KEEPING THE INTERNET
OPEN • INNOVATIVE • FREE

www.cdt.org

CENTER FOR DEMOCRACY
& TECHNOLOGY

1634 I Street, NW
Suite 1100
Washington, DC 20006

P +1-202-637-9800
F +1-202-637-0968
E info@cdt.org

COMMENTS TO THE US COMMERCE DEPT. INTERNET POLICY TASK FORCE

Copyright Policy, Creativity, and Innovation in the Digital Economy

November 13, 2013

The Center for Democracy & Technology (CDT) submits these comments in response to the October 3 Federal Register notice requesting public comment on certain issues raised by the Department of Commerce Green Paper, *Copyright Policy, Creativity, and Innovation in the Digital Economy*.[1] CDT is a non-profit, public interest organization dedicated to preserving and promoting openness, innovation, and freedom on the decentralized Internet. CDT believes copyright law and policy must aim to protect the rights of content creators without curtailing the Internet's tremendous potential for fostering innovation, free expression, and new forms of creativity. Below, we offer comments on each of the issues raised in the Notice, beginning with the areas where we have the most developed views: the DMCA's notice-and-takedown process and statutory damage reform. For ease of reference, the issues are as follows:

For more information, please contact David Sohn (dsohn@cdt.org) or Andrew McDiarmid (andrew@cdt.org).

I. Operation of the DMCA Notice and Takedown System

A. A best practices process cannot be a vehicle for fundamental changes to the DMCA's notice-and-takedown framework.

CDT believes it is appropriate to consider ways that the practical operation of the DMCA's notice-and-takedown process might be improved. But a best-practices process cannot and should seek to alter the fundamental assignment of roles and responsibilities under section 512 of the DMCA.

[1] Docket no. 130927852-3852-01, 78 FR 61337, https://federalregister.gov/a/2013-24309. *See also* 78 FR 66337, https://federalregister.gov/a/2013-26487 (extending time to file comments).

Under section 512, and as confirmed by multiple courts, the burden of identifying specific instances of infringing material to target for takedown rests with the rightsholders.[2] It is understandable that this can prove frustrating to rightsholders at times. But there are powerful reasons for this assignment of responsibilities. First, rightsholders are in a much better position than anyone else to determine which material is in fact infringing. Perhaps even more important, the notice-and-takedown process, while no panacea for online infringement, is an extremely powerful tool. It enables any rightsholder to achieve on-demand removal of content from virtually any US content-hosting platform, based on skeletal allegations and with no involvement or oversight by any judicial body or other neutral decisionmaker. Safeguards against overreaching are relegated largely to the after-the-fact counter-notice process, once content has already been removed.

This is no small power for private-sector entities to exercise on an essentially unsupervised basis. Broadening the scope of this power, or making its exercise too automatic or too frictionless, would raise significant concerns relating to free expression and due process.

A best practices process, therefore, must take care to avoid being too ambitious. It likely will not be able to address all concerns – particularly concerns that are, at base, concerns about the fundamental assignment of responsibilities under the DMCA. Of the issues identified by the Task Force in question 22, "minimizing reappearance of infringing material," warrants particular caution in this regard. In Europe, courts have flirted with the concept of "notice and stay down," under which hosting platforms would be required to prevent the reappearance of material identified in takedown notices.[3] But barring reappearance requires hosting platforms to engage in ongoing, pervasive scrutiny and filtering of the material posted by users. This would be at odds with the DMCA's directive that a service provider is not required to engage in affirmative monitoring of user content.[4]

CDT is not unsympathetic to the problem of the reappearance of previously removed infringing material. It is a legitimate issue for a best practices discussion to explore. But any approaches aimed at addressing this problem must respect the basic framework and roles established by the DMCA. The same is true of the other issues listed in the Notice. The Task Force's discussions must be aimed at improving the practical operation of the current process, not fundamentally altering the basic framework.

B. A best practices process should seek participation and input from a wide range of stakeholders, including entities that are not regular participants in Washington DC policy debates.

CDT applauds the Task Force's commitment to an inclusive process. As the Internet has opened new opportunities for both the creation and dissemination of creative works, the notice-and-takedown process can affect more people and entities than ever before. It is critical that a

[2] *See, e.g., UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011); *Viacom International Inc. v. YouTube Inc.*, 2013 WL 1689071 (S.D.N.Y April 18, 2013).

[3] *See* CDT, "Cases Wrestle with Role of Online Intermediaries in Fighting Copyright Infringement," June 26, 2012, https://www.cdt.org/policy/cases-wrestle-role-online-intermediaries-fighting-copyright-infringement (discussing several cases in Europe and arguing that "notice and stay down" would be inconsistent with the EU equivalent of the DMCA).

[4] 17 USC § 512(m).

best practices process be as open as possible both to industry stakeholders of varying sizes and perspectives and to public interest organizations and the public at large.

In particular, it would be important to secure participation and input from:

- Hosting and infrastructure companies that are not the widely recognized, consumer-facing household names with large presences in Washington, DC. Many such companies play important but often behind-the-scenes roles in empowering Internet users to communicate in the online environment.

- Small and emerging online service providers, such as those that have recently launched or are aiming to serve niche markets.

- Parties who believe their content has been wrongly targeted by takedown notices. For example, CDT compiled a report several years ago about improper takedowns of political campaign materials.[5] Campaign professionals might have an interesting perspective on the takedown process.

- Companies that make a business of sending and coordinating takedown notices on behalf of rightsholders. These companies may be some of the most intensive users of the notice-and-takedown process and may possess important information about its practical operation today.

- Parties outside the United States. Because many of the world's most prominent online service platforms are based in the United States, the US notice-and-takedown regime affects numerous Internet users outside US borders. What happens on US-based Internet platforms affects the free expression capabilities of Internet users outside the US – their ability both to read and post material on popular service platforms – and the copyright enforcement capabilities non-US rightsholders. In addition, the DMCA has also come to serve as a model (in part due to trade agreements with the US) for other governments around the world, and best practices developed here may well be duplicated in other countries.[6] At a minimum, therefore, a best practices process should be open to participation by persons and entities outside the US, and should strive to remain cognizant of the potential cross-border impact.

Securing participation from a wide range of stakeholders may be challenging. The Task Force should consider providing opportunities for remote participation, to minimize the travel burden on small or geographically diverse stakeholders. Ideas and proposals developed in face-to-face meetings should be transparently released for broader public input and reaction before receiving any form of general endorsement. And it may require affirmative outreach and solicitation of input by the Task Force at various stages of the process, with an eye to addressing potential gaps in participation.

---

[5] CDT, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, September 2010, https://www.cdt.org/files/pdfs/copyright_takedowns.pdf; *see also* Green Paper at 57 (citing CDT report).

[6] *See* Daniel Seng, *Comparative Analysis of National Approaches of the Liability of the Internet Intermediaries,* World Intellectual Property Organization, 2011, http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries.pdf.

C. Any discussion of best practices should respect the diverse roles and capabilities of different actors in the Internet ecosystem; one-size-fits-all approaches are likely to be unworkable.

Different actors play different roles in the Internet ecosystem, and a best practices process needs to reflect and respect those differences. It would be neither feasible nor productive to expect that all players should implement the same practices.

Section 512 itself spells out some distinctions: conduits, caching providers, hosting providers, and information location tools. But even within these categories, roles may vary a great deal. This is particular true for hosting providers covered by 512(c) – a category which is a primary focus of the notice-and-takedown regime. For example:

- There are providers of unmanaged hosting, offering connectivity and server space for whatever applications (website hosting, email services, data backup) their customers choose to deploy, often with little granular access to or control over the content customers store using their services.

- There is a variety of user-generated content (UGC) platforms, some of which are tailored to distributing or sharing a particular type of content (e.g., photos or video) and others of which are more tailored to enabling users to store or backup data without regard to the type of content that data represents.

- There are numerous websites that publish a mix of their own content and user-provided content – for example, newspaper sites that publish their own articles but also allow for user comments and discussion. In some cases the user-provided content functions may be relatively minor or ancillary, while in others they may be a key part of the site's purpose or function.

The logistics of notice and takedown may vary considerably among these various parties. Indeed, some hosts may simply lack the ability to remove specific files, because they have physical access but not logical access to the servers where the targeted content resides. Any best practices process needs to recognize the highly heterogeneous nature of the Internet ecosystem; it is unrealistic to think that all parties can or should take on the same roles or engage in the same practices.

D. The practices of rightsholders and copyright enforcement service providers should be a significant focus of any discussion.

Every takedown notice involves at least two parties: the party submitting the notice, and the party receiving it. Any best practices discussion needs to carefully consider the practices of rightsholders and their agents who create and submit notices, not just the practices of the websites and services that receive and respond to them.

Indeed, in many respects the proper functioning of the system depends first and foremost on the quality and reliability of the notices coming in. Sloppy, incomplete, or improperly targeted notices not only can make the system less efficient and more burdensome, but also greatly increase the risk of serious collateral damage to legitimate free expression. Because the system incentivizes quick action with little or no individual scrutiny, bad inputs are highly likely to carry forward to unwarranted and harmful actions. Lawful content can be pulled from the

Internet, with remedies possible only after significant damage has already been done. Thus, this is very much a system in which "garbage in" translates into "garbage out."

The practices of rightsholders and their agents – especially companies providing the service of targeting and sending takedown notices – are therefore central to the overall impact of the notice-and-takedown system. Yet while websites and online services often publicly disclose their notice and takedown policies to users, the practices of parties that initiate takedowns may be relatively non-transparent. Any best practices discussion should include, as a central part of its focus, consideration of the practices surrounding notice generation and submission.

E. Making progress on the issues identified in the Notice will require identifying and focusing on more concrete sub-issues where there is a realistic prospect for agreement.

The five issues listed in question 22 of the Notice are a reasonable categorization of the high-level goals various parties have for improving the notice-and-takedown system. But to be productive, Task Force discussions would need to focus on concrete sub-issues where consensus is possible on potential ways of serving those goals.

For example, increased transparency from all parties – rightsholders, their vendors, and notice recipients – might be a means of furthering the goals of reducing improper and abusive takedown requests. Increased transparency would in no way upset or conflict with the basic statutory scheme, and yet could provide a useful safeguard that could improve the overall process. This seems like a sub-issue worthy of substantial discussion.

Standardizing data formats for takedown notices might be another sub-issue worth considering. Some forms of voluntary data format standards might help serve the goal of making the process less burdensome and easier to administer. On the other hand, standards could carry some disadvantages, if their practical impact were to freeze out new technological approaches or encourage automated bulk takedown requests at the expense of accuracy. There would be pros and cons, but it could be worth exploring.

Participants in any discussions should be asked to identify, early in the process, specific sub-issues and proposals for possible discussion among stakeholders. Precision should be emphasized in order to establish a more concrete basis on which to proceed toward the goals listed in the Notice.

Importantly, given the potential for divisiveness in this area, making progress would almost certainly require paring away some of the most controversial issues from the agenda. The conveners should quickly identify and dispense with discussion of any sub-issues or proposals that would be inconsistent with the statutory framework or obvious non-starters for a substantial set of stakeholders. Where an issue or proposal reflects fundamental disagreement with the underlying statute, including it in the discussion would be a distraction and a waste of time. For example, rightsholders would surely object to any suggestion that, to prevent inaccurate or abusive takedowns, takedown notices should be subject to some form of judicial review or oversight in advance, as occurs in the notice-and-takedown regime enacted in Chile.[7] Likewise,

---

[7] *See* CDT, *Chile's Notice-and-Takedown System for Copyright Protection: An Alternative Approach*, August 2012, https://www.cdt.org/files/pdfs/Chile-notice-takedown.pdf.

Internet-focused consumer groups and online platforms would surely reject any suggestion that websites should be expected to assume a new active policing role by broadly monitoring and filtering the online behavior of their user base.

In short, ensuring a productive process would require the Task Force to steer the discussion towards concrete areas and sub-issues where progress is possible, and away from high-level wishlists and areas of wide disagreement.[8]

II. Statutory Damages

CDT appreciates the Task Force's focus on concerns that have been raised regarding the statutory damages regime. We agree that the availability of statutory damages can play an important role in effective enforcement and deterrence of copyright infringement, including in the online environment. Nonetheless, it is clear that the damages currently available can too easily become disproportionate to acts of infringement by individuals, and that the specter of massive liability has a chilling effect on innovation in the technology and Internet industries.

The Task Force is right to highlight these two issues and to distinguish them from one another, as they are fundamentally different problems that would likely require different approaches to reform. For individuals, the goal should be to bring damage awards more in line with principles of proportionality and due process. For innovators and their investors, the goal should be to ensure that they are not "betting the company" every time they develop products and services in a space where copyright law is unsettled and there is a strong but untested case that the product or service is non-infringing. Reducing this risk would facilitate innovation in the information technology sector, to the ultimate benefit of consumers and the economy at large.

A. The current regime threatens disproportionate sanctions against individual infringers.

In cases against individuals, statutory damages can escalate to levels that are vastly disproportionate to any reasonable assessment of either harm or culpability. Many casual or non-commercial infringing acts of private individuals are a far cry from the acts of professional, criminal piracy rings – yet they are subject to the same damages regime. The result in the few cases that have gone to trial has been damage awards that seem disproportionately large.

One suit against an individual user who infringed 24 songs via a peer-to-peer filesharing network resulted in damage awards, in three separate trials, of $222,000, $1.92 million, and $1.5 million.[9] A similar suit on the basis of 30 songs yielded an award of $650,000.[10] In an order vacating the *lowest* award, the trial judge in the first case wrote: "While the Court does not discount Plaintiffs' claim that, cumulatively, illegal downloading has far-reaching effects on their businesses, the damages awarded in this case are wholly disproportionate to the damages

---

[8] *Cf.* CDT Comments to NTIA in the matter of Multistakeholder Process to develop Consumer Data Privacy Codes of Conduct, Docket No. 120214135–2135–01, RIN 0660–XA27, April 2, 2012 https://www.cdt.org/files/pdfs/CDT_NTIA_Comments_Multistakeholder_Process.pdf (suggesting that the NTIA's process should focus on specific, manageable privacy issues on which consensus was achievable).

[9] *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, (8th Cir., 2012), http://media.ca8.uscourts.gov/opndir/12/09/112820P.pdf.

[10] *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010).

suffered by Plaintiffs. Thomas allegedly infringed on the copyrights of 24 songs—the equivalent of approximately three CDs, costing less than $54, and yet the total damages awarded is $222,000—more than *five hundred* times the cost of buying 24 separate CDs and more than *four thousand* times the cost of three CDs."[11] The trial judge in the other case reduced the award by 90% on constitutional grounds, writing that the amount was "far greater than necessary to serve the government's legitimate interests in compensating copyright owners and deterring infringement. In fact, it bears no meaningful relationship to these objectives."[12]

The larger awards eventually were upheld on appeal in both cases due to the broad latitude given Congress in this area. It is nonetheless telling that two federal judges in high-profile cases were persuaded that levying such huge awards against individuals engaged in noncommercial infringement, even if it was willful, was unconstitutionally disproportionate.[13]

For purely punitive damages, the Supreme Court has established "guideposts" for assessing awards' consistency with due process: the reprehensibility of the defendant's behavior, the degree of disparity between the award and actual harm, and the award's relationship to awards in similar cases.[14] Scholars have argued that high statutory damage awards should fail this test, but appellate courts have yet to apply the test to copyright statutory damages.[15] Nonetheless, awards of hundreds or thousands of times the value of the infringed works raise serious questions.[16]

The Task Force asks whether the current range of statutory damages is necessary to deter infringement. For individuals, CDT believes that assessing hundreds of thousands of dollars in damages far exceeds what is necessary to achieve a strong and appropriate deterrent effect. As the trial judge in *Capitol v. Thomas-Rasset* noted in reducing the award, "While the Copyright Act was intended to permit statutory damages that are larger than the simple cost of the infringed works in order to make infringing a far less attractive alternative than legitimately purchasing the songs, surely damages that are more than one hundred times the cost of the works would serve as a sufficient deterrent." As noted above, the trial judge in the Tenenbaum case likewise wrote that the damage award bore "no meaningful relationship" to the government's interest in deterring infringement. These statements reflect a recognition that beyond a certain point, higher and higher damage awards likely have vanishingly small marginal impact on deterrence; those individuals capable of being deterred by threat of damages have already been reached, making higher awards more purely punitive in effect. For individuals,

---

[11] *Capitol Records, Inc. v. Thomas-Rasset*, 579 F. Supp. 2d at 1227.

[12] *Sony BMG v. Tenenbaum*, *supra* note 10.

[13] The judge in the *Thomas* case ultimately reduced the $1.5 million award on constitutional grounds. *See Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999 (D. Minn. 2011), http://ia700504.us.archive.org/21/items/gov.uscourts.mnd.82850/gov.uscourts.mnd.82850.457.0.pdf.

[14] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Both the *Tenenbaum* and *Thomas-Rasset* judges found the awards in those cases unconstitutional under the more deferential standard established by *St Louis Ry Co v. Williams*, 251 U.S. 63 (1919).

[15] Samuelson, P. and Wheatland, T., *Statutory damages in copyright law: A remedy in need of reform*, 51 William & Mary L. Rev. 2, 439 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604.

[16] As part of her call for copyright reform legislation, the Register of Copyrights recently suggested "considering whether exponential awards against individuals for the infringement of large numbers of works should bear a relationship to the actual harm or profit involved." Maria Pallante, *The Next Great Copyright Act*, 36 Columbia Journal of Law & the Arts 315, http://www.copyright.gov/docs/next_great_copyright_act.pdf at 329.

damages on the measure of hundreds of thousands of dollars are likely well past the point at which additional damages cease to achieve additional deterrence.

Excessive damages can lead to a "shakedown" dynamic in which individuals don't dare contest allegations even when they think they would have a good claim of non-infringement. When the consequence of losing would be financial ruin, individuals can't afford to take any chances. This dynamic can lead to the development of "copyright trolls," entities with the primary goal not of protecting their copyrights and monetizing their creative content, but of exacting payments under the threat of massive damages, even for conduct that a court might not find infringing.

In this way, threat of excessive damages can end up deterring far more than infringement. In particular, the availability of excessive damages can stifle the creation of new works or other expression that rely on fair use. Given the uncertain contours of fair use, a cease-and-desist letter threatening massive financial risk would be enough to scare most people away, even where the conduct is most likely non-infringing.

More broadly, publicity around cases imposing what most will view as absurdly large damage awards contributes to attitudes of disrespect and ridicule for copyright law. This is a serious problem, because curbing infringement depends in part on the public's belief in the value of copyright. As CDT has commented in other proceedings, eliminating copyright infringement completely is an impossible task, and in the computer and Internet age, there simply are no good policy options for making infringement *technically* infeasible.[17] In a world where all consumers have access to a wide range of powerful computing and Internet tools, infringement rates will ultimately depend a great deal on the extent to which copyright is viewed as legitimate and reasonable. Rationalizing statutory damages with respect individuals would be helpful in that regard.

B. The current regime threatens excessive damages for businesses seeking to offer new, innovative services.

In the age of computers and the Internet, tools and services of all kinds include powerful capabilities for creating, copying, processing, and communicating information. This creates a fertile field for innovation. Under copyright's current statutory damages regime, however, it also creates the potential for damage awards to quickly reach astronomical levels – far beyond what is necessary for appropriate deterrence.

In its suit against YouTube, Viacom requested $1 billion in statutory damages. But even that number represents a fraction of what would be possible given Viacom's claims; by one estimate, the potential damage award could have been 15 times the $1.65 billion Google paid to acquire YouTube.[18] In another ongoing case against Google, for its book-scanning project – in which CDT and others believe Google has a strong fair-use argument – potential damages again could easily total billions of dollars.[19] The record labels' 2006 lawsuit against XM Radio sought per-

[17] CDT Comments to the US Intellectual Property Enforcement Coordinator, August 2012, https://www.cdt.org/comments/cdt-comments-ipec-copyright-enforcement-strategy.

[18] Michael A. Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law*, Oxford University Press, 2009, p. 147.

[19] *See* Pamela Samuelson, "Statutory Damages As a Threat to Innovation," *Communications of the ACM* 56, no. 7, July 2013.

song statutory damages that by one estimate could have produced a total damages figure of $37 billion – almost three times the gross US revenues of the entire recording industry.[20] Mp3.com faced the prospect of a damage award in the hundreds of millions of dollars after a court declined its fair use claims in 2000 (forcing the company to settle the case because it was unable to post the bond required to appeal the decision).[21]

As in the case of individuals, such sky-high numbers seem well beyond what is needed for deterrence. Indeed, for most legitimate businesses, the risks of having the business declared unlawful and shut down and then having to pay actual damages and profits would be significant enough to deter business models based on blatant or rampant infringement. Damages calculations that reach into the hundreds of millions or even billions of dollars – without any showing or link to harm – are overkill.

Excessive damages create a "bet the company" risk dynamic that can discourage innovation and investment. A corporation of Google's strength may occasionally have the will and the resources to shoulder such risks, but most smaller innovators will not. This dynamic gives rise to a "permissions culture" in which innovators (or the investors who back them) will seek to negotiate permission even for things that should not need it. This in turn gives rightsholders leverage to demand concessions regarding features or other details, which further narrows the field for innovation.

Evidence for the innovation-chilling effect will, by its nature, usually not be readily apparent. In most cases, the public doesn't see and will likely never know about the innovations that don't happen and the features that aren't offered. Only when cases get litigated is the impact publicly observable. For example, in the case of Cablevision's remote digital video recorder, the product was found to be lawful in the end, but getting the green light took several years of litigation.[22] The threat of massive statutory damages forced Cablevision to seek a declaratory judgment before rolling out the product, slowing the pace of innovation substantially.

Moreover, as noted in the Green Paper, law professor Michael Carrier conducted an interview study of investment in music distribution in the wake of the peer-to-peer suits of the 1990s and 2000s, which documents the chilling effect. "One record-label official agreed that 'even the threat of a lawsuit . . . really does slow down investment in the space.' This respondent was "sure" there were "quite a few" innovative services that 'never came to life' because of 'the threat of potential lawsuits from content owners.'"[23] Another participant described statutory damages as "'effectively infinite.' The 'point is' that when you are charged with statutory damages, 'you're dead.'"[24] And one interviewee described a company being "'reluctant to expand its service' because it worried about 'potentially extra damages if it lost.'"[25] The National Venture Capital

---

[20] Fred von Lohmann, "Record Labels Sue XM Radio," EFF *DeepLinks* blog, May 16, 2006, https://www.eff.org/deeplinks/2006/05/record-labels-sue-xm-radio.

[21] Tim Lee, "Why the mp3.com decision was never appealed," Technology Liberation Front blog, April 2006, http://techliberation.com/2006/04/19/why-the-mp3com-decision-was-never-appealed.

[22] *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

[23] Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 Wisconsin Law Review 891 (October 2012), http://ssrn.com/abstract=2099876p, at 938.

[24] *Id.* at 941.

[25] *Id.*

Association raised similar concerns in an amicus brief in the Grokster case, writing that "[i]t is critical to understand that the threat of secondary liability from copyright suits is qualitatively different from most other sorts of business risks that investors can insure against or build into their business calculations. The mandatory mechanism of statutory damages—designed to discourage direct infringement—has crushing implications for vendors of multi-purpose technologies, where damages from unforeseen users can quickly mount in the millions or even billions of dollars."[26]

It is also important to note that CDT is unaware of any evidence that supports the current level of statutory damages as being in any way optimal, appropriate, or effective for deterrence or any other goal. There is no evidence that such large statutory damages are necessary or beneficial.

The argument that statutory damages need recalibration in cases of secondary liability is particularly strong because a secondary infringer doesn't control the number of works ultimately infringed. Even if a product or service is contributorily liable, it is the direct infringers (users) that determine the number of works infringed, which is the basis for calculating statutory damages. Internet platforms operate at massive scale, meaning that users' infringements can quickly multiply and escalate a platform's possible damages to incredible heights.

That said, the innovation impact of statutory damages is not strictly limited to secondary liability. Many legitimate businesses dealing with novel and uncertain issues under copyright law end up getting sued not just for secondary liability, but for direct liability as well. Examples include the cases against Cablevision's remote DVR, image-based search,[27] and Google Books. (In the two of these cases that have closed, the technology was ultimately found not to be infringing.) Policymakers should consider statutory damages not just in the context of secondary liability, but also in the more general context of companies seeking to develop legitimate, non-infringing businesses in areas where copyright law is novel and uncertain.

C. Recalibrating statutory damages likely requires legislation, but non-legislative guidelines could perhaps be a positive step.

CDT believes there are strong arguments for legislation to recalibrate statutory damages for (i) private individuals acting in their personal capacity and with no commercial purpose; and (ii) legitimate businesses facing secondary liability or navigating undecided copyright issues. There is no compelling reason to impose sky-high damages in such cases, and we believe reform would carry substantial benefits to free expression and innovation. We would envision separate provisions, as the issues for individuals and for technology companies seem distinct.

One non-legislative option would be to create a set of guidelines to courts for assessing statutory damages. This has been suggested by law professor Pamela Samuelson as part of the Copyright Principles Project, with the goal of ensuring that awards are "consistent, reasonable, and just."[28] While such guidelines obviously could not change the range of

---

[26] Brief of the National Venture Capital Ass'n as Amicus Curiae in Support of Respondents to the Supreme Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), at 2.

[27] *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003).

[28] Pamela Samuelson, et al., *The Copyright Principles Project: Directions for Reform*, 25 Berkeley Tech. L.J. 1175, 1220 (2010).

available damages, some form of non-legislative principles concerning what should be considered reasonable could help improve consistency and create an expectation that certain scenarios call for damages at or near the bottom of the range, to avoid disproportionate or widely divergent results.

Were the Task Force to take on the project of creating or facilitating such guidance, we would urge it to carefully consider the approaches taken in past legislative efforts and in Prof. Samuelson's work.[29] Some options include:

- recommending lower damages in secondary liability cases where the defendant had a strong if ultimately losing case of fair use or other non-infringement;
- urging expanded use of the innocent infringer provision, including cases where the fair-use or other non-infringement arguments were strong;
- recommending lower damages for non-commercial infringement by individuals; and
- recommending damages that more closely track approximations of actual harm.

III. Framework for Remixes

A. Reforming statutory damages would be a crucial step to improve the environment for remixes.

As discussed above, the current statutory damages regime makes it exceedingly risky to rely on fair use. For an artist engaged in remixing, each and every work used involves a high-stakes legal gamble. Fair use is inherently uncertain and fact-specific, and if the artist ever guesses wrong, statutory damages can be ruinous. Moreover, the availability of statutory damages provides an incentive for rightsholders to sue even where there is no plausible case that a remix has caused any harm. Thus, a remixer cannot proceed on the assumption that if a remix seems harmless or inconsequential, a lawsuit is extremely unlikely.

In short, a key step in any effort to create a more accommodating environment for remixes would be to reform statutory damages so that they no longer serve as a draconian risk multiplier for artists and others engaged in activities with a reasonable and good faith claim to fair use.

B. Remixes need careful treatment by enforcement technologies.

The creation of remixes may be significantly affected not only by the de jure legal framework, but also by the de facto copyright enforcement practices and tools employed by Internet platforms such as user-generated content (UGC) sites. If sites employ automated copyright filters or similar tools, and if those tools are calibrated such that even small excerpts of copyrighted content are identified and blocked, then remixes are likely to be substantially stifled. It is important, therefore, that filters and other voluntarily deployed copyright enforcement measures take care to distinguish remixes from garden-variety infringement and provide reasonable ways for lawful remixes to remain accessible on mainstream platforms.

---

[29] *See* Samuelson and Wheatland, *supra* note 15.

A set of principles developed back in 2007 by a number of rightsholders and affiliated UGC platforms alluded to this idea by noting that infringement-fighting tactics should "accommodate fair use." But aside from including this phrase, the principles offered no guidance concerning how the copyright enforcement they called for might avoid entangling remixes or other fair uses.[30] Designing an automated system to make full fair-use assessments may be an impossible challenge, but some accommodations could be made to allow a wide berth for uses very likely to be fair. For example, one option would be to calibrate enforcement tools to ignore small excerpts of content embedded in longer works. UGC platforms also could provide mechanisms for enabling users to assert fair use and thereby sidestep automated blocking that might otherwise apply.[31] Other approaches might be possible.[32] But without some concrete accommodations, remixes could easily end up as collateral damage of copyright enforcement tools aimed at straightforward copyright infringement. Policymakers should be aware that a healthy space for creative remixing requires attention not just to the legal regime, but to enforcement practices and technologies as well.

IV. First Sale in the Digital Environment

A. The first sale doctrine carries important benefits.

The Task Force asks about the benefits of the first sale doctrine. CDT believes the doctrine provides substantial benefits related to consumer choice and access to creative works:[33]

- First, it enables secondary markets that provide lower-priced options for consumers – from secondhand purchase to library borrowing to commercial rental to hand-me-downs from family or friends.
- Second, first sale spurs innovation in the marketplace. It enables third parties to develop new distribution models (such as, for example, video rental) that generate new options for consumers, and prompts rightsholders to compete with secondary offerings.
- Third, first sale helps preserve access and availability. If the original distributor ceases to distribute a work – due to commercial decisions, going out of business, or for any other reason – first sale enables the secondary markets that allow interested parties to find alternative sources for obtaining copies of the work. Such markets have flourished online thanks to new tools that make it practical to locate and obtain even obscure, rare, or far-flung copies of works.

---

[30] David Sohn, "Two Takes on Copyright Principles for UGC Platforms," *CDT Policy Beta* blog, Oct. 31, 2007, https://www.cdt.org/blogs/david-sohn/two-takes-copyright-principles-ugc-platforms.

[31] For example, YouTube's Content ID system gives a user the option, when a video he or she is attempting to post has been flagged by the system, of proceeding to post the video on the ground that it constitutes fair use. *See* Shenaz Zack, "Content ID and Fair Use," *Google Public Policy Blog,* Apr. 23, 2010, http://googlepublicpolicy.blogspot.com/2010/04/content-id-and-fair-use.html.

[32] For example, several public interest and academic organizations issued some "Fair Use Principles for User Generated Video" in 2007, available at https://www.eff.org/pages/fair-use-principles-user-generated-video-content.

[33] For a more detailed discussion of the benefits of the first sale doctrine, *see* Aaron Perzanowski and Jason Schultz, *Digital Exhaustion*, 58 UCLA L. Rev. 889, http://www.uclalawreview.org/?p=1677.

- Fourth, first sale tends to limit the amount of control rightsholders can exercise over how downstream users engage with their works, because it prevents rightsholder from having privity of contract with all downstream users or purchasers.34 This means more freedom for users and more full enjoyment of copyrighted works. Rightsholders can't force book purchasers to read chapters in a specific order, or prohibit purchasers from framing or mounting an artwork as they see fit.

- Fifth, first sale protects privacy by making it impossible for rightsholders to track the identities of all consumers who have obtained copies of their works. In short, the right to read anonymously35 is protected by the ability to obtain works from decentralized, secondary distributors with little incentive to try to track the movement of those works.

- Sixth, the first sale doctrine reduces consumer lock-in with respect to technology platforms. For example, users might be more reluctant to upgrade to CDs if they couldn't resell their vinyl records and thus recoup some of their investment in the earlier technology.

B. The online marketplace may be able to mimic some of the first sale doctrine's benefits, but likely subject to significant limits.

The Task Force asks to what extent the online market, now or in the future, may provide the opportunity to engage in the same kinds of activities that the first sale doctrine makes possible in the analog world.

There are certainly scattered examples of the online marketplace providing functionalities that mimic analog activities facilitated by first sale. To take several examples from the leading e-book platforms: Amazon, Barnes & Noble, and Google Play each offer textbooks for digital rental.[36] Amazon and Barnes & Noble offer limited lending options for some e-book purchases.[37] And Amazon also offers a private "library" for members of its "Prime" service.[38]

Nonetheless, there are significant limits in the ability of the online marketplace to match the benefits of first sale on its own. In both the analog and digital worlds, it has always been possible and indeed likely that some rightsholders would voluntarily choose to permit or enable downstream distribution, regardless of the legal regime. But the premise and raison d'etre of the first sale doctrine is that rightsholders will not always believe it is in their self-interest to do so. The revenue-maximizing strategy of rightsholders will not always be consistent with the existence of secondary markets, lending, etc.

---

[34] Indeed, the doctrine was born in a court's refusal to allow an attempt at downstream pricing control where there was no privity of contract. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

[35] *See* Perzanowksi & Schultz, *supra* note 33; *see also* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" In Cyberspace*, 28 Conn. L. Rev 981 (1996), http://ssrn.com/abstract=17990.

[36] *See* Amazon, Kindle Textbook Rental, http://www.amazon.com/gp/feature.html?docId=1000702481; Barnes & Noble, eTextbooks, http://www.barnesandnoble.com/u/etextbooks-digital-textbooks/379002516; and Google Support, "Rent textbooks and books," https://support.google.com/googleplay/answer/3260366?p=books_rental&rd=1.

[37] *See* Amazon Support, "Lend or Borrow Kindle Books," http://www.amazon.com/gp/help/customer/display.html?nodeId=200549320; and Barnes & Noble, Top LendMe Nook Books, http://www.barnesandnoble.com/u/top-lendme-nook-books-ebooks/379003749.

[38] Amazon, Kindle Owners Lending Library, http://www.amazon.com/gp/feature.html/?docId=1000739811.

If this premise is correct, then it is doubtful that the marketplace alone can ever fully match the benefits of the first sale doctrine. At most, downstream functions like lending would be allowed voluntarily by some of the rightsholders, some of the time, and subject to restrictions. Indeed, this is the case in several of the examples cited above. Rental or lending is not available for all e-book titles, at the discretion of the publisher, and is often subject to other restrictions. And E-book lending for libraries is often subject to limits on sequential borrowing, after which libraries must license a new copy.[39]

Moreover, the market alone seems ill-suited to provide some of first sale's benefits. While one can imagine rightsholders making marketplace decisions to license some functions (e.g., rentals, lending) typically covered by first sale, others hardly seem likely. For example, robust, comprehensive resale markets for digital products seem unlikely to develop in the absence of a first-sale principle. Some rightsholders might choose to permit resale, but many would not. As a result, there would likely not be sufficient digital works available to build the critical mass necessary to attract a large group of market participants. Nor is the market likely capable of fully replicating the kind of individual transactions that the first sale doctrine permits between downstream consumers; even if rightsholders were favorably inclined, the transaction costs associated with individual consumers seeking permissions or licenses would be prohibitive.

Lastly, in a world where first sale–like benefits are dependent on the affirmative participation of rightsholders and distributors, the benefit of preserving access would likely be lost entirely. When the original distributor of a work goes defunct, the market has no means of preserving availability and access in the absence of first sale, because the only entity with the legal right to distribute the work no longer exists. Without first sale, there would be no marketplace player with the legal ability to preserve access.

C. Rather than an all-or-nothing approach to digital first sale, policymakers should explore options for extending first sale subject to appropriate criteria for determining when it should apply and when not.

The Task Force asks about trends since the Copyright Office first sale report in 2001. The most obvious trend is the strong and inexorable trend toward digital distribution. Given this, as well as the limitations on market-driven first sale–like benefits discussed above, there are strong arguments for extending first sale into the digital environment in some fashion. As more and more copyrighted works are distributed in digital form, more and more of the market for copyrighted works is no longer subject to first sale. As the Green Paper noted, the prospect of a media market without meaningful first sale protections is moving closer to reality: "in a world of increasingly digital distribution, the traditional field of application of first sale doctrine may disappear."[40]

A second trend is that secondary markets are an increasingly important locus of commerce. The Internet has facilitated thriving online secondary markets that empower individual

---

[39] David R. O'Brien, Urs Gasser, and John Palfrey, *E-Books in Libraries*, (noting the existence of eBook lending licenses that expire after "26 loan circulations"), The Berkman Center for Internet & Society, February 2012, http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/E-Books%20in%20Libraries%20(O'Brien,%20Gasser,%20Palfrey)-1.pdf

[40] Green Paper at 37.

consumers and small businesses, greatly reducing the obstacles of transaction costs and geography. Online secondary markets are not a fringe economic phenomenon but an important and durable feature of the consumer economy.[41]

There is also, however, an important trend towards new distribution models in which consumers access copyrighted content without necessarily acquiring ownership. Consumers often buy access to large libraries of content via subscriptions, or buy cloud-based services in which they have an ongoing relationship with the provider rather than conducting a one-time transaction that feels like a single "purchase." Spotify and Netflix streaming are leading examples from the music and movie marketplaces. Increasingly, then, consumers' access to content need not involve ownership. For these new business models, the first sale doctrine would fit awkwardly if at all.

The policy conundrum is that at either extreme, the possible responses to these trends seem problematic. Allowing first-sale principles to go completely extinct in digital markets is undesirable. But so is forcing digital content to be distributed via "ownership" models in order to permit resale, when the market is embracing subscription and service-based distribution models.

The challenge for policymakers, therefore, is to find ways to extend first sale into the digital world without foreclosing business models where it does not fit. To that end, it would be useful to develop criteria for distinguishing those scenarios where it would be appropriate to extend first sale principles from those where it would not. For example, perhaps a digital first sale rule should apply only to purchases of digital content, while not touching and not trying to restrain non-purchase business models. Perhaps resale of digital goods should be permitted under certain circumstances, even though such resale requires making a new copy of the content, so long as the original copy is deleted and there is no overall multiplication in the number of usable copies. Perhaps other distinctions could be made, separating the circumstances under which first sale–like rights might be applicable and those under which they might not. The end result would be a regime for the digital environment that captures some of the benefits of first sale in the offline world, but that is more nuanced and carefully tailored in its application than an all-or-nothing approach.

In connection with the idea of some kind of digital first sale policy, the Task Force asks whether there have been any advances in technology to ensure that an original copy of a work no longer exists after it has been distributed. While CDT is aware of some limited experimentation in this area, it seems unrealistic to expect innovation on this front to precede changes in the legal regime. ReDigi attempted to implement a transfer-and-delete system, and was held by a court to infringe copyright *regardless* of whether its system for deleting the original copy was sufficiently robust.[42] So long as the legal regime appears hostile to transfer-and-delete systems, innovation along those lines will necessarily be sparse.

---

[41] For example, eBay 's Marketplaces division saw 112 million active users in 2012, generating $7.4 billion in revenue. *See* eBay, Inc. 2012 Annual Report, http://investor.ebayinc.com/annuals.cfm.

[42] *Capitol Records v. ReDigi*, No. 12 Civ. 95 (S.D.N.Y March 2013), https://www.docketalarm.com/cases/New_York_Southern_District_Court/1--12-cv-00095/Capitol_Records_LLC_v._Redigi__Inc./109 ("the right 'to reproduce the copyrighted work in . . . phonorecords' is implicated whenever a sound recording is fixed in a new material object, regardless of whether the sound recording remains fixed in the original material object.").

V. The Online Licensing Environment

A. CDT welcomes the focus on improving the online licensing environment, provided that it is understood that not all copyright issues are best resolved through licensing.

Effective, efficient licensing regimes have an important role to play in enabling the development of robust online markets that serve the full range of content creators and users. Nobody benefits when transaction costs are unnecessarily high or create extra barriers to the creation of innovative content distribution services. Moreover, as digital technologies empower individuals and small entities to create and distribute content on a significant scale, licensing questions become relevant to many people who don't have ready access to a team of lawyers for navigating arcane licensing systems. Finally, as CDT and others have noted in comments to the IPEC, increasing the amount and availability of lawful options for accessing copyrighted content can also play a major role in reducing infringement.[43] In short, CDT would welcome a focus on improving the online licensing environment, including by improving access to reliable ownership data.

Despite the practical importance and potential of a discussion aimed at improving licensing, however, not all copyright questions are best addressed through more efficient licensing. With respect to the Task Force's reference to the "Licenses for Europe" initiative, CDT would caution that that initiative has drawn substantial criticism for treating licensing reform as substantially equivalent to copyright reform.[44] In particular, new licensing mechanisms should not displace or minimize the importance of copyright's limitations and exceptions, which create realms in which licensing is not required. For example, CDT would argue that issues like temporary buffer copies are best resolved not by creating easier mechanisms for licensing, but rather by clarifying that such copies are not sufficiently permanent to trigger the reproduction right at all. The same would apply to many traditional applications of fair use, such as the use of brief quotations or excerpts for commentary, teaching, and criticism. Fair use is not just the serendipitous consequence of inefficiencies in licensing. The Supreme Court has recognized its important role in the relationship between copyright and users' free expression rights,[45] and its role and scope should not diminish simply because licensing becomes more efficient.

Moreover, it is important to remember that a tremendous amount of content today is created and distributed by individuals without an expectation of commercial exploitation. Creators of this content are not likely to register with any rights ownership database or provide rights ownership information in standardized format, no matter how streamlined the system. This will frustrate any effort to create rights ownership data systems that are truly, or even mostly, "comprehensive." Such systems should focus instead on providing accessible and efficient tools for those creators who wish to take advantage of licensing opportunities.

---

[43] *See, e.g., supra* note 17.

[44] *See e.g.*, Letter from Klaus-Peter Böttger, President of European Bureau of Library, Information and Documentation Associations, and Andreas Krisch, President of European Digital Rights, to Vice-President Kroes, and Commissioners Vassiliou and Barnier, April 8, 2013, http://www.edri.org/files/Licences-for-EuropeWG1_letter_EDRi-EBLIDA.pdf

[45] *Eldred v. Ashcroft*, 537 U.S. 186 (citing fair use as a "built-in First Amendment accommodation[]" in copyright law).

In short, licensing is one component of copyright policy, but not all copyright problems are best viewed or addressed through a licensing lens.

B. Music licensing is particularly complicated and would benefit from reform.

CDT agrees with the Green Paper's observation that music licensing is particularly complex, making this an area where legislative adjustments should be considered. CDT would support an effort to develop a more navigable and more equitable system for music licensing.

Music licensing reform should focus on clarity and simplification. Clarity and ease-of-use in the licensing regime is important for building legal music delivery services and hence minimizing the appeal of illegal music sources. As the Internet facilitates more diverse participation in legal music delivery, more parties – including small webcasters and startups – need to be able to navigate the legal regime. For example, changing the section 115 license to a blanket license could help streamline the process for digital distribution services to license a comprehensive catalog of music, enabling them to better compete with illicit sources. Music distribution services could likewise benefit from more certainty concerning which rights (performance, distribution, reproduction) they need to license, and from a clear rule that a service engaged in licensed activity need not obtain any further license for the making of ephemeral buffer, cache, or server copies that are merely by-products of the licensed activity and have no independent use or value.

Music licensing reform should also emphasize the principle of technological neutrality; the licensing regime should not impose higher burdens or costs on new and online delivery models than their more traditional counterparts. For example, there is no good reason why rate-setting proceedings under section 114 should be governed by one standard in the case of webcasting and an entirely different standard in the case of satellite radio or cablecasting – nor, as the Green Paper notes, why terrestrial radio should retain a complete exemption from performance royalties.