[3510-60-P]

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

National Telecommunications and Information Administration

Docket No.: 130927852-3852-01

Request for Comments on Department of Commerce Green Paper, *Copyright Policy, Creativity, and Innovation in the Digital Economy*

AGENCY: Office of the Secretary, U.S. Department of Commerce; United States Patent and Trademark Office, U.S. Department of Commerce; National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Request for public comments and notice of public meeting.

SUMMARY: Consistent with the Department of Commerce's Internet Policy Task Force (Task Force) Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy (Green Paper) released on July 31, 2013, the Task Force seeks public comment from all interested stakeholders on the following copyright policy issues critical to economic growth, job creation, and cultural development: the legal framework for the creation of remixes; the relevance and scope of the first sale doctrine in the digital environment; the appropriate

calibration of statutory damages in the contexts of individual file sharers and of secondary liability for large-scale infringement; whether and how the government can facilitate the further development of a robust online licensing environment; and establishing a multistakeholder dialogue on improving the operation of the notice and takedown system for removing infringing content from the Internet under the Digital Millennium Copyright Act (DMCA). The Task Force will also hold an initial public meeting on October 30, 2013, to discuss these topics.

DATES: Comments are due on or before November 13, 2013. Any comments received before October 15, 2013 will be considered in the discussions in the public meeting.

The public meeting will be held on October 30, 2013, from 8:30 a.m. to 5:00 p.m., Eastern Daylight Time. Registration will begin at 8:00 a.m.

ADDRESSES: The Task Force intends to hold the public meeting in the Amphitheatre of the Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue, N.W., Washington, DC 20004. All major entrances to the building are accessible to people with disabilities. Confirmation of the venue for the public meeting will be available at least seven (7) days prior to the meeting on the Internet Policy Task Force Web site, *http://www.ntia.doc.gov/internetpolicytaskforce* and the USPTO's Web site, *http://www.uspto.gov*.

Interested parties are encouraged to file comments electronically by e-mail to: CopyrightComments2013@uspto.gov. Comments submitted by e-mail should be machine-searchable and should not be copy-protected. Written comments also may be submitted by mail to Office of Policy and External Affairs, United States Patent and Trademark Office, Mail Stop

External Affairs, P.O. Box 1450, Alexandria, VA 22313-1450. Responders should include the name of the person or organization filing the comment, as well as a page number, on each page of their submissions. Paper submissions should also include a CD or DVD containing the submission in Word, WordPerfect, or pdf format. CDs or DVDs should be labeled with the name and organizational affiliation of the filer, and the name of the word processing program used to create the document. All comments received are a part of the public record and will be made available to the public at *http:www.ntia.doc.gov/category/internet-policy-task-force* without change. All personally identifiable information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. The Task Force will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: For further information regarding the meeting, contact Hollis Robinson or Ben Golant, Office of Policy and External Affairs, United States Patent and Trademark Office, Madison Building, 600 Dulany Street, Alexandria, VA 22314; telephone (571) 272-9300; e-mail hollis.robinson@uspto.gov or benjamin.golant@uspto.gov.

For further information regarding the public comments, contact Garrett Levin or Ben Golant, Office of Policy and External Affairs, United States Patent and Trademark Office, Madison Building, 600 Dulany Street, Alexandria, VA 22314; telephone (571) 272-9300; e-mail garrett.levin@uspto.gov or benjamin.golant@uspto.gov.

Please direct all media inquiries to the Office of the Chief Communications Officer, USPTO, at (571) 272-8400.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce's Internet Policy Task Force (Task Force) released *Copyright Policy, Creativity, and Innovation in the Digital Economy* on July 31, 2013 (Green Paper).[1] The Green Paper is the product of extensive public consultation led by the United States Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA). It provides a comprehensive review of the current policy landscape related to copyright and the Internet, and identifies important issues that call for attention and possible solutions. The paper focuses on three goals: maintaining an appropriate balance between rights and exceptions as the law continues to be updated; ensuring that copyright can be meaningfully enforced on the Internet; and furthering the development of an efficient online marketplace. It emphasizes the need to maintain a balanced and effective 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.

The Green Paper does not set out substantive policy recommendations, except where the Administration is already on record with a stated position. Rather, it describes changes that have already occurred in adapting copyright law to the digital environment, identifies issues on which more work should be done, and sets out paths to move that work forward. As to some of these issues, the paper expresses support for efforts already under way to address them in other forums – notably Congressional attention to music licensing, the Copyright Office's work on orphan works and mass digitization, and the Intellectual Property Enforcement Coordinator's facilitation of cooperative efforts by stakeholders to curb online infringement.

[1] The Green Paper is available at http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf.

On five other topics, the Green Paper proposes to undertake further work to develop policy recommendations by soliciting public comment and convening roundtables or forums: (1) the legal framework for the creation of remixes; (2) the relevance and scope of the first sale doctrine in the digital environment; (3) the appropriate calibration of statutory damages in the contexts of individual file sharers and of secondary liability for large-scale infringement; (4) whether and how the government can facilitate the further development of a robust online licensing environment; and (5) establishing a multistakeholder dialogue on improving the operation of the notice and takedown system for removing infringing content from the Internet under the DMCA. For each topic, the Task Force anticipates further public discussion following the submission of comments. The contours of those public discussions will be determined after reviewing the comments. Ultimately, the information obtained through this public process will be used to formulate the Administration's views and recommendations regarding copyright policy.

Request for Comment

Commenters are free to address any or all of the issues identified below, as well as to provide information on other aspects of these issues that are relevant to developing copyright policy for the Internet economy. When responding, commenters should provide evidence to support their positions and assist in developing evidence-based policy recommendations. Please note that the government will not pay for response preparation or for the use of any information contained in the response.

Legal Framework for Remixes

Advances in digital technology have made the creation of "remixes" or "mashups" – creative new works produced through changing and combining portions of existing works – easier and cheaper than ever before, providing greater opportunities for enhanced creativity. These types of "user-generated content" are a hallmark of today's Internet, in particular on video-sharing sites. But because remixes typically rely on copyrighted works as source material – often using portions of multiple works – they can raise daunting legal and licensing issues.

As explained in the Green Paper, there are two general methods for permitting legal remixes in today's marketplace – fair use and licensing mechanisms.[2] Many remixes may qualify as fair uses of the copyrighted material they draw on. Remixers may also rely in some contexts on licensing mechanisms such as YouTube's Content ID system, Creative Commons licenses, and other online licensing tools.[3] There have been additional efforts to provide guidance through the creation of best practices and industry-specific guidelines to help those looking to use existing works make informed choices.[4]

Despite these alternatives, a considerable area of legal uncertainty remains, given the fact-specific balancing required by fair use and the fact that licenses may not always be easily available.

1. Is the creation of remixes being unacceptably impeded by this uncertainty? If not, why not? If so, how? In what way would clearer legal options result in even more valuable creativity?

[2] Green Paper at 28-29.
[3] *Id.* at 29, 87-89.
[4] *Id.* at 29.

2. In what ways, if any, can right holders be efficiently compensated for this form of value in cases where fair use does not apply?
3. What licensing mechanisms currently exist, or are currently under development, for remixes and for which categories of works?
4. Can more widespread implementation of intermediary licensing, such as YouTube's Content ID system, play a constructive role? If so, how? If not, why not?
5. Should alternatives such as microlicensing to individual consumers, a compulsory license, or a specific exception be considered? Why or why not?
6. What specific changes to the law, if any, should be considered? To what extent are there approaches that do not require legislation that could constructively address these issues?

First Sale in the Digital Environment

The first sale doctrine, which limits the scope of the exclusive distribution right and allows the owner of a physical copy of a work to resell or otherwise dispose of that copy without the copyright owner's consent,[5] does not apply to digital transmissions where copies are created implicating the reproduction right.[6]

In 2001, in a report requested by Congress, the Copyright Office considered whether the first sale doctrine should be amended to extend to digital transmissions.[7] It recommended against doing so, noting the fact that a digital transmission creates a perfect copy of the work, which could both negatively affect the development of the digital marketplace and fuel piracy.[8]

[5] 17 U.S.C. § 109.
[6] Green Paper at 35.
[7] *Id.* at 35-36 (citing U.S. Copyright Office, *A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act*, 78-79 (2001) *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf).
[8] *Id.* at 35-36.

The Office also noted that the issue might be one that Congress would want to revisit as the digital marketplace developed and matured.

Proponents of a digital first sale doctrine argue that the extension of the doctrine would have pro-competitive effects, and would preserve the traditional benefits of users sharing works with friends or family, and students being able to purchase less expensive copies of textbooks. Proponents have also suggested that technological advances would lessen the potential risk of piracy.[9] But others assert that the risk of piracy remains too great for adoption of the doctrine in the digital environment, and that the market is evolving in ways that make its application unnecessary.[10]

7. What are the benefits of the first sale doctrine? And to what extent are those benefits currently being experienced in the digital marketplace?
8. To what extent does the online market today provide opportunities to engage in actions made possible by the first sale doctrine in the analog world, such as sharing favorite books with friends, or enabling the availability of less-than-full-price versions to students?
9. If the market does not currently provide such opportunities, will it do so in the near future? If not, are there alternative means to incorporate the benefits of the first sale doctrine in the digital marketplace? How would adoption of those alternatives impact the markets for copyrighted works?
10. Are there any changes in technological capabilities since the Copyright Office's 2001 conclusions that should be considered? If so, what are they? For example, could some

[9] *Id.* at 36
[10] *Id.*

technologies ensure that the original copy of a work no longer exists after it has been redistributed?

11. To what extent are there particular market segments or categories of users that may warrant particularized legal treatment?
12. How will the Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013), impact the ability of right holders to offer their works at different prices and different times in different online markets? How will any such changes impact the availability of and access to creative content in the United States and elsewhere?

Statutory Damages

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.[11] 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.

In recent years, concerns have been raised about the level of statutory damage awards in certain contexts; in particular: (1) the use of orphan works; (2) secondary liability claims against online services; and (3) private individuals making infringing content available online. The Copyright Office has already recommended addressing the issue of statutory damages in the context of orphan works by limiting their availability in certain circumstances.[12] With respect to statutory damages for secondary liability, there are competing arguments about the potential negative impact on investment and the need for a proportionate level of deterrence.[13] Finally,

[11] *Id*. at 51 (citing 17 U.S.C. § 504(c)).
[12] Green Paper at 51-52.
[13] *Id*. at 52.

there have been calls for further calibration of the levels of statutory damages for individual file sharers in the wake of large jury awards in the two file-sharing cases that have gone to trial.[14]

13. To what extent is application of the current range of statutory damages necessary for effective deterrence with respect to (a) direct infringement by individual file sharers and (b) secondary liability by online services?
14. Is the potential availability of statutory damages against online services for large scale secondary infringement hindering the development of new, legitimate services or platforms for delivering content? If so, how? What is the evidence of any such impact?
15. If statutory damages for individual file sharers and/or services found secondarily liable for infringement were to be recalibrated, how should that be accomplished? Would legislation be required?

Government Role in Improving the Online Licensing Environment

Great strides have been made toward fulfilling the Internet's promise as a market for copyrighted works, with legitimate services delivering a wide variety of works in a wide variety of formats, as well as the increasing availability of online licensing.[15] Building the online marketplace is fundamentally a function of the private sector, and that process is well under way. 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. In reaching these goals, 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.

[14] *Id.*
[15] *Id.* at 77-80, 87-98.

One possible area for government involvement is helping to provide better access to standardized rights ownership information. The Copyright Office is working to improve the reliability of the public registration and recordation systems, and considering educational efforts and stronger incentives that could further increase the use of the system and enhance its comprehensiveness.[16] The expertise and resources of the private sector could also be drawn on to create innovative public/private partnerships improving or linking rights databases. Such an approach was highlighted in the Copyright Office's Notice of Inquiry in March 2013, seeking public comment on the integration of private databases with the Office's public database.[17]

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.,[18] launching the kind of multistakeholder dialogue recently begun by the European Commission through the "Licences for Europe" initiative,[19] participating in the development of international initiatives such as the World Intellectual Property Organization's (WIPO) International Music Registry,[20] and/or facilitating the involvement of U.S. stakeholders.

16. What are the biggest obstacles to improving access to and standardizing rights ownership information? How can the government best work with the private sector to overcome those obstacles?

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[16] *Id.* at 89-92.
[17] *See* U.S. Copyright Office, *Technological Upgrades to Registration and Recordation Functions*, 78 Fed. Reg 17722 (Mar. 22, 2013). This Notice also discussed the Office's recent exploration of issues related to data standards and the need for bulk data transfer. *Id.* at 17723.
[18] Green Paper at 96.
[19] *See* Licences for Europe, Structured stakeholder dialogue 2013 *at* 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.")
[20] Green Paper at 96.

17. To what extent is a lack of access to standardized, comprehensive, and reliable rights information impeding the growth of the online marketplace? What approaches could be taken to improve the situation?
18. Are there other obstacles that exist to developing a more robust, effective, or comprehensive online licensing environment? If so, what are they?
19. In addition to those efforts to develop standardized, comprehensive, and reliable rights databases and online licensing platforms described in the Green Paper, are there other efforts under way by the private sector or public entities outside the United States? If so, what are they?
20. Would a central, online licensing platform for high-volume, low-value uses (a "copyright hub") be a useful endeavor in the United States? If not, why not? If so, how can the government support such a project?
21. What role should the United States government play in international initiatives at WIPO or elsewhere?

Operation of the DMCA Notice and Takedown System

In 1998, the DMCA established safe harbors to shield online service providers that act responsibly from unreasonable monetary liability for copyright infringement. 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. One of the conditions on the availability of the safe harbors is that an Internet service provider (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. A "put-back" mechanism allows content to be restored that was

removed through mistake or misidentification. This structure has essentially created a new, extrajudicial tool – notice and takedown – for curbing infringement.[21]

After more than a decade of experience with the DMCA notice and takedown system, right holders, ISPs, and content creators, have all identified respects in which its operation can become unwieldy or burdensome. On one side, there are complaints that the system can be too resource-intensive and require constant re-notification as to the same content;[22] on the other, that the volume has become too high, and notices may be inaccurate or otherwise misused.[23] Right holders have also found unwieldy the application of notice and takedown to services, such as cyberlockers, where stored content is not directly searchable; infringing URLs must be located through other sites that aggregate links and then right holders must send takedown notices directly to the cyberlockers, adding a step to the process. And consumer and free speech advocates have raised concerns about notices claiming that fair uses or other permissible activities are infringing.[24]

These problems taken together may be undermining the benefits of the notice and takedown system for all parties. The Task Force believes that one potential solution to ease burdens and improve results that would not require legislation is the creation of best practices. Such agreements 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 multistakeholder dialogue involving right holders (both large and small), ISPs, consumer and public interest representatives and companies in the business of identifying infringing content, on how to improve the operation of the notice and takedown system. The goal of this process is not

[21] *Id*. at 53.
[22] *Id*. at 56.
[23] *Id*. at 57.
[24] *Id*. at 57-58.

to identify ways to change the law, but rather to determine how the operation of the existing system can be improved within the existing legal framework.

Although the details of the process will be developed following review of public comments, the Task Force anticipates a structure of regular meetings over a finite period of time to address a series of discrete topics. Since the notice and takedown system is already widely used, the Task Force wants to ensure participation by a wide variety of its current users – both right holders and service providers – as well as stakeholders that wish to use the system and those that are otherwise directly affected. Transparency is necessary to allow the public to understand how participants reach their decisions.[25] Consensus of a broad set of stakeholders, achieved through a transparent process, would lend legitimacy to the outcome.

The Task Force's role will be to provide a forum for discussion and consensus-building among stakeholders. Stakeholder groups convened for this process will not be advisory committees, as neither the Task Force nor any other Federal agency or office will seek advice or recommendations on policy issues from participants.

To identify potential topics that would benefit from this process, and to develop a productive structure, the Task Force seeks comment from stakeholders. Commenters may wish to provide their views on how discussions of the proposed issue(s) should be structured to ensure openness, transparency, and consensus-building. Experiences with other Internet-related multistakeholder processes on policy or technical issues could be valuable, taking into account

[25] *See* Memorandum for the Heads of Executive Departments and Agencies, Open Government Directive, Dec. 8, 2009, *available at* *http://www.whitehouse.gov/open/documents/open-government-directive*; Memorandum for the Heads of Executive Departments and Agencies, "Transparency and Open Government," Jan. 21, 2009, *available at* *http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/*.

the fact that the notice and takedown process may differ because of the existing legal framework.[26]

22. The Task Force believes that at least the following issues could be constructively addressed through a notice and takedown multistakeholder dialogue:

    a. Reducing the volume of takedown notices sent to service providers;

    b. Minimizing reappearance of infringing material;

    c. Inaccurate takedown requests;

    d. Misuse of takedown requests; and

    e. Difficulties in using the system for individuals or small and medium-size enterprises (SME).

    What other issues could be considered? For each issue to be considered, who are the stakeholders needed at the table?

23. How can the Task Force ensure participation by all relevant stakeholders, as well as effective and informed representation of their interests?

24. Are there lessons from existing multistakeholder processes in the realms of Internet policy, intellectual property policy, or technical standard-setting that could be applied here? If so, what are they and to what extent are they applicable?

25. In what ways could the stakeholder discussions be structured to best facilitate consensus?

[26] Potentially relevant examples include NTIA's ongoing privacy multistakeholder process arising out of the Executive Office of the President's Privacy and Innovation Blueprint, http://www.ntia.doc.gov/other-publication/2013/privacy-multistakeholder-process-mobile-application-transparency, the Internet Corporation for Assigned Names and Numbers (ICANN), the Internet Engineering Task Force (IETF), and the Internet Governance Forum (IGF). The Task Force welcomes discussion of these and any other examples of multistakeholder policy development processes that commenters believe are relevant to developing consensus for improvements to the notice and takedown system.

Public Meeting

On October 30, 2013, the Task Force will hold an initial public meeting to hear stakeholder views and to initiate discussion of the five topics identified above. The event will seek participation and comment from interested stakeholders, including creators, right holders, Internet intermediaries, consumer representatives, public interest groups, and academics.

The agenda for the public meeting will be available at least one week prior to the meeting and the meeting will be webcast. The agenda and webcast information will be available on the Internet Policy Task Force Web site, *http://www.ntia.doc.gov/internetpolicytaskforce* and the USPTO's Web site, *http://www.uspto.gov*.

The meeting will be open to members of the public to attend, space permitting, on a first-come, first-served basis. Pre-registration for the meeting is available at: *http://events.SignUp4.com/Green Paper*. The meeting will be physically accessible to people with disabilities. Individuals requiring accommodation, such as sign language interpretation, real-time captioning of the webcast or other ancillary aids, should communicate their needs to Hollis Robinson or Ben Golant, Office of Policy and External Affairs, United States Patent and Trademark Office, Madison Building, 600 Dulany Street, Alexandria, VA 22314; telephone (571) 272-9300; e-mail hollis.robinson@uspto.gov or benjamin.golant@uspto.gov at least seven (7) business days prior to the meeting. Attendees should arrive at least one-half hour prior to the start of the meeting, and must present a valid government-issued photo identification upon arrival. Persons who have pre-registered (and received confirmation) will have seating held until

15 minutes before the program begins. Members of the public will have an opportunity to ask questions at the meeting.

Dated: 9/30/2013

Teresa Stanek Rea
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Deputy Director of the United States Patent and Trademark Office

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