biggest reason for the change was “the increase in free and legal music streaming services.”

1. Today’s Legal Offerings

U.S. creative industries are at the forefront in licensing new business models providing consumers with online access to copyrighted works. The following gives a snapshot of where these efforts stand today, in this country and around the world.

After the initial rapid take-off of P2P file-sharing (at a time when few lawful online services existed), the music sector was the first to launch online services. Beginning with the success of iTunes, the number of licensed digital music services grew globally from less than 60 in 2004 to more than 500 in 2011. These services offer consumers a wide array of experiences, including à la carte downloads, monthly subscription services, free ad-supported streaming, music bundled with a mobile phone, cloud storage, digital radio services, and online simulcasts. Most of these services are available on computers, smartphones, and other consumer electronic devices.

The film and television industry has been slower to launch online, but is quickly making headway. The Motion Picture Association of America (MPAA) lists on its website over 50 sites where consumers can legitimately access movies and TV shows online in the United States. The largest services are already well-established,

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expanding their programming lineups, and serving consumers in the United States and abroad.\textsuperscript{423} More broadcast content is expected to be available online in the near future as copyright owners conclude negotiations with online video distributors.\textsuperscript{424}

The online publishing market is also rapidly growing. The number of licensed services in the United States has increased dramatically in the past few years. According to a recent analysis, in mid-2011 over 1.5 million e-books were available online from legitimate sources,\textsuperscript{425} including substantial catalogs of e-textbooks.\textsuperscript{426} And libraries provided an alternate route; the American Library Association reports that in 2011 66% of public libraries offered free access to e-books, an increase of almost 30 percentage points over the previous two years.\textsuperscript{427} The market for scientific, technical, and medical (STM) journals has changed fundamentally since publishers began creating online distribution platforms starting in the mid-1990s. Virtually all STM journals are now available online, and in many cases publishers and others have retrospectively digitized hard copy material back to their first volumes.\textsuperscript{428}

The advent of cloud computing is transforming the business and entertainment software markets. Software delivery is shifting from a traditional licensing model where applications are installed on-premise to a per-user cloud-based software-as-a-service (SaaS) model.\textsuperscript{429} According to some forecasts, by 2015, service-enabled software will account for approximately 24% of all new business software purchases, and 13.1% of worldwide software spending will be for SaaS delivery.\textsuperscript{430} And whereas

\textsuperscript{423} Netflix reports that it is available in 40 countries, \url{http://ir.netflix.com/}; Amazon's Lovefilm operates streaming video on demand in the UK, Germany, Sweden, Denmark, and Norway, \url{http://corporate.blog.lovefilm.com/}; and YouTube is available in over 50 countries, \url{http://www.youtube.com/yt/press/statistics.html}. The Copyright Office recently found that individual broadcast programs are now widely available through streaming video services, a-la-carte downloads, and websites maintained by the major broadcast networks and sports rights owners. See Copyright Office, \textit{Satellite Television Extension and Localism Act: Section 302 Report} at 121-27 (Aug. 29, 2011), available at \url{http://www.copyright.gov/reports/section302-report.pdf}.


entertainment software products ten years ago consisted almost entirely of console or PC games sold on disc, today game publishers have leveraged cloud capabilities to enable a range of new online business models and service offerings. This explosion of online services has added up to a substantial new revenue source for the creative industries. In 2004, the worldwide recording industry earned $420 million from digital services; in 2012 it earned $5.6 billion. Online distribution of movies, which generated worldwide revenues of $1.2 billion in 2006, is projected to reach $7.6 billion by 2015. In late 2012, e-books represented 20% of the overall market for trade sales, with net e-book sales in that sector increasing significantly from 12.6% in 2011. Annual revenues generated from English-language STM journal publishing are estimated at about $9.4 billion in 2011 (up from $8 billion in 2008), with the digital share representing about 60%. For the entertainment software industry, purchases of digital content accounted for 31 percent of game sales in 2011, generating $7.3 billion in revenue in North America alone.

It must be recognized, however, that these positive results represent only part of the picture; the question is whether all combined sources of revenue provide sufficient incentives for the production of creative works, despite the decline in physical sales in many sectors. A healthy transition to the online marketplace will be complete when overall sales, regardless of business model, can support thriving creative industries.

2. Impediments to Licensing for Online Distribution

Despite the growth of licensed online services, a number of impediments have slowed

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431 Entertainment Software Association Submission to IPEC 6-7 (Aug. 10, 2012).


435 STM Report, supra note 428 at 99.


437 Even for those creative sectors where digital sales outpace physical sales today, total revenues may be significantly lower than they were in the pre-Internet environment. See Eric Pfanner, Music Industry Sales Rise, and Digital Revenue Gets the Credit, NY TIMES, Feb. 26, 2013, available at http://www.nytimes.com/2013/02/27/technology/music-industry-records-first-revenue-increase-since-1999.html?_r=0 (reporting worldwide music revenue increasing in 2012 for the first time since 1999 to $16.5 billion, still far less than the highest historical revenue figures of $38 billion).
their development. These relate primarily to whether the statutory licenses and collective licensing mechanisms for music still function properly in the digital age; how pre-digital contract terms should be interpreted; and how to ensure the ability to license smoothly across sectors and borders.

a) The Complexity of Music Licensing

As noted above, the music industry has been at the forefront of new online distribution models. Before launching, however, digital music services must navigate an often-confusing licensing landscape, featuring a combination of statutory licenses and direct negotiations with right holders. Music licensing is particularly complex due to the existence of two categories of works – sound recordings and musical compositions – which must be separately licensed, the fact that the different rights in musical compositions are administered by different entities, and long-standing limitations on the ability to license multiple musical compositions in a single transaction.

i) Licensing Musical Compositions

While there is a statutory license in U.S. law that permits the reproduction and distribution of musical compositions (known as a “mechanical license”), there is no statutory license for their public performance. Moreover, the different rights are administered by different entities in the U.S., sometimes by the right holders directly and sometimes through a collecting society. This structure raises a number of issues.

First, the statutory license for the mechanical right is work-specific. Unlike many other countries, there is no blanket mechanical license for musical compositions, which would allow an entire repertoire to be licensed in a single transaction. Services that wish to use the Section 115 mechanical license must notify every right holder of their intention to rely on the license. Moreover, although a virtually complete set of public performance licenses for musical compositions can be obtained through licenses with the three PROs, antitrust law constrains the PROs from licensing the mechanical

438 17 U.S.C. § 115. As with the Section 114 statutory license, the rates for the mechanical license are set through proceedings before the Copyright Royalty Board.

439 Collective management organizations known as Performing Rights Organizations (PROs) exercise the public performance right on behalf of the publisher. The publisher directly administers the mechanical right (i.e., reproduction and distribution rights). The Harry Fox Agency (HFA) serves as a centralized administrator for the mechanical right for a number of publishers, but many publishers’ works are not available through HFA.

440 17 U.S.C. § 115(b). There are likely thousands of different right holders with whom to negotiate. See David Touve, Music Startups and the Licensing Drag MUSIC BUS. J., Dec. 2012, available at http://www.thembj.org/2012/12/music-startups-and-the-licensing-drag (“Estimates of the number of points of contact for direct licensing or ‘noticing’ musical work copyrights vary substantially: from as few as 500 points, to as many as 6,000, to in excess of 30,000 potential points of contact.”). Of course, services may choose to negotiate directly with individual right holders, but that still requires contacting every right holder.

441 The recent decisions by some major publishers to withdraw their rights from the PROs for streaming presents a potential complication moving forward. See Ed Christman, Universal Music Publishing Plots Exit
rights for works in their repertoire.\footnote{See, e.g., United States v. Am. Soc’y of Composers, Authors and Publishers, Civ Action No. 41-1395, Second Amended Final Judgment at IV(A) (S.D.N.Y. June 11, 2001.)}

In addition, new digital services are blurring the traditional lines between the different exclusive copyright rights. Many services engage in combined acts of reproduction, distribution, and public performance, and their users often enjoy hybrid formats for accessing music. As a result, the different administrators of different rights can all demand payment for a single use of a single right holder’s work. As the Register of Copyrights explained in 2005:

[I]n many situations today it is difficult to determine which rights are implicated and therefore whom a licensee must pay in order to secure the necessary rights. Faced with demands for payment from multiple representatives of the same copyright owner, each purporting to license a different right that is alleged to be involved in the same transmission, licensees end up paying twice for the right to make a digital transmission of a single work. . . . But whether or not two or more separate rights are truly implicated and deserving of compensation, it seems inefficient to require a licensee to seek out two separate licenses from two separate sources in order to compensate the same copyright owners for the right to engage in a single transmission of a single work.\footnote{Statement of Marybeth Peters, the Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary (June 21, 2005), http://www.copyright.gov/docs/regstat062105.html.}

This potential duplication has since been addressed to some extent. Courts have held that some digital distributions, including transmission of downloads and ringtones, do not implicate the public performance right, and therefore only the mechanical right must be secured.\footnote{See U.S. v. Am. Soc’y of Composers, Authors & Publishers, 485 F. Supp. 2d 438, 443-44 (S.D.N.Y. 2007) (transmitting digital downloads does not require public performance license); In re Cellico P’ship, 663 F. Supp. 2d 363, 374 (S.D.N.Y. 2009) (transmitting ringtones does not require public performance license).} But as digital uses continue to evolve, there will be continued questions over which rights are implicated by new services and how to deal with overlaps given the different licensing agencies for each right.

Stakeholders are attempting to resolve some of these issues through private negotiation. For example, in April 2012, organizations representing music publishers, major record labels and digital music services reached an agreement setting mechanical royalty rates for a variety of cutting-edge music services, such as paid locker services and music bundles.\footnote{See David Oxenford, Music Royalty Settlement Announced on Mechanical Royalties – Not a Decision on Webcasting Rates, Broadcast Law Blog, http://www.broadcastlawblog.com/2012/04/articles/music-royalty-settlement-announced-on-mechanical-royalties-not-a-decision-on-webcasting-rates/ (Apr. 11, 2012).} The music publishers, record companies, and digital music services also agreed that non-interactive streaming does not implicate the
mechanical right, only the public performance right.\textsuperscript{446} Although the threat of “double dipping” for other services was avoided by including a formula whereby any payments to the PROs for the public performance license can be subtracted from the royalties due for the mechanical license, a user would still need to make more than one stop to clear the necessary public performance and mechanical rights for a single use of a single composition.\textsuperscript{447}

\textit{ii) Licensing Sound Recordings}

The licensing of sound recordings is generally less complex. In the case of certain non-interactive digital transmissions, there is a statutory license for the public performance of sound recordings.\textsuperscript{448} Licenses for interactive transmissions and other uses like permanent downloads and ringtones must be individually negotiated.\textsuperscript{449} Although these negotiations can be time-consuming, only a discrete number of licensors need to be approached – currently three major labels and several aggregators that negotiate on behalf of groups of independent labels.\textsuperscript{450} Moreover, the sound recording right holders can grant all of the necessary licenses for a given use of a sound recording, while as discussed above, the mechanical and performance rights for musical works must generally be negotiated separately.

One complication is that sound recordings fixed prior to 1972 are not subject to federal copyright law but rather are protected by a variety of potentially inconsistent state laws. The Copyright Office recently concluded that federal protection should be extended to pre-72 recordings for a variety of reasons, including to allow users to benefit from exceptions in Title 17 and to facilitate licensing.\textsuperscript{451}

\textit{iii) Practical Impact on Licensing}

The relative complexities of music licensing can be illustrated by listing the licenses that must be obtained before non-interactive and interactive streaming services can launch.


\textsuperscript{447} Oxenford \textit{supra} note 445.

\textsuperscript{448} 17 U.S.C. § 114. \textit{See also} supra pp. 10-12.


\textsuperscript{450} See, \textit{e.g.}, Touve \textit{supra} note 440 (estimating that “[b]etween ten and fifteen sound recording deals, across major owners and aggregators of these rights, are believed to be necessary for initial service launch”).

\textsuperscript{451} See U.S. Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings 175-77 (Dec. 2011), available at \url{http://www.copyright.gov/docs/sound/pre-72-report.pdf}. 
<table>
<thead>
<tr>
<th>Examples</th>
<th>Sound Recording Licenses</th>
<th>Musical Composition Licenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-interactive streaming</td>
<td>Sirius XM, Pandora, iHeartRadio</td>
<td>Public performance licenses from PROs or individual publishers</td>
</tr>
<tr>
<td></td>
<td>Section 114 statutory license</td>
<td></td>
</tr>
<tr>
<td>Interactive streaming</td>
<td>Spotify, Rhapsody</td>
<td>Individual licenses from record companies and aggregators</td>
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In the years since the creation of the sound recording performance statutory license, a wide variety of non-interactive services have entered the market, providing a plethora of new ways for consumers to enjoy music online. The royalties they pay for the use of sound recordings have become an important and growing revenue stream for right holders and creators, amounting to over $450 million distributed in 2012.

The interactive streaming market is also growing in the United States, but there is untapped potential. Some of the more prominent interactive services have launched in the United States long after launching in other countries, or have not yet launched in

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452 Mechanical licenses are required for interactive streaming services because the services implicate both the reproduction and distribution rights.

453 The Copyright Office maintains a list of services that are operating under the statutory license, which shows over 3600 such services as of mid-July 2013. See U.S. Copyright Office, Notice of Use of Sound Recordings, [http://www.copyright.gov/licensing/114_list.pdf](http://www.copyright.gov/licensing/114_list.pdf).


455 In 2011, the last year that the RIAA separately reported revenue for interactive subscription services, revenues were $241 million, from approximately 2 million subscribers. See RIAA, 2011 Year-End Shipment Statistics [available at](http://76.74.24.142/FA8A2072-6BF8-D44D-89C8-C5E55BBC050.pdf). The 2011 revenue represented a 13.5% increase from 2010. In 2012, the RIAA began reporting for the first time the combined total revenue from interactive services and streaming services that operate outside of the statutory license, which includes services like YouTube. Combined, those services generated $570.8 million in 2012 and $359.2 million in 2011. See RIAA 2012 Year-End Shipment Statistics [supra] note 432.
the United States 456 Although there are 20 million worldwide subscribers to interactive services, only 3.4 million are in the United States.457 Moreover, as these services have grown in recent years, increasing attention is being paid to whether artists are being adequately compensated for the use of their works.458

The question is whether more can and should be done to streamline online music licensing. In 2005, Congress held hearings on music licensing reform. Although subsequent progress has been made to improve the licensing landscape, such as the April 2012 agreement, a number of concerns remain.459 As the Register of Copyrights explained in 2005, the United States would benefit from being in line with the many countries where “[collective management] organizations license both the public performance right and the reproduction right for a musical composition, thereby creating more efficient ‘one-stop-shopping’ for music licensees and streamlined royalty processing for copyright owners.”460 Creating such a system in the U.S. would, however, entail revisiting the antitrust constraints that prevent PROs from licensing both the mechanical and public performance rights.461

The Task Force believes that collective licensing, implemented in a manner that respects competition, can spur rather than impede the development of new business models for the enjoyment of music online. The time may be ripe to revisit whether legislative adjustments can help modernize the existing mechanical license for the digital age, for example by converting it into a blanket license, permitting a single license for a complete repertoire.462 Congress has recently indicated that it will be exploring music licensing issues during the upcoming term, including questions of mechanical license reform, the digital sound recording right, and a broadcast performance right.463 The Task Force anticipates that legislation on one or more of


460 Statement of Marybeth Peters, the Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary (June 21, 2005) [http://www.copyright.gov/docs/regstat062105.html](http://www.copyright.gov/docs/regstat062105.html).


462 See Maria Pallante, Manges Lecture supra note 31 at 20.

463 See Statement of Representative Goodlatte, Music Licensing Part One: Legislation in the 112th Congress, Hearing Before the Subcommittee on Intellectual Property, Competition, and the Internet, Serial No. 112-
these issues will be introduced and looks forward to the Administration providing its views to Congress at the appropriate time.

b) **Old Contracts, New Uses**

Another problem relates to the application of old contracts to new forms of exploitation. Can transfers of rights that were executed prior to the development of digital network technologies be read to cover these new distribution methods, which may displace prior uses and offer significant revenue streams? This too is the latest iteration of a recurring question. “Disputes about whether licensees may exploit licensed works through new marketing channels made possible by technologies developed after the licensing contract – often called ‘new-use’ problems’ – have vexed courts since the advent of the motion picture.”

Recent litigation over these issues has occurred in the context of how decades-old publishing contracts determine the right to publish e-books, and the digital exploitation of musical compositions. As each case generally turns on the specific language of the relevant contract, the courts will continue to develop a body of precedent.

c) **Licensing Across Borders**

In recent years, there has been much discussion of problems with cross-border online licensing. The issue arises from the tension between the territorial nature of rights and the increasingly global nature of online markets. The primary focus has been in the EU, where concerns have been raised that a lack of pan-European licensing could threaten the goal of a single European market with access on equal terms for consumers in all Member States. Considerable work is being done to address these concerns, including a pending directive on collective management.

In order to fully realize the potential of the Internet as a global marketplace for

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copyrighted content, it is important to ensure the availability of smooth cross-border licensing. While distribution platforms will each have their own strategies for where to commence operations and when, they will want maximum flexibility in making those decisions. The international initiatives discussed below seek to advance that goal.

B. Moving Licensing Online

Online licensing can be more efficient and less time-intensive than traditional licensing involving real-time negotiations. Although such negotiations may continue to work well for mass commercial services, automated online licensing can be better suited to the Internet’s countless low-value transactions. Many individual uses of copyrighted works in the digital environment would involve disproportionate transaction costs to determine ownership and seek clearances. For example, a university professor wishing to reproduce a painting on the cover of his course materials may not be able to invest the time and effort required to find and negotiate with the right holder, despite being willing to pay a reasonable fee. While online licensing is in its early days, mechanisms have begun to develop in a number of areas, most of them limited to a single category of work.

A number of these mechanisms are available in the music industry. For mechanical rights, there are services that enable recording artists to obtain online the mechanical licenses they need to record a cover of a song. Online licensing is also available for public performance rights in musical works. Both ASCAP and BMI allow a music service to obtain a public performance license online—with some limitations depending on the size of the service. Other services provide online “sync” licensing for sound recordings and the musical compositions they contain to permit their use in audiovisual works including videos, commercials, and video games. And a number of independent record labels offer licensing of their catalogs directly through the Internet.

469 The services operate as a one-stop shop for mechanical licenses for a catalog of musical works. A performer submits information about the song(s) she wants to record and how she wants to distribute the recording(s) and the services will get the license. See, e.g., Limelight at https://www.songclearance.com/about/; HFA Songfile at http://www.harryfox.com/public/songfile.jsp. These services are focused on independent recording artists.


472 See, e.g., http://magnatune.com/info/licensing. An essential aspect to this type of online licensing is that these companies control the rights to both the master sound recordings and the underlying musical composition, thus permitting a one-stop licensing shop. Other record labels, such as the large U.K.-based Beggars Group, allow for the online submission of licensing requests, but only for the sound recording rights. See Beggars Group Licensing Requests at http://licensing.beggars.com/.
Online licensing is available for other types of works as well, in a wide variety of contexts and for a wide range of uses.\footnote{A less common approach focuses on the type of user rather than the type of work. Christian Copyright Licensing International, for example, offers online licenses for various uses of different types of works to churches (e.g., worship songs for congregational singing, stream or podcast recordings of worship music, license to use movie clips in church). See CCLI at \url{http://www.ccli.com/WhatWeOffer/ChurchCopyrightLicense.aspx}.} For print works, the Copyright Clearance Center (CCC) has led in providing sophisticated licensing tools.\footnote{CCC is the organization in the U.S. that licenses and collects royalties for the reproduction of written works. See Copyright Licensing Experts - Copyright Clearance Center at \url{http://www.copyright.com/content/cc3/en.html}. For more information on reprographic rights organizations, see WIPO Collective Management in Reprography (2005), available at \url{http://www.wipo.int/freepublications/en/copyright/924/wipo_pub_924.pdf}.} In addition to an annual blanket license, CCC offers a “pay-per-use” service that allows users to obtain permissions online to use content from works published not only in the United States but in a number of countries around the world.\footnote{See Copyright Clearance Center at \url{http://www.copyright.com/search.do?operation=show&page=ppu}; Copyright Clearance Center, Pay-Per-Use Services at \url{http://www.copyright.com/content/dam/cc3/marketing/documents/pdfs/Search-Instructions-PPU.pdf}.} CCC also offers a service called RightsLink that allows individual right holders to provide automated licenses directly from their own websites.\footnote{RightsLink at \url{http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions/rightslink.html}.}

Services such as Getty Images, Flickr (a website hosting user-uploaded images), and Corbis enable online licensing of images and videos, with some available for a flat fee based on the size of the image, some subject to additional royalties, and some offered royalty-free.\footnote{See, e.g., Getty Images, License Information at \url{http://www.gettyimages.com/Corporate/LicenseInfo.aspx?isource=usa_chp_userAssistance_licensing}; Flicker at \url{http://www.gettyimages.com/creative/frontdoor/flickrphotos?isource=usa_nav_images_whatsnew_flickr}; Corbis Motion at \url{http://www.corbismotion.com}; Corbis Images at \url{http://www.corbisimages.com}.} Museums are also increasingly offering licenses online for reproductions of at least some of the works in their collections.\footnote{See, e.g., Art Institute of Chicago Images at \url{http://www.artinstituteimages.org/index.asp}; Art Resource at \url{http://www.artres.com} (offering license for images of the collections of a large number of museums, including the Metropolitan Museum of Art and the National Portrait Gallery).}

One innovative and well-known mechanism for online licensing by any type of right holder is the Creative Commons. Creative Commons was founded to address an unserved need: making it possible for copyright owners to grant blanket licenses to the public as a whole specifying ways in which their works may freely be used without payment. Three of the six current licenses are limited to non-commercial uses, and all are subject to the owner receiving credit. Creative Commons licenses are available for all categories of works, can be tailored as appropriate to the copyright owner’s

\begin{itemize}
\item Creative Commons at \url{http://creativecommons.org/}. The Creative Commons licenses were inspired in part by open source software and borrow some of the principles of those licenses. See Creative Commons – History at \url{http://creativecommons.org/about/history}; CC Wiki – Frequently Asked Questions at \url{http://wiki.creativecommons.org/FAQ#Can_I_use_a_Creative_Commons_license_for_software.3F}. Cf. Open Source Initiative – The Open Source Definition at \url{http://opensource.org/osd} (in the context of functional software, providing a blanket license permitting free redistribution, access to the source code and permission to create derivative works which are subject to the same terms as the original work).
\end{itemize}
preferences, and provide machine readable metadata.

C. The Basic Building Blocks: Global Rights Information

The most basic prerequisite for obtaining licenses is reliable, up-to-date information about who owns what rights in what territories. Users need to find the right holders from whom to obtain permission, and right holders or their representatives need to be contacted to determine terms of use. As online businesses seek licenses for large repertoires of works to be offered in multiple countries in a variety of formats, and as multimedia uses become more common, the need for comprehensive globally-linked databases is growing.

1. Access to Ownership Information

The U.S. Copyright Office and some foreign governments operate public registration systems that provide relevant information as to owners of rights. In addition, many private sector organizations have databases of such information, some but not all of which are open to the public. As a result of this combination of resources, described below, much information is currently available. Nevertheless, significant gaps remain.

a) Public Registries

There is clear public value from a registry of claims to copyright, giving would-be users notice of who claims what rights. The United States has long had such a system, beginning at a time when there were legal requirements for registration. Today, copyright protection applies automatically to “original works of authorship fixed in any tangible medium of expression,” whether or not they are registered with the Copyright Office. Registration still provides meaningful benefits, however; it gives public notice of the claim to rights, and provides the owner with a certificate of registration serving as prima facie evidence of title and validity. Moreover, registration is required for U.S. works before a civil infringement suit can be brought, and a failure to register in a timely manner will limit the available remedies for infringement.

The Copyright Office also records documents related to transfers of ownership, and other documents that “pertain to a copyright” such as licenses, contracts and

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480 Copyright Act of 1909 at §§ 9-22; Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541, §§ 401-412. Those statutes generally required formal copyright notices and mandatory registration based on the type of work.


484 17 U.S.C. §§ 408-412 (statutory damages and attorney’s fees are not available in a suit involving a work that is not registered by “the earlier of 3 months after the first publication of the work or 1 month after the copyright owner has learned of the infringement”).
certificates of corporate title. \textsuperscript{485} Since 1988, recordation has been voluntary, but again there are statutory incentives to do so. \textsuperscript{486}

The Copyright Office makes all registrations and recordations publicly available in physical forms and also through an online catalog for those works registered or recorded from 1978 to the present. Today more than 80 percent of applications for registration are filed electronically; those that are not are converted into digital form and made available online as well. \textsuperscript{487} The online Copyright Office Catalog contains approximately 20 million records for works registered and documents recorded with the Copyright Office since 1978. \textsuperscript{488}

For pre-1978 registrations, the Copyright Office maintains approximately 45 million physical cards, which are reproduced in a \textit{Catalog of Copyright Entries} (CCE), published in printed format and on microfiche. The CCE does not, however, include pre-1978 recordations. It is available to the public at the Copyright Office, as well as at a number of libraries throughout the United States and online at the Internet Archive. \textsuperscript{489} In addition, for a fee, the Copyright Office staff will search the registration and other recorded documents concerning ownership of copyright and provide a written report.

As a result of this history, the Copyright Office records are useful but limited sources of ownership information. Specifically, the records: (1) do not provide comprehensive coverage of all copyright-protected works; (2) give only certain facts existing at the time of registration or recordation; \textsuperscript{490} (3) are not yet all available online; and (4) relate to the treatment of copyrights under U.S. law only, including as to rights and term of protection. Nevertheless they represent an important starting point for finding the owners of many works, particularly those of commercial value whose owners are likely to want a public record of their claims.


\textsuperscript{486} As with the prior registration requirement, when the United States implemented the Berne Convention, it eliminated mandatory recordation for transfers of ownership. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, 2857. The benefits of recordation include the following: (1) under certain conditions, recordation establishes priorities between conflicting transfers, or between a conflicting transfer and a nonexclusive license; (2) recordation establishes a public record of the contents of the transfer or document; and (3) recordation of a document in the Copyright Office provides the advantage of “constructive notice,” (i.e., members of the public are deemed to have knowledge of the facts stated in the document and cannot claim otherwise). See U.S. Copyright Office, Circular 12 \textit{supra} note 485 at 5.


\textsuperscript{488} See U.S. Copyright Office, Circular 23: \textit{The Copyright Card Catalog and the Online Files of the Copyright Office available at} http://www.copyright.gov/circs/circ23.pdf at 2. Because the Catalog does not contain the underlying documents recorded, however, it generally cannot be relied on to provide complete ownership information. Users or their agents can go to the Copyright Office to review the physical documents.

\textsuperscript{489} See id.

\textsuperscript{490} Copyright registrations generally contain the following elements: (1) title; (2) author(s); (3) copyright claimant or owner; (4) dates of creation, publication, and registration; (5) the category of work; and (6) registration number. See id. Recordations show only the facts reflected on the recorded documents. See U.S. Copyright Office, Circular 12 \textit{supra} note 483.
The Copyright Office is aware of the legal and technological challenges that affect the quality and usefulness of its database, and has been deeply engaged over the past year with a multitude of stakeholders and technical experts to identify innovative improvements and business-to-business relationships that may be possible to pursue. It is examining ways to make registration easier for certain types of works including groups of related works and content disseminated online, such as website pages and blogs. It is also taking forward projects to improve online registration and recordation, as well as the scope, accuracy and searchability of the public databases. These efforts will clearly make the U.S. public database more and more useful going forward, and it is important to ensure that the Copyright Office has sufficient resources to accomplish them. The Task Force supports the Copyright Office in examining the many business, legal, and technological means that may serve to improve copyright registration and recordation in the United States.

While the United States is not the only country with a public registration system, ours is the most extensive and publicly accessible. Other countries may register only certain categories of works or only recently created works, may not record transfers, and may not make the data available online. Moreover, these systems exist as islands; no infrastructure has yet been put in place to allow them to communicate with each other. WIPO has noted that “[t]he absence of voluntary national registration systems, together with the lack of communication or interaction among them, results in a highly asymmetric international scenario.”

Given the benefits of a public registration system, particularly in the global network environment, calls have recently been made to reinstate a registration requirement in the United States and elsewhere. The major obstacle to doing so is the existing framework of international treaties containing a prohibition on imposing formalities as

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491 Priorities and Special Projects _supra_ note 487 at 13; _see also_ U.S. Copyright Office, _Technological Upgrades to Registration and Recordation Functions_ at _http://www.copyright.gov/docs/technical_upgrades/_.

492 Priorities and Special Projects _supra_ note 487 at 15; Copyright Matters, _Copyright digitization: Moving right along!_ (Mar. 22, 2013) at _http://blogs.loc.gov/copyrightdigitization/2013/03/copyright-digitization-moving-right-along/_.

493 Reportedly, a U.S. certificate of registration is often relied on by courts in other countries as probative evidence of ownership and/or the validity of a copyright.

494 Of the 48 WIPO member states with copyright registration systems, most do not record ownership transfers, and the majority of registries are not interconnected to other public or private copyright data systems. Only 16% have a public online search facility. WIPO, _Summary of responses to the Questionnaire for Survey on Copyright Registration and Deposit Systems_ Response to Question 1, Summary of Response, Annex A.4, p.3 available at _http://www.wipo.int/export/sites/www/copyright/en/registration/pdf/a4_charts.pdf_.

495 WIPO, _Copyright Registration and Documentation_, available at _http://www.wipo.int/copyright/en/activities/copyright_registration/index.html_.

496 Proponents of reinstatement have also pointed to the low standards for originality, the automatic nature of copyright protection, and the current long duration of rights. _See, e.g._, Christopher Sprigman, _Reform(alizing) Copyright_, 57 STANFORD L. REV. 484 (2004); James Gibson, _Once and Future Copyright_, 81 NOTRE DAME L. REV. 167 (2005).
a condition to the enjoyment or exercise of rights. Amending these treaties, even if possible politically and logistically, would be a task of many years. Nevertheless there is much that can and should be done more immediately to improve the coverage and utility of existing registration systems, promote the development of new and complementary ones, and ensure appropriate links between them. Among other things, consideration should be given to finding additional ways in which copyright owners can be incentivized to register their claims.

In today’s world, with the prevalence of blogs and social networks, as well as online financial transactions, members of the public are increasingly accustomed to using the Internet in their daily lives as a communications and marketing tool. Submitting an online registration application for examination can be as simple as clicking a link, and the benefits of publicly marking one’s claim are amplified as it reaches the global Internet audience. Moreover, additional incentives may be provided without violating the prohibition on formalities, for example through further calibration of remedies and the availability of enhanced licensing options. The Task Force supports examination of such enhanced incentives for using the public registration and recordation systems administered by the Copyright Office.

b) Private Databases

There are also many private databases of ownership information in countries around the world, maintained by right holder membership organizations and other entities. What follows is an overview of major ongoing initiatives, involving databases already available or in development.

i) Membership Organizations

Collective management organizations are an important resource for rights information. Given their role in collecting and distributing royalties, they need to ensure that the information is kept accurate and up-to-date, and to provide a mechanism for resolving disputes.

The most extensive online databases are in the music field. In the United States, the three PROs have databases covering all compositions in their respective repertoires available to the public on their websites. ASCAP’s database is called ACE and is available at [https://www.ascap.com/Home/ace-title-search/index.aspx](https://www.ascap.com/Home/ace-title-search/index.aspx). BMI’s database is called the BMI Repertoire and is available at [http://repertoire.bmi.com/startpage.asp](http://repertoire.bmi.com/startpage.asp). SESAC’s repertory database is available at [http://www.sesac.com/Repertory/Terms.aspx](http://www.sesac.com/Repertory/Terms.aspx).

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497 Berne Convention at art. 5(2); TRIPS at art. 9; WCT at art. 3; WPPT at art. 20. The formalities originally included in the Berne Convention, “created considerable difficulties for authors and courts alike. . . . [I]t was possible for an author to lose protection under the Convention by reason of a trivial omission, such as failure to deposit the requisite number of copies of his work . . . . Accordingly, the logic of abolishing formalities altogether became more and more compelling.” SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND 308 (Oxford University Press 2006).

498 See, e.g., 17th Annual BCLT/BTLJ Symposium, Reform(alizing) Copyright for the Internet Age? (Apr. 2013) [http://www.law.berkeley.edu/formalities.htm](http://www.law.berkeley.edu/formalities.htm).

As a result, the ownership of almost all musical compositions available for licensing in the United States can be found on one of these four websites. 

As to sound recordings, the data offered to the public is not as comprehensive. SoundExchange, the collective management organization for the public performance of sound recordings in the United States, lists sound recordings whose uses have been reported to it for payment purposes, together with the artist and label. Because SoundExchange administers the collection and distribution of performance royalties collected under the Section 112 and 114 statutory licenses for all sound recording right holders and performers, rather than representing particular right holders pursuant to agreements, it does not have a catalog of works to make available. And because its database is derived from information reported by the services subject to the statutory licenses, its accuracy and completeness is dependent on the quality of those reports.

In the audiovisual field, some limited online databases are maintained by U.S. labor unions. Their establishment was the result of a DMCA provision ensuring that purchasers of rights in motion pictures produced under a collective bargaining agreement would be responsible to pay residuals despite a lack of legal privity. Purchasers are deemed to have knowledge that a motion picture was produced under a collective bargaining agreement, making them subject to residual obligations, if the union makes such information available through its website. As a result, several unions, including the Writers Guild of America, West (WGAw), the Directors Guild of America (DGA), and the Screen Actors Guild-American Federation of Television and Radio (SAG-AFTRA), make available online databases that identify the original producers of motion pictures. While this information is helpful, the original producer may no longer own the work and the databases do not purport to be comprehensive.

Progress has also been made in publishing and the visual arts. CCC has a database on its website where members of the public can ascertain the publishers of the works in its catalog. The Photographer Registry, a joint project of several photographers associations, provides a database of information that is searchable by photographer name and by URL. And information as to many visual works of art is available online through Artists Rights Society (ARS), a licensing and monitoring organization for over 50,000 visual artists in the United States. Again, however, these lists are not

503 Id.
507 The list of represented artists is available at http://www.arsny.com/complete.html. Instructions for obtaining a license are available at http://www.arsny.com/procedures.html. There is not an option for clearing rights online, but requests can be made via email.
comprehensive.


\section*{ii) Other Private Databases}

Other entities have also developed online databases of ownership information.\footnote{In 2011, WIPO released a survey of “private copyright documentation systems.” See WIPO, Survey of Private Copyright Documentation Systems and Practices (2011), available at \url{http://www.wipo.int/meetings/en/2011/wipo_cr_doc_ge_11/pdf/survey_private_crdocystems.pdf}. The report provides information on private copyright registries, which serve primarily as resources for right holders by allowing them to register their works as a way of generating verifiable third-party evidence of “the date of creation of a very precisely identified work” as an alternative to voluntary public registries like the Copyright Office, and private documentation systems, which include the kind of databases discussed in this paper and generally “provide useful information, which may (for example) complement the search for a right-holder or vehicle meaningful licensing details (to human beings and computers).” \textit{Id.} at 24.} The recently launched Digital Public Library of America provides metadata for the digital collections of numerous libraries, museums, and archives throughout the United States, with links to access individual photographs, writings, movies and sound recordings.\footnote{Digital Public Library of America, \url{dp.la}. The access to the individual works is determined by the underlying collections that are participating in the project.} As to print media, the Open Library, a project of the non-profit Internet Archive, seeks to build a web page for every book ever published.\footnote{Open Library, \url{http://openlibrary.org/}.} Although it does not provide contact information, it identifies the author and provides a link to the author’s website if available, as well as each edition’s publisher. The online WATCH (Writers, Artists, and Their Copyright Holders) database provides contact information for works by numerous U.S. and U.K. authors.\footnote{Harry Ransom Center, The University of Texas, \url{http://norman.hrc.utexas.edu/watch/about.cfm}.} Another database still in beta, the Copyright Registry, allows users to search for copyright ownership information for images on the Internet through the URL where the image is located.\footnote{Copyright Registry, \url{http://www.c-registry.us/pages/index.php?plID=20}.}

\section*{2. Connecting the Dots: Integrating Databases Across Borders and Sectors}

As is clear from the above overview, existing databases have various limitations. They do not link different types of copyrighted works that may be incorporated into a multi-media product. Nor are there links between databases covering rights in different territories. We do not yet have a network of databases with global, comprehensive
reach using interoperable standards to communicate with one another.\footnote{These shortcomings have been described and analyzed in two papers prepared for the U.K. government. Richard Hooper, Rights and Wrongs: Is copyright licensing fit for purpose for the digital age? (Mar. 2012), available at \url{http://www.ipo.gov.uk/dce-report-phase1.pdf} (“Hooper Report I”); Richard Hooper and Ros Lynch, Copyright works: Streamlining copyright licensing for the digital age (July 2012), available at \url{http://www.ipo.gov.uk/dce-report-phase2.pdf} (“Hooper Report II”). As noted in the Hooper Report I, one of the main problems in copyright licensing is “[t]he lack of common standards and of a common language for expressing, identifying and communicating rights information across the different creative sectors and across national borders.” Hooper Report I at 7.}

\textit{a) Global Information Resources}

Work is being done to address these issues, so far primarily in the music sphere. One leading example is a planned Global Repertoire Database (GRD) for musical works, spearheaded and funded by music publishers and collective management organizations. The GRD is intended to provide a single, comprehensive and authoritative source of information about the ownership and control of musical works worldwide.\footnote{Global Repertoire Database, \url{http://www.globalrepertoiredatabase.com/}.} It will accept registrations directly from publishers, composers and collective management organizations, and maintain a database of those registrations, with protocols to resolve disputes in ownership claims.\footnote{Hooper Report II supra note 514 at 41.} An operational GRD with some data is anticipated to be available in 2015.\footnote{PRS for Music, \textit{Global Repertoire Database makes strong progress with plans for 2013 well underway} (Jan. 24, 2013) available at \url{http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/GlobalRepertoireDatabasemakesstrongprogresswithplansfor2013wellunderway.aspx}; see also Hooper Report II supra note 514 at 42.} In the field of sound recordings, PPL, the U.K. collective management organization, is in the process of building a Global Recordings Database. It has already compiled a database with information on over 5.6 million recordings released in the U.K. and is in the process of working with major record companies and a range of overseas music licensing companies to expand it to include worldwide data.\footnote{Tim Ingham, \textit{License to Thrill}, \textit{MUSIC WEEK} (Aug. 8, 2012); see also Hooper Report II supra note 514 at ¶¶ 67-70. The PPL database is available at \url{http://repsearch.ppluk.com/ARSWeb/appmanager/ARS/main?cont=A}.}

There are also a number of databases that are operated by groups of collective management organizations that provide right holder information for multiple countries. These databases are not, however, publicly accessible, and are primarily designed to help the organizations find right holder information for works in other participating organizations’ repertoires. Examples include the International Documentation on Audiovisual works (IDA),\footnote{IDA Communication Space, \url{http://www.ida-net.org/index.php}.} and the Musical Works Information Database (WID),\footnote{Musical Works Information Database, \url{http://www.widb.com/default.asp}.} both owned by the International Confederation of Societies of Authors and Composers (CISAC), which is composed of a group of collective management organizations from around the world.

Globally-linked databases can serve as a platform for cross-sector and cross-border
licensing. In 2011, a consultant commissioned by the U.K. government to review the country’s intellectual property laws recommended the creation of a Digital Copyright Exchange (DCE), or “a network of interoperable databases to provide a common platform for licensing transactions.”521 A subsequent report on how best to implement this recommendation proposed in 2012 to create

a not-for-profit, industry-led Copyright Hub based in the UK that links interoperably and scalably to the growing national and international network of private and public sector digital copyright exchanges, rights registries and other copyright-related databases, using cross-sectoral and cross-border data building blocks and standards, based on voluntary, opt-in, non-exclusive and pro-competitive principles.522

The Copyright Hub’s focus would not be on the high-value licensing that the Hooper Report found was already occurring with relative ease, such as the licensing of the catalog of a major record label by a digital music service. Instead, it is intended to focus “on the very high volume of automatable, low monetary value transactions coming mostly from the long tail of smaller users – the small digital start-up company wanting to use music and images and text creatively for its customers, the teacher in the classroom, a user posting a video on YouTube.”521 The project will be led and primarily funded by industry, with the government playing a facilitating and advisory role.524 A launch group was established in late 2012, and the Copyright Hub’s initial test phase went online in July 2013.525

Another cross-border initiative is WIPO’s International Music Registry (IMR). The IMR is a collaborative process involving stakeholders from all parts of the music sector.526 Unlike the GRD or the Global Recording Database, its goal is not to create an independent database, but rather to promote the advancement of music rights databases, and facilitate coordination between them, in order to develop robust information sources that can be easily used to obtain licensing information.527 In other words, “[t]he IMR seeks to create an international system that provides a single access point to all the different rights management systems used around the world.”528 To date, WIPO has released a detailed scoping study and is conducting a series of roundtables on the IMR’s scope and structure.529

521 Hargreaves Report supra note 33 at 33.
522 Hooper Report II supra note 514 at ¶ 7.
523 Id. at ¶ 8.
525 See The Copyright Hub, http://www.copyrighthub.co.uk/.
b) Standards

A key component in creating interoperable databases and licensing platforms is the implementation of standards infrastructures. Common standards will facilitate linking databases and ensuring that accurate rights information can be communicated across sectors and borders. A range of standards already exist primarily focused on creating unique identifying information for works. Although a comprehensive review is beyond the scope of this paper, the more notable standards include: (1) International Standard Recording Code (ISRC), which identifies sound recordings; (2) the International Standard Work Code (ISWC), which identifies musical compositions; (3) International Standard Audiovisual Number (ISAN), which identifies films, television shows, and other audiovisual works; and (4) International Standard Book Number (ISBN), which identifies books. Other standards have been developed for purposes beyond identification, including improving licensing and distribution of royalties.

In light of these myriad standards across multiple types of works, it would be helpful to develop universal standards to streamline licensing, distribution, and payments. One goal of the WIPO IMR is to help develop such standards in the music context. In Europe, the European Publishers Council with partners from a range of content sectors has formed the Linked Content Coalition (LCC), focused on developing and implementing standards infrastructures to enable cross-industry and cross-border licensing. The LCC determined that this requires: (1) registries (i.e., the data of who owns what); (2) exchanges (i.e., the services providing the transactional interface between owners and users); and (3) a standardized communication layer (i.e., the standardized identification, metadata and messaging to communicate between the registries and the exchanges). Because in its view the registries and exchanges should be and have been created by right holders, organizations, and entrepreneurs in response to market development, the LCC is focusing on the missing link – the standardized communication.

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533 See ISAN (International Standard Audiovisual Number), http://www.isan.org/portal/page?_pageid=168,1&_dad=portal&_schema=PORTAL.


535 Creative Commons licenses, for example, have standardized machine-readable elements that rely on the CC Rights Expression Language. See About the Licenses – Creative Commons at http://creativecommons.org/licenses/. DDEX is a partnership between record labels, collective management organizations, and digital service providers that has developed standards used primarily to improve efficiency in processing sales and usage data. See DDEX, http://ddex.net/.


537 See Linked Content Coalition – FAQ, http://www.linkedcontentcoalition.org/#faq/cxed. As the LCC recently explained, “[t]he objective is to create something that would achieve what the banking sector’s ‘IBAN’ achieves. The IBAN allows transactions to take place between banks all over the world despite each
framework, which it is testing in collaboration with the European Commission and has made available for peer review.\textsuperscript{538}

D. Role of Government

Building the online marketplace is fundamentally a function of the private sector, and that process is well underway.\textsuperscript{539} In order to achieve its full promise, however, there remains a need for more comprehensive and reliable ownership data, interoperable standards enabling communication among databases, and more streamlined licensing mechanisms. Moreover, inefficiencies and structural anomalies in the complex music licensing system may need reform.

The Task Force expects that the private sector will continue to make progress toward resolving these issues. In the interim, there may be an appropriate and useful role for government in facilitating the process, whether by removing obstacles or taking steps to encourage faster and more collaborative action.

One possible area for government involvement is helping to provide better access to standardized rights ownership information. Already work is being done to improve the reliability of the public registration and recordation systems, but additional educational efforts and stronger incentives could further increase the use of the system and enhance its comprehensiveness. The expertise and resources of the private sector could also be drawn on to create innovative public/private partnerships improving or linking rights databases.

With respect to creating new platforms for online licensing, such efforts should continue to be primarily driven by the industries involved. But there may be ways in which the U.S. government can play a helpful role on both the domestic and international fronts. This could include pursuing the concept of a digital copyright hub similar to that under discussion in the U.K., launching the kind of multi-stakeholder dialogue recently launched in Europe as part the “Licences for Europe” bank having their own internal systems.” Linked Content Coalition, News Release, Commission-Backed Project To Boost Digital Content Forges Ahead (Nov. 19, 2012) available at http://media.wix.com/ugd/bff7bc_b0233171da77396c3d436a98a1f5adff.pdf.


539 Legislation introduced in Congress in 2012 contained a provision directing the Librarian of Congress, in consultation with the PTO and IPEC, to submit a report to Congress “that provides a set of recommendations about how the Federal Government can facilitate, and possibly establish, a global music registry that is sustainably financed and consistent with World Intellectual Property Organization obligations.” Internet Radio Fairness Act of 2012 (IRFA), H.R. 6480 at § 7. The PROs opposed this provision as “wholly unnecessary, particularly in light of ongoing international database initiatives led and funded by the world’s PROs, with the participation of music publishers and music users, to establish just such a registry”, and urged Congress to “allow the ongoing privately-driven initiative to proceed without government interference.” Letter to Honorable Bob Goodlatte and Honorable Mel Watt at 4 (Nov. 19, 2012), available at http://www.ascap.com/Press/2012/~/media/Files/Pdf/press/FINAL%20PRONSA%20response%20to%20Music%20HearingChaffetz%20bill%20111912.pdf.
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initiative,\textsuperscript{540} as well as participating in the development of international initiatives such as WIPO’s IMR, and facilitating the involvement of U.S. stakeholders. The Task Force will solicit comments and convene roundtables on what role the government can or should play to improve and take forward the online licensing environment.

E. Conclusion and Next Steps

- **There has been tremendous growth in the online copyright marketplace.** In recent years, numerous services have launched across copyright sectors to provide consumers with unprecedented access to content in a wide variety of formats.

- **Some obstacles remain, particularly in the area of music licensing.** The complexity of different works, different licensing mechanisms, and different administrators of different rights has led to overlaps and inconsistencies that may be impeding the development of legitimate services.

- **The Internet holds great promise in streamlining licensing transactions.** Online licensing mechanisms can significantly reduce the cost and difficulty of obtaining permissions, particularly for small-scale individual uses.

- **Access to reliable and comprehensive ownership information is essential.** Although information about rights ownership is publicly available from many sources, the databases are limited in scope and are not integrated or interoperable.

- **The Task Force recommends a number of steps to be taken to address the issues raised in this Section:**
  - The Task Force will provide input into any Congressional review of music licensing, particularly with respect to the mechanical license for musical compositions;
  - The Task Force supports the Copyright Office’s work in improving the registration and recordation systems and supports the provision of enhanced incentives for using these systems; and
  - The Task Force will solicit public comment and convene roundtables regarding an appropriate role for the government to help to improve the online licensing environment.

V. Conclusion

Continued engagement with all stakeholders is critical to evaluating and refining our national copyright policy. Accordingly, the Department of Commerce’s Task Force will seek further public input on the issues identified in this report to determine how the current copyright framework can be improved to serve creators, right holders, service providers, consumers, innovation, and national economic goals.

\textsuperscript{540} See Licences for Europe, Structured stakeholder dialogue 2013 at \url{http://ec.europa.eu/licences-for-europe-dialogue/} (focusing on four areas: “Cross-border access and portability of services; User-generated content and licensing; Audiovisual sector and cultural heritage; [and] Text and data mining.”)
Appendix A: Summary of Recommendations and Issues for Further Discussion and Comment

1. Issues on which the Task Force reiterates a previous Administration call for action

   • Extending the public performance right for sound recordings to cover broadcasting.
     o For over thirty years, the Administration and Copyright Office have made repeated calls to create a public performance right for the broadcasting of sound recordings. Apart from the inability to obtain compensation in the United States, this omission has had a real impact on the balance of payments from abroad. While broad public performance rights are enjoyed by owners of sound recordings in most other countries, U.S. sound recording owners and performers have been unable to collect remuneration for the broadcasting of their works in those countries, due to the lack of reciprocal protection here.

   • Adopting the same range of penalties for criminal streaming of copyrighted works to the public as now exists for criminal reproduction and distribution.
     o While the willfully infringing reproduction and distribution of copyrighted works can be punished as a felony, willful violations of the public performance right are punishable only as misdemeanors. This discrepancy is an increasingly significant impediment to the effective deterrence and criminal prosecution of unauthorized streaming. Since the most recent updates to the criminal copyright provisions, streaming (both audio and video) has become a significant if not dominant means for consumers to enjoy content online. The Administration and the Copyright Office have both called on Congress to amend the Copyright Act to ensure that illegal streaming to the public can be punished as a felony in the same manner as other types of criminal infringement.

2. Additional issues on which the Task Force supports Congressional or regulatory attention, without specifying particular solutions

   • Assessing the appropriateness of different rate-setting standards for the public performance of sound recordings by different types of digital music services.
     o Any reconsideration should focus broadly on the interests of all involved parties, taking into account the impact on creators and right holders as well as on different types of services.

   • Reforming music licensing, with particular focus on the mechanical license for musical compositions.
     o The Task Force believes that collective licensing, implemented in a manner that respects competition, can spur rather than impede the development of new business models for the enjoyment of music online.
The time may be ripe to revisit whether legislative adjustments can help modernize the existing mechanical license for the digital age, for example by converting it into a blanket license, permitting a single license for a complete repertoire. Congress has recently indicated that it will be exploring music licensing issues during the upcoming term, including questions of mechanical license reform. The Task Force looks forward to the Administration providing its views to Congress at the appropriate time.

- Ensuring that consumers have the ability to unlock their cell phones, subject to applicable service agreements.
  - The decision in the most recent DMCA rulemaking not to continue the exemption for cell phone unlocking as applied to newly purchased phones has raised controversial issues of telecommunications policy. The Administration has made clear its position “that consumers should be able to unlock their cell phones,” while respecting the process undertaken by the Librarian of Congress. The Administration and Library of Congress agree that the DMCA rule-making process “was not intended to be a substitute for deliberations of broader public policy.

3. Issues on which the Task Force will solicit public comments or establish multi-stakeholder dialogue, or on which it recommends additional work:

- The legal framework for the creation of remixes.
  - The Task Force will solicit public comment and convene roundtables on issues related to the creation of remixes. Many remixes will qualify as fair use, or be covered by existing licenses. The question is whether the creation of remixes is being unacceptably impeded by legal uncertainty. There is today a healthy level of production, but clearer legal options might result in even more valuable creativity. Is there a need for new approaches to smooth the path for remixes, and if so, are there efficient ways that right holders can be compensated for this form of value where fair use does not apply? Can more widespread implementation of intermediary licensing play a constructive role? Should solutions such as microlicensing to individual consumers, a compulsory license, or a specific exception be considered? Are any of these alternatives preferable to the status quo, which includes widespread reliance on uncompensated fair uses?

- The relevance and scope of the first sale doctrine in the digital environment.
  - The Task Force will solicit public comment and convene roundtables on issues related to the first sale doctrine in the digital environment. The first sale doctrine as currently formulated does not apply to digital transmissions, and the Copyright Office concluded in 2001 that extending the doctrine to the digital environment was not advisable. Since the Copyright Office’s examination in 2001, much has changed.
a world of increasingly digital distribution, the traditional field of application of the first sale doctrine may disappear, and the resale market become obsolete. The question is whether there is a way to preserve the doctrine’s benefits, allowing the equivalent of sharing favorite books with friends, or enabling the availability of less-than-full-price versions to impecunious students. Will the market provide these opportunities, and if so, how? And are there any changes in technological capabilities that would alter any of the Copyright Office’s 2001 conclusions?

- The application of statutory damages in the context of individual file-sharers and secondary liability for large-scale online infringement.
  - The Task Force reiterates the importance of statutory damages in online copyright enforcement, but believes that there are certain areas where recalibration of their scope may be appropriate. To that end, we will seek public comment and convene public discussions regarding the application of statutory damages in the context of: (1) individual file-sharers; and (2) secondary liability for large-scale online infringement.

- Improving the operation of the DMCA’s notice and takedown system.
  - Although the notice and takedown system has generally worked well with respect to traditionally hosted online content, both right holders and ISPs have identified a number of ways in which its operation can become unwieldy or burdensome. One potential solution to ease the burdens involved with the notice and takedown system and improve results could be to create best practices for identifying infringing content and sending notices, for takedown procedures, and for ensuring that infringing content once removed does not immediately reappear. This would benefit right holders, ISPs and end users alike, by supporting a more efficient and reliable notice and takedown system. To that end, the Task Force will convene a multi-stakeholder dialogue involving right holders (both large and small), ISPs, consumer representatives and companies in the business of identifying infringing content, on how to improve the operation of the notice and takedown system.

- Supporting, monitoring, and evaluating the effectiveness of appropriate voluntary private sector initiatives to improve enforcement of rights online, to determine whether additional action should be considered.
  - The Task Force is encouraged by the progress that has been made through the cooperative efforts of right holders, ISPs, payment processors, ad networks and search engines to develop the voluntary initiatives discussed in this section. We encourage interested stakeholders to continue identifying and developing voluntary solutions that benefit all parties. The Task Force will provide assistance to the IPEC as needed to help foster further developments in this area. Moreover, as requested in the IPEC 2013 Joint Strategic Plan, the USPTO will institute
studies, based on public input and with the assistance of other relevant agencies, examining the effectiveness of voluntary initiatives in curtailing online infringement.

- Providing enhanced incentives for using the public registration and recordation systems administered by the Copyright Office.
  - In today’s world, with the prevalence of blogs and social networks, as well as online financial transactions, members of the public are increasingly accustomed to using the Internet in their daily lives as a communications and marketing tool. Submitting an online copyright registration application for examination can be as simple as sending an email, and the benefits of publicly marking one’s claim are amplified as it reaches the global Internet audience. Moreover, additional incentives may be provided without violating the prohibition on formalities, for example through further calibration of remedies and the availability of enhanced licensing options.

- Promoting enhanced public education and outreach to curb online infringement.
  - Increased public education and outreach, both domestically and internationally, is an important tool to help stop infringement. Such educational efforts should be balanced to include information about both rights and exceptions. Many right holder organizations, user groups and other stakeholders, including the U.S. government, have developed educational materials for parents and teachers regarding the value of copyright and to help educate young people about how to legally access content online and use copyrighted materials.

- The appropriate role for the government, if any, to help the private sector improve the online licensing environment.
  - The Task Force expects that the private sector will continue to make progress toward resolving online licensing issues. In the interim, there may be an appropriate and useful role for government in facilitating the process, whether by removing obstacles or taking steps to encourage faster and more collaborative action. One possible area for government involvement is helping to provide better access to standardized rights ownership information. With respect to creating new platforms for online licensing, such efforts should continue to be primarily driven by the industries involved. But there may be ways in which the U.S. government can play a helpful role on both the domestic and international fronts. The Task Force will solicit comments and convene roundtables on what role the government can or should play to improve and take forward the online licensing environment.
4. Issues currently being addressed by other actors which the Task Force supports and on which it will provide input as appropriate:

- **Copyright Office**
  - Updating the Section 108 exception for libraries;
  - Reviewing copyright issues related to higher education, including distance education;
  - Updating the Chafee Amendment to ensure access to copyrighted works by individuals with print disabilities in the context of current technologies;
  - Examining the issues of orphan works and mass digitization to develop potential legislative solutions;
  - Improving the DMCA database of designated agents;
  - Examining the use of possible small claims procedures that can assist individual creators and SMEs in enforcing their rights online;
  - Improving the public registration and recordation systems, including through public-private partnerships;
  - Educating the public on fair use through creation of an index of major court cases, as proposed in the IPEC 2013 Joint Strategic Plan.

- **IPEC**
  - Helping to foster voluntary best practices for online enforcement between stakeholders, including right holders, ISPs, payment processors, and online advertising networks.

- **Private Sector**
  - Developing interoperable and connected online databases of ownership information and online licensing platforms;
  - Creating inclusively developed fair use guidelines for various user communities;
  - Establishing voluntary cross-industry initiatives such as the Copyright Alert System.

5. Issues that are in the process of being further interpreted by the courts:

- The meaning of “public performance” in the context of new video streaming technologies;
- The treatment of temporary reproductions;
- The scope of the distribution right as applied to making works available online;
- The meaning of elements of the DMCA’s safe harbors for service providers, primarily the knowledge standard and provisions on termination of repeat infringers’ accounts;
- How old contracts apply to new uses in the digital environment.
Appendix B: Acknowledgements, Symposium Panelists and Notice of Inquiry Respondents

The Internet Policy Task Force extends its thanks to all of our colleagues throughout the Executive and Legislative branches who have provided valuable feedback and consultation during the development of this report. We offer special thanks to all of the individuals and private sector organizations who participated in our public Symposium on Copyright Policy, Creativity & Innovation in the Internet Economy, and those who submitted written comments to the Notice of Inquiry that served as the basis for this report.

Symposium Panelists (as identified in the Symposium agenda)

Jonathan Band, Policybandwidth
Susan Cleary, Independent Film & Television Alliance
Rick Cotton, NBC-Universal
Sarah Deutsch, Verizon
Ken Doroshow, Entertainment Software Association
Keith Epstein, AT&T
Joshua Friedlander, Recording Industry Association of America
Marianne Grant, Motion Picture Association of America
Leslie Harris, Center for Democracy and Technology
Thomas Hesse, Sony
Lance Kavanaugh, YouTube
Scott Martin, Motion Picture Association of America
Corynne McSherry, Electronic Frontier Foundation
Peter Menell, UC Berkeley School of Law
Gene Mopsik, American Society of Media Photographers
Brian Napack, MacMillan
Thomas Rubin, Microsoft
Piotr Stryszowski, Organisation for Economic Cooperation and Development
Harlan Yu, Princeton University
Notice of Inquiry Respondents

American Association of Independent Music
American Business Media
American Federation of Musicians of the United States and Canada
American Federation of Television and Radio Artists
Association for Competitive Technology
Association of American Publishers
AT&T
Attributor Corporation
Beachbody, LLC
Business Software Alliance
Center for Democracy and Technology
Computer & Communications Industry Association
Consumer Electronics Association
Copyright Clearance Center
Creative Commons
Digital Media Association
Digital Society
Directors Guild of America
EDUCAUSE
Electronic Frontier Foundation
Entertainment Software Association
Etopia Press
Fantasy & Science Fiction
Future of Music Coalition
Google, Inc.
Independent Film & Television Alliance
Information Technology and Innovation Foundation
Institute of Intellectual Property and Social Justice
Interactive Advertising Bureau
International Alliance of Theatrical and Stage Employees
Internet Commerce Coalition
Library Copyright Alliance
Media Education Lab
Michigan State University
Motion Picture Association of America, Inc.
Mozilla
MySpace Music
National Cable & Telecommunications Association
National Music Publishers' Association
New America Foundation
Pink Visual
Public Knowledge
Recording Industry Association of America
Screen Actors Guild
SESAC, Inc.
Sher Music Co.
Sloane & Company
Software & Information Industry Association
TechAmerica
The Copyright Alliance
Total-Knowledge.com, Culturedialogue.org
TuneCore
U.S. Chamber of Commerce
University of Michigan Library
Visa, Inc.
Writers Guild of America West
Zack Aab  
Dan Aaro  
Francisco Abreu  
Alexander Acosta  
Chris Adams  
Justin Adkins  
Lucian Agnello  
Jonathan Aiken  
Garry Airiants  
Justin Alderman  
Allan Alexander  
Josh Alexander  
Adhem Ally  
Kimberly Altenburg  
Winna Althiser  
Nayeli Alvarado  
Elizabeth Amber  
Earl Ambrose  
William Ambrose  
Amer Amer  
Anthony Amico  
Spencer Andersen  
Marc Anderson  
Michael Anderson  
Steven Anderson  
Troy Anderson  
Adrian Archer  
Madeleine Archer  
Ivan Arguello  
Michael Armstrong  
Eric Arntson  
Anthony Arquette  
Christian Ates  
Stephen Ausmus  
Zachary Averty  
Brian Ayotte  
Farhad Badri  
R. Renee Bagby  
Kim Bahnson  
Gary Balaban  
Adam Balk  
Zach Bamford  
William Barbano  
Israel Barbarin  
Claire J. Barber  
Joseph Barder  
Dashiel Barlow  
Cory Barnett  
Michael Barnette  
Andrew Barrett  
Andy Barton  
Scott Bateman  
Aaron Bausch  
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Nicholas Behrens  
Garth BeMiller  
Dr. E. Ben-Sefer  
Royce Benda  
John Bendi  
Galen Lee Benway  
Emily Beshlian  
Carlton Betts  
Jared Beymer  
Bert Bingham  
Joe Bivins  
Tara Blaize  
Robert Blankenship  
Abraham Blea  
David L. Blevis  
Victoria Bissse  
Warren Blyth  
Daniel Bogan  
Bob Bolin  
Drew Bond  
Douglas Bonham  
Derek Book  
Adam Boser  
Steven Boss  
Sharon Boullion  
Tim Boysen  
Chad Bramble  
Brian Breczinski  
Brenna  
Matthew Bresnahana  
Jay Bridal  
Martin Brinkley  
Kevin Britts  
Jarod Brody  
Jared Brogan  
Nicholas Brosz  
Berengaria Brown  
Jason Brown  
Jeremy Brown  
Matthew Brown  
Veronic Brummer  
Timothy Buchheim  
Anthony Bundren  
Brian Burch  
Aliyah Burke  
Robert Burke  
James Burns  
Monica Burns  
Yancy Burns  
Travis Burr  
Heather Butler  
Jeff Byrnes  
Phillip Campbell  
Brian Campos  
Samuel Carchidi  
Vanessa Cardona  
Kevin Carignan  
Karen Carino  
Michael A. Carrier  
Carly Carson  
Anthony Caruso  
Rob Castillo  
David Castro  
Gian Caterine  
Ryan Cavanaugh  
William Chambers  
Kyle Chambliss  
Elise Chand  
Charlie Chang  
Avery Chapman  
Gershon Chapman  
Anthony Chen  
Sun-Ling Chen, MD  
Thomas Chen  
Rowena Cherry  
Tyler Chester  
Caroline Ching  
Timothy Choat  
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Chris Christiansen  
Davio Cianci  
Peter Cintula  
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Bryan Cole  
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Nathaniel Collard  
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Robert Collier  
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Phoebe Conn  
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Curtis Dressler
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Russell Evans
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Joshua Morand
Bradley Moreland
Stephanie Morris
Anthony Morton
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Jeffrey Murphy
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Omar Naranjo
Al Narvaez
Cosme Navarro
Jannor Navarro
Logan Nazareth
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Andrew Willeford
Thomas Willes
Thomas Willet
Brenna Williams
David Williams
James Williams
Julian Williams
Keifer Williams
Qaey Williams
Ryan Williams
Shermaine Williams
Chris Williamson
Michelle Willingham
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Mary Wilson
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Pamela Yeagely
David Yeakle
Jason York
Cora Zane
Kevin Zeher
Kenneth Zike
Daniel Zipfel
Glenn Zorn
Wendi Zwaduk
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

v. 64 Civ. 3787 (LLS)

BROADCAST MUSIC, INC.,

Defendant.
---------------------------------
New York, N.Y.
September 16, 2016
3:00 p.m.

Before:

HON. LOUIS L. STANTON,
District Judge

APPEARANCES

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
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SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300
THE COURT: Good afternoon, everybody.
I have read the Antitrust Division's August 4 statement and BMI's letter briefs of August 4 and August 12, and the division's letter brief of August 9 and its attachments, and a letter brief from the National Music Publishers Association, dated September 13, just the other day.
It's apparent to me that the first thing that we should focus on is the question of whether the consent decree should be read to require 100 percent or full-work licensing and not expend time and effort on broader issues, such as the merits of various modification until that first point is clear.
Do both parties agree we should address that question first?

MR. EDELMAN: BMI agrees, your Honor.

MR. SHANNON: Your Honor, Kelsey Shannon for the United States. We would be amenable to proceed in that way.

THE COURT: Then I'd like to hear, I think, probably the division first since it's really the protagonist here, whatever the parties would like me to hear concerning that first point. But I'd like to hear what has not been covered by the material already submitted.

MR. SHANNON: Thank you, your Honor. I will per your request aim to limit myself to information that is not either in our August 4 closing statement or the letter that we sent to

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you, but just to frame the issue briefly, I think as we do say
in the August 4 letter, the argument begins with the decree and
it begins with the language of the decree, and it begins with
the requirement that BMI provide its licensees the ability to
perform compositions. I think the argument that BMI and others
have made is that "compositions" must mean something different
than the natural reading of that word. And while we're going
to discuss additional evidence and the many times in which BMI
and others have described the licenses as providing the ability
to perform works, and we are going to discuss the many ways in
which this provision is crucial to the procompetitive benefits
of BMI's licensing, we can't forget that this is a question
about what the decree means. And the language of the decrees
here, we would submit, is clear.

Again to try to move to material we haven't submitted
in our papers to date, I want to begin by the way that BMI has
been describing its licenses at least for the past many years,
and as a brief tangent or brief digression, we talk about BMI,
but there are two PROs here. There are two PROs with consent
decrees with, in this particular context, similar language and
similar requirements, and two PROs that have a consistent
practice of describing their licenses as providing the ability
to users to perform the works in their repertory.

In the letter, we highlighted just as an example a
statement that BMI made in its pleas in the ongoing rate court
litigation regarding ESPN. We chose that one because it is the
most recent one, not because it is in any way unique. And I
want to read both the direct quote that we had in our letter,
which is from paragraph 8 of that submission, where BMI
describes in a paragraph in which it is emphasizing the value
of the license that BMI provides, that those licenses provide
"immediate access to the more than 10.5 million works in BMI's
repertoire."

We go a couple paragraphs later, paragraph 11 of the
same document says, "through BMI licensees obtain the right to
publicly perform any and all of the works in BMI's repertoire."
And I will say the Antitrust Division has been looking at this
intensely for probably more than a year, certainly more than a
year, and I don't know that we've ever received an explanation
for what these descriptions mean if they don't mean BMI is
providing users with the ability to perform the works in their
repertoire.

There is a suggestion throughout BMI's papers
certainly, and in addition in the submission that NMPA made,
the National Music Publishers Association made earlier this
week, that nobody until the Department of Justice came up with
this idea, had ever thought it was possible that the BMI
licenses would provide the ability to perform works that were
not controlled wholly by BMI's members. And I think the type
of quotes that I just offered you from the ESPN submissions
believe that, but actually I want to get a little more specific
and go to the Pandora proceeding, which was, I believe, the
last complete rate court proceeding in front of your Honor.
BMI had an expert in that proceeding, and that expert spoke to
the Court, and he said, "My testimony is that if it's a split
work, my understanding, and correct me if I'm wrong, if that is
a split work, then even if -- so suppose there's a work that's
owned jointly by SONY and BMG, if BMG withdraws but SONY
remains, that if that work is jointly owned and SONY is still
under BMI, then that work can legally be played."

That is the precise question we're asking here, What
happens when there is a work that is partially controlled by
BMI and partially outside of BMI, and BMI offered an expert who
addressed that specific question and said exactly what the
Justice Department is saying today, which is that that license
provides the ability to own the works.

I guess I will offer one final, additional piece of
something that is not in the papers that we've submitted
before, and this goes to ASCAP. ASCAP is not a party to this
current dispute but has very similar language in its decree.
As we noted in the filings that we made, ASCAP and BMI have
announced that they are engaged in a joint effort here to
overturn the decision that the division announced. But ASCAP
has not sought the interpretation or modification that BMI is
seeking now, and there may be many reasons for that, but I will
submit that one of the reasons for that is that ASCAP has
already answered the question. And ASCAP has already answered
the question because during its own proceedings in front of
Judge Cote in the Pandora case, when Judge Cote was considering
the partial withdrawal question that you also considered
somewhat later, Judge Cote issued written questions to the
parties. One of those written questions was, and I quote,
"Whether the term 'works,' as used throughout the ASCAP consent
decree, means 'compositions or rights in compositions.'" This
again is exactly the question that's being presented here, Does
the word "compositions" in the consent decrees of BMI and ASCAP
mean compositions, or does it mean rights in compositions?

This is how ASCAP's long-time counsel, speaking on
behalf of ASCAP, answered that question in Judge Cote's
courtroom. He said, and I quote: "And I am not disputing that
a work is a composition. That's your third question.
That's -- clearly, it's defined. That's of course what it is."

And Judge Cote interjected, "OK. Well, in your
briefs, you --"

And Mr. Cohen, ASCAP's counsel, answered, "If we were
being ambiguous in our briefs, I withdraw that. 2(u) of the
ASCAP consent decree defines it as a work. There's absolutely
no way for us to take the contrary position."

I've offered these as three examples of situations in
which BMI and in the last example ASCAP have publicly taken a
position that supports the division's reading of that decree.

Before sitting down, I want to make a final point, which is in our brief, and that is the importance of providing the ability to perform compositions to effectuate the procompetitive benefits of the BMI license. Obviously BMI and ASCAP blanket licenses have been subject to literally decades of antitrust litigation, some of which has involved the Department of Justice, some of which has not; some of which has worked its way through this court, some of which has worked its way up to the Supreme Court. And the courts and the Justice Department have always, and still, viewed BMI as providing important benefits to both their members and to users, and that remains true today. On the other hand, we, the Department of Justice and the courts, have had to balance those benefits against the potential risk to competition that occurs any time there is a collection of competitors who are getting together, jointly selling their products, and agreeing among each other how they will offer those products. And the consent decrees and the courts' decisions seek to strike that balance. And when they do so, they look at what the benefits are of the license.

I think we have one quote in our letter from BMI v. CBS, the Supreme Court decision that held that the blanket license was not a per se violation of the antitrust laws, but I want to quote one more, which I believe is not in our papers,
and that's this: "The blanket license is composed of the individual compositions plus the aggregating services." I will note that they say "the individual compositions" and not something different than that. And then the Supreme Court goes on to say, "Here, the whole is truly greater than the sum of the parts. It is to some extent a different product. The blanket license has certain unique characteristics. It allows the licensees immediate use of cover compositions without the delay of prior individual negotiations and great flexibility in the choice of musical material."

A license of the type that BMI is urging today would not provide in many instances licensees with the immediate use of covered compositions. It wouldn't; that is the entire dispute here. If there is a song which BMI does not control 100 percent, can the licensee immediately play that song, or does it need another license or multiple other licenses from the other members?

In interpreting the consent decree, we step back to where I started. Interpreting the consent decree, we begin with the language of the consent decree. In trying to think through how a departure from the plain language of the consent decree, such as that urged by BMI, we can look at what is the purpose here, what are these terms trying to accomplish, and I think BMI v. CBS, in addition to years of review by the Justice Department and the courts, make clear that a crucial benefit
that supports the continued existence of blanket licensing is
the ability to provide users with, again to quote, "immediate
use of the covered compositions."

Your Honor, I'll sit down unless you have specific
questions.

THE COURT: No. Thank you, Mr. Shannon.

Mr. Edelman.

MR. EDELMAN: Good afternoon, your Honor.

Your Honor, I brought up with me the consent decree,
because I think this motion turns not on what Mr. Cohen may
have said on behalf of ASCAP before Judge Cote or what the
Second Circuit said in the CBS case, not that any of those
things are inconsistent with our reading, but it turns under
numerous authorities on how to read a consent decree on the
language of the consent decree.

The issue here is whether DOJ is correct in reading
the BMI consent decree as prohibiting BMI from licensing
fractional interests in a composition, and that question can
only be determined by looking at the consent decree and seeing
whether that prohibition is contained in the consent decree.
Notably absent from DOJ's argument today was the ability to
point to the language that so prohibits that result.

Your Honor, according to the letter that DOJ
submitted, their argument is based on section 14 of the consent
decree, which provides that BMI must license "any, some, or all
of the compositions in defendant's repertory," and repertory is
defined as those compositions, the right of public performance
of which defendant has or hereafter shall have, the right to
license or sublicense. As I understand the argument being
made, somehow those sentences should be read to prohibit BMI
from licensing fractional interests. Your Honor, we submit
they don't.

Again, under U.S. v. Armour and numerous cases from
the Second Circuit that we will cite to your Honor, the law is
clear that a consent decree is read according to its terms and
the parties are held to the bargain that they agreed to on
paper. A consent decree will not be extended to accomplish
supposed purposes that underlie the decree or to prohibit an
action that the parties might have prohibited had they been
considering the case anew. And in this case, the consent
decree contains no prohibition on fractional licensing.

Now, frankly, your Honor, our view is, and I'll walk
through my own, what we've taken to calling my syllogism on the
issues, and we argue that whether or not fractional interests
are part of the repertory is a red herring because we should
prevail in either instance.

First, let me deal with why we believe that fractional
interests are compositions within the repertory. We submit
that consistent with the copyright office's interpretation, the
custom and practice in the music business has been that
compositions are read to include fractional interests. The consent decree should be read that way in this case. And, your Honor, the copyright office wrote at page 14 of its report, "ASCAP and BMI had been representing fractional interests for over two decades at the time of the most recent amendments to the consent decrees in 1994 and 2001." Your Honor, we will submit evidence that the custom and practice in the music industry is that the term "compositions" is viewed to include fractional interest in compositions by music publishers.

We will also submit that the consent decree speaks of BMI licensing "any, some, or all of the works in the repertory." Now, it doesn't just say "any" or "all." It says "any, some, or all," and, your Honor, we would submit that for the word "some" to not be just repetitive of "any," it must be read to refer to a fractional interest in the work, because "any" means more than one, and "some" of the works would be read the same way.

Your Honor, a rational reading of the licensing provision of the consent decree is that BMI is required to license to any user whatever rights it has available to license, and our view of fractional licensing is consistent with that view. If all BMI has is a right to a fraction of a particular work, under our reading, BMI is obligated to offer a license to that fraction on the same terms it would be obligated to license a whole work. But under DOJ's reading,
fractional interests are off limits. DOJ wrongly relies on the decisions in the Pandora case.

In Pandora, your Honor and the Second Circuit in the ASCAP case held that if a PRO only has the right to offer a particular composition or a particular right to some users but not to others, then the right may not be offered to any user. That principle is not being offended in the least here. Whether fractional interests or entire interests, BMI would be offering those interests to all users, so the Pandora concern is not implicated here.

Now, I teased you with the idea of a syllogism earlier, and what did I mean by that? It's our view that the fractional interests are compositions, and therefore, their argument falls away. But let's suppose that we accept the DOJ view that fractional interests are not compositions, that they're not part of the repertory. As I said earlier, United States v. Armour says that if you want to prohibit something in a consent decree, it has to be express. Well, this consent decree follows that model. It prohibits a number of things. When the parties wanted to prohibit BMI from doing something, they were clear. It prohibits BMI from publishing music. It prohibits BMI from recording music. It prohibits BMI from distributing sheet music, and I can go on and on with examples.

In contrast, it doesn't prohibit anything having to do with fractional interests. So if DOJ really wants to take the
position that fractional interests are not part of the
repertory and they're not covered by section 14, then what's
the consequence of that position? The consequence would be
that fractional interests are not regulated by the consent
decree, and BMI is free to offer licenses for those fractional
interests.

Your Honor, the consent decree is not a fluid, living
instrument with which the Department of Justice can study an
issue for a year and then decide what the consent decree means
to suit its purposes. The consent decree is a contract in
which the parties wrote down specific actions that would be
required and specific actions that would be prohibited. We
submit with great confidence that the parties never
contemplated fractional interests back in 1994 when section 14
was added, and there's absolutely nothing in this consent
decree to address fractional interests and nothing that
prohibits BMI from granting a license for those fractional
interests.

We agree with your Honor that the best way to proceed
is to brief first the question of what the consent decree means
or doesn't mean, because only if we don't prevail would the
modification issue be relevant.

Does the Court have any questions?

THE COURT: Thank you, Mr. Edelman.

You've suggested submitting some citation to law and
you've submitted some characterizations you're thinking of putting in afterwards. That law is familiar to me. The last thing I need is to read four more cases covering those well-established propositions, and I don't want to sound like President Nixon, I don't think it would be proper or desirable to decide this question with a great deal of weight placed on how it's been characterized, even by parties who are familiar with the facts. The decision has to come from more core considerations than that, and it seems to me that the materials I have read have pretty well covered the field that is necessary to answer the first question, so I hesitate to delay the decision of that question unless it's for things I really need. It's a need I don't feel.

Mr. Shannon, are there any other materials that the division needs to present before I decide this question?

MR. SHANNON: Thank you, your Honor. I will say that we submitted a three-page letter brief in response to theirs.

THE COURT: It was a pretty full statement.

MR. SHANNON: I think it was a pretty full statement on our view and how we reached our view and why we think as a matter of interpretation and a matter of policy the BMI view is mistaken. I'm not sure that we had the opportunity to fully brief the questions of how this should intersect with the case law, but I guess what I'm hearing is that you feel comfortable with how those questions intersect each other. BMI dedicated
space that we really didn't dedicate, in part because of space
limitations, to talking through, "this is the standard for a
decree interpretation; this is the relevance of parol evidence
to a decree interpretation, these are the proper people to look
at for decree interpretation," those types of questions. And I
think I'm hearing you say that you don't think that's
necessary, but I do want to highlight that that's not something
that we, in part because of space constraints, really got to,
and it's not exactly the frame on which we were focused for our
longer statement.

I guess I'd make one point that is related to that,
which is I've heard them discuss and in their letter discuss
what the industry views the word "composition" to mean. The
industry is not a party to the consent decree. The United
States is, BMI is, and it isn't clear to me that that evidence
of what industry participants who are not parties to the decree
think has any bearing on how we interpret the decree.

THE COURT: I think there's been some confusion in the
colloquy and in the writings, and some of it is evident at
portions of the Pandora record where the two terms have been
blurred, but they are actually not the same at all. A
composition is a piece of music. A performance is the
performance of that piece of music. If one has permission to
perform it, then they have the license, and those are each
separate concepts.
MR. SHANNON: I think we agree with you, actually.

THE COURT: The decree uses them precisely.

MR. SHANNON: Right, the word "performance."

THE COURT: Yes.

MR. SHANNON: Right, and maybe I'm agreeing.

THE COURT: It refers to a composition, the performance of which BMI has the right to license.

MR. SHANNON: Right. And I think that that gets to where we are as well, which is the question is, is this license providing the ability to perform the composition?

THE COURT: Exactly.

MR. SHANNON: Yes. That I agree with, and I think that's a helpful clarification about the different words that are getting used there.

THE COURT: Is there anything further that you wish to submit in writing?

MR. SHANNON: I'm sure that if given the opportunity we will submit additional materials in writing.

THE COURT: That really isn't my question.

MR. SHANNON: That I understood.

THE COURT: My question is, is there something I need to consider that you want to get into my hands before I decide this, bearing in mind the pretty full treatment that has been put before me already?

MR. SHANNON: Your Honor, would you object if I confer
with my colleague for a moment?

THE COURT: Sure.

MR. SHANNON: Thank you.

Your Honor, Mr. Kendler reminds me that we did not, so I heard Mr. Edelman making at least two different arguments when he was up here. The first is the one about whether compositions extends to interest in compositions. I think that it's fair to say we joined issue on that. The second was an argument that I believe they raised for the first time in their second letter, which was that even if the repertory is limited to compositions, they can license fractional interests; those are just not subject to the consent decree. I don't think we've actually responded in writing to that, and if your Honor thought it would be helpful, we would be happy to do so.

THE COUR: I don't think it's necessary.

MR. SHANNON: OK. Then I think the answer is no, your Honor.

THE COURT: Mr. Edelman.

MR. EDELMAN: May I consult with my cocounsel?

THE COURT: Yes indeed.

MR. EDELMAN: Your Honor, I'm assuming that the transcript of today's discussion would be viewed as part of the record that you would decide the matter on.

THE COURT: Absolutely. It's essential to hear what you have told me. A lot of it didn't perhaps come as news, but
of course it is.

MR. EDELMAN: On that basis, we will accept the
Court's suggestion that we proceed on the basis of the
submissions and argument already made.

THE COURT: Very well. I will try not to delay things
further, and I thank you for your appearance and argument.

We're adjourned.

(Adjourned)
This application for a construction of the Final Judgment ("Consent Decree")\(^1\) in this case is stimulated by the August 4, 2016 publication of the Antitrust Division of the U.S. Department of Justice's "Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees" ("Statement"), which asserts that:

... the consent decrees, which describe PROs'\(^2\) licenses as providing the ability to perform "works" or "compositions," require ASCAP and BMI to offer full-work licenses.\(^3\) The Division reaches this determination

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\(^2\) PROs are "performing rights organizations" who "provide licenses to users . . . to publicly perform the musical works of the PROs' thousands of songwriter and music publisher members." [Statement p. 2]

\(^3\) The Statement defines these:

Under a "full-work" license, each PRO would offer non-exclusive licenses to the work entitling the
based not only on the language of the consent decrees and its assessment of historical practices, but also because only full-work licensing can yield the substantial procompetitive benefits associated with blanket licenses that distinguish ASCAP's and BMI's activities from other agreements among competitors that present serious issues under the antitrust laws. [Statement p. 3]

* * *

If PROs offer fractional licenses, a music user, before performing any multi-owner work in a PRO's repertory, would need a license to the fractional interests held by each of the work's co-owners. A full-work license from a PRO, on the other hand, would provide infringement protection to a music user seeking to perform any work in the repertory of the PRO. [id. p. 10]

* * *

If the licenses were fractional, they would not provide immediate use of covered compositions; users would need to obtain additional licenses before using many of the covered compositions. And such fractional licenses would not avoid the delay of additional negotiations, because users would need to clear rights from additional owners of fractional interests in songs before performing the works in the ASCAP and BMI repertories. Similarly, the Second Circuit has held that ASCAP is "required to license its entire repertory to all eligible users," and that the repertory includes "all works contained in the ASCAP

3 (cont'd)

user to perform the work without risk of infringement liability. Under a "fractional" license, each PRO would offer a license only to the interests it holds in a work, and require that the licensee obtain additional licenses from the PROs representing other co-owners before performing the work. [Statement p. 8]
repertory." Pandora Media, Inc. v. ASCAP, 785 F.3d 73, 77-78 (2d Cir. 2015) (emphasis removed). The Second Circuit rejected arguments that this decree requirement conflicted with copyright law, noting that "[i]ndividual copyright holders remain free to choose whether to license their works through ASCAP." Id. at 78. The logic of the Second Circuit's decision applies to BMI as well.

Accordingly, the consent decrees must be read as requiring full-work licensing. ASCAP and BMI can include in their repertories only those songs they can license on such a basis. [id. p.12]

* * *

Moreover, nothing in this interpretation contradicts copyright law. To the extent allowed by copyright law, co-owners of a song remain free to impose limitations on one another's ability to license the song. Such an action may, however, make it impossible for ASCAP or BMI--consistent with the full-work licensing requirement of the antitrust consent decrees--to include that song in their blanket licenses. [id. p. 13]

BMI promptly sought a declaratory judgment that the Consent Decree does not require 100% ("full-work") licensing.

**DISCUSSION**

Nothing in the Consent Decree gives support to the Division's views. If a fractionally-licensed composition is disqualified from inclusion in BMI's repertory, it is not for violation of any provision of the Consent Decree. While the Consent Decree requires
BMI to license performances of those compositions "the right of public performances of which [BMI] has or hereafter shall have the right to license or sublicense" (Art. II(C)), it contains no provision regarding the source, extent, or nature of that right. It does not address the possibilities that BMI might license performances of a composition without sufficient legal right to do so, or under a worthless or invalid copyright, or users might perform a music composition licensed by fewer than all of its creators.

The parties to it stipulated that the Consent Decree did not extend to problems such as those involved in determining the value or validity of copyrights of compositions in BMI's repertory. The Consent Decree states in Article XIV (D):

(D) Nothing in this Article XIV shall prevent any applicant from attacking in the aforesaid [rate court] proceedings or in any other controversy the validity of the copyright of any of the compositions in defendant's repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

The Consent Decree does not regulate the elements of the right to perform compositions. Performance of a composition under an ineffective license may infringe an author's rights under copyright, contract or other law, but it does not infringe the Consent Decree, which does not extend to matters such as the invalidity or value of copyrights of any of the compositions in BMI's repertory. Questions of the validity, scope and limits of the right to perform
compositions are left to the congruent and competing interests in the music copyright market, and to copyright, property and other laws, to continue to resolve and enforce. Infringements (and fractional infringements) and remedies are not part of the Consent Decree's subject-matter.

The structural difference between the issue of the fractional licenses and BMI v. Pandora Media, Inc., No. 13 Civ. 4037 (LLS), 2018 WL 6697788 (S.D.N.Y. Dec. 19, 2013) illustrates the point. In the Pandora case, the Consent Decree itself explicitly regulated the conduct: "The BMI Consent Decree requires that all compositions in the BMI repertory be offered to all applicants" id. at *3; "Under Section XIV of the BMI Consent Decree, when an applicant requests a license for 'any, some or all of the compositions in defendant's repertory,' BMI must grant a license for performance of the requested compositions . . . to all applicants, with fees that do not discriminate between applicants similarly situated." [Id.] The language of the Consent Decree was mandatory and unambiguous. Compositions, whose copyright-holders persuaded BMI to exclude them from BMI's offer to Pandora and New Media (digital) services, did not meet the standards of the BMI Consent Decree and were accordingly disqualified under its own terms from participation in BMI's repertory.

The Consent Decree contains no analogous provision concerning the values of fractional versus full-work licensing. That area of dispute is left to the applicable law.
DECLARATORY JUDGMENT

The phrase in Art. II (C) of the Consent Decree defining BMI's repertory as "those compositions, the right of public performance of which [BMI] has . . . the right to license or sublicense" is descriptive, not prescriptive. The "right of public performance" is left undefined as to scope or form, to be determined by processes outside the Consent Decree. The Consent Decree neither bars fractional licensing nor requires full-work licensing.

DATED: New York, New York
September 16, 2016

Louis L. Stanton
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U. S. D. J.