



COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY

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Message from Secretary of Commerce Penny Pritzker

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.”¹

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.² 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.³ Subsequently, the Task Force published a Notice of Inquiry (NOI) and received several hundred submissions in response.⁴

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.⁵

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.

¹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

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.

³ USPTO & NTIA, Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 33577 (June 14, 2010). An agenda from the symposium is available at <http://www.ntia.doc.gov/legacy/InternetPolicyTaskForce/copyright/CopyrightSymposiumProgram.pdf>.

⁴ USPTO & NTIA, Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 72790 (November 26, 2010). The comments are available at <http://ssl.ntia.doc.gov/comments/100910448-0448-01/>.

⁵ See IPEC, Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement, 77 Fed. Reg. 42765 (July 20, 2012).

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,⁶ 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.

I. Copyright and the Internet: Opportunities and Challenges

Copyright law grants exclusive rights to authors in order to encourage the production of creative works, to the benefit of society as a whole.⁷ These exclusive rights are balanced by a range of limitations and exceptions that permit some uses of copyrighted works without the need for authorization.⁸ 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.⁹

“[N]othing is more important to American prosperity than jumpstarting our engine of innovation.”¹⁰ 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.¹¹ In that same year, these industries contributed 4.4 percent of U.S. GDP, or approximately \$641 billion.¹² 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.¹³

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

⁷ *Washingtonian Publ’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/>.

¹⁰ Remarks by Gary Locke, Secretary of Commerce, at the Internet Policy Task Force Symposium on Copyright Policy, Creativity, and Innovation in the Internet Economy (July 1, 2010), available at <http://www.commerce.gov/news/secretary-speeches/2010/07/01/remarks-copyright-policy-internet-economy-symposium>.

¹¹ Economics and Statistics Administration and the USPTO, Intellectual Property and the U.S. Economy: Industries in Focus at 39-42 (March 2012), available at http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf. When indirect employment in the supply chain supported by these copyright-intensive industries is included, the figure rises to nearly 7.6 million. *Id.* at 43-44.

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.¹⁴ In the course of the 20th century, copyright confronted new technologies ranging from player piano rolls,¹⁵ to motion pictures, television and radio,¹⁶ to photocopy machines,¹⁷ computers¹⁸ and VCRs.¹⁹ Each of these developments provoked great anxiety as to the continued viability of copyright,²⁰ 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.²¹ In 1995, the Clinton Administration’s Intellectual Property Working Group issued a report on *Intellectual Property and the National Information Infrastructure*.²² 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).

¹⁶ See, e.g., *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911); *Jerome H. Remick & Co. v. Am. Auto. 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).

¹⁸ See Final Report of the National Commission on New Technological Uses of Copyrighted Works, 1-2 (1978).

¹⁹ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

²⁰ See John Phillip Sousa, *The Menace of Mechanical Music*, 8 APPLETON’S MAG. 278 (1906); *The Law: 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 A. Ringer, *The Demonology of Copyright*, R.R. Bowker Memorial Lecture (Oct. 24, 1974).

²¹ See, e.g., John Perry Barlow, *The Economy of Ideas: A framework for patents and copyrights in the Digital Age*, WIRED, Mar. 1994 available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html>.

²² *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (Sept. 1995) (NII Report), available at <http://www.uspto.gov/web/offices/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.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.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 broad-based 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.²⁵ Since the NII Report, the

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.

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).

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;²⁶ 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,²⁷ the proliferation of unlicensed sites and services making content available without restriction or payment impedes the growth of legitimate services.²⁸

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,"²⁹ a time-tested means to promote the production and dissemination of creative works.³⁰

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.³¹ This paper describes ongoing

Piracy, Propertization, and Thomas Jefferson, 79 S. CAL. L. REV. 993, 1009-10 (2006); ADRIAN JOHNS, THE NATURE OF THE BOOK 32 (1998); ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES (2011).

²⁶ See *infra* pp. 39-78. USPTO & NTIA, Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 61419, 61421 (Oct. 5, 2010).

²⁷ 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").

²⁹ *Harper & Row*, 471 U.S. at 558.

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.³² 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.³³ 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.³⁴ 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

a series of hearings on such a review. See U.S. House of Representatives, Committee on the Judiciary, *Chairman Goodlatte Announces Comprehensive Review of Copyright Law* (Apr. 24, 2013) available at http://judiciary.house.gov/news/2013/04242013_2.html. And the National Research Council of the National Academies recently released a report calling for more empirical research to be conducted on digital copyright issues to help inform the policy debates. See COPYRIGHT IN THE DIGITAL ERA: BUILDING EVIDENCE FOR POLICY 26 (2013) (Stephen A. Merrill & William J. Raduchel, eds.), available at http://www.nap.edu/catalog.php?record_id=14686 (“Copyright in the Digital Era”).

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.

³³ See, e.g., World Economic Forum, *Global Agenda Council on the Intellectual Property System - Digital Copyright Principles* (2013), available at http://www3.weforum.org/docs/WEF_GAC_CopyrightPrinciples.pdf; UK IPO, *Modernising Copyright: A modern, robust and flexible framework* (2012), available at <http://www.ipo.gov.uk/response-2011-copyright-final.pdf>; Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011), available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf> (“Hargreaves Report”); European Commission, *Commission agrees way forward for modernizing copyright in the digital economy*, MEMO/12/950 (Dec. 5, 2012), available at http://europa.eu/rapid/press-release-MEMO-12-950_en.htm.

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.³⁵ 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.³⁶ 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.³⁷

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.³⁸ Congress determined that a

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. 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.

³⁶ Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

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).

³⁸ Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995), amending 17 U.S.C. §§ 106, 114-15. The digital performance right was further amended by the DMCA and by the Copyright Royalty and Distribution Reform Act of 2004, Public Law 108-419, 118 Stat. 2341, and the digital performance right and corresponding statutory licenses as currently codified reflect those amendments.

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.”³⁹

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.⁴⁰ 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.⁴¹

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.⁴² 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.⁴³ 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.⁴⁴

³⁹ S. REP. 104-128, at 14 (1995).

⁴⁰ See 17 U.S.C. § 114(d)(2).

⁴¹ See 17 U.S.C. §§ 114(f)(2)(B), 801(b)(1). The Copyright Royalty Board is an independent administrative law panel housed in the Library of Congress that adjudicates the rates and terms of the statutory licenses in the Copyright Act. See 17 U.S.C. §§ 801-805.

⁴² 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.

⁴³ See, e.g., Register of Copyrights, Report on Performance Right in Sound Recordings, H.R. Doc. No. 15, 95th Cong., 2d Sess. (1978); Register of Copyrights, *Report on Copyright Implications of Digital Audio Transmission Services* (Oct. 1991); Letter from Cameron F. Kerry to Honorable Patrick Leahy (Apr. 1, 2010), available at <http://www.commerce.gov/sites/default/files/documents/2012/january/s379apr0110.pdf>; Administration’s White Paper on Intellectual Property Enforcement Legislative Recommendations 17 (Mar. 2011), available at http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf.

⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.”⁴⁸ 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.⁴⁹ 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

performances of U.S. sound recordings. See Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee of Courts, the Internet, and Intellectual Property, Committee on the Judiciary, *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century* (July 31, 2007) available at <http://www.copyright.gov/docs/regstat073107.html>.

⁴⁵ More broadly, the transmission of any information over the Internet – including content protected by copyright – inherently requires numerous temporary copies or buffers to be made as the information traverses the network. As information is transported from switch to switch and server to server across the Internet, temporary copies are made at every stopping point. Without temporary copies, no communications could flow across the Internet.

⁴⁶ In other words, they access the software according to their license terms, load it into their computer’s random access memory (RAM), use it and then close the program or shut down the computer – with the software only being temporarily stored on the computer’s or server’s hard drive.

⁴⁷ See Final Report of the National Commission on New Technological Uses of Copyrighted Works *supra* note 18 at 12-13, 22; Computer Software Copyright Act of 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3028; *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).

⁴⁸ 17 U.S.C. § 101 (definition of “fixed”).

⁴⁹ 991 F.2d 511 (9th Cir. 1993).

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 computer⁵³ 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

⁵⁰ U.S. Copyright Office, *A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act*, 108 (2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> (“Section 104 Report”).

⁵¹ See *Carson v. Verismart Software*, No. C 11-03766, 2012 U.S. Dist. LEXIS 42166 at *8-9 (N.D. Cal. Mar. 27, 2012); *Costar Realty Info., Inc. v. Field*, No. 08-CV-0663, 2010 U.S. Dist. LEXIS 135016 at 19 (D. Md. Dec. 20, 2010); *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1148 (N.D. Cal. 2010); *Apple, Inc. v. Psystar Corp.*, 673 F. Supp. 2d 931, 935 (N.D. Cal. 2009); *Quantum Sys. Integrators, Inc. v. Sprint Nextel Corp.*, No. 08-1534, 2009 U.S. App. LEXIS 14766 at 18-19 (4th Cir. July 7, 2009).

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 17 U.S.C. § 112(e). 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.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.”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.”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.⁶² And the United States’ bilateral free trade agreements incorporate obligations to extend the reproduction right to temporary storage in any manner or form.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.⁶⁴ In order to resolve potential ambiguity in the

⁵⁹ WIPO, *Agreed Statements Concerning the WIPO Copyright Treaty* (WIPO Doc. No. CFNF/DC/96) (1996) (Agreed Statement concerning Article 1(4)); WIPO, *Agreed Statements Concerning the WIPO Performances and Phonograms Treaty* (WIPO Doc. No. CFNF/DC/96) (1996) (Agreed Statement concerning Articles 7, 11 and 16).

⁶⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society at art. 2 (OJ L 167 of 22.6.2001) (“Copyright Directive”).

⁶¹ *Id.* at art. 5(1) (brackets in original). 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.

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

⁶³ 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.”

⁶⁴ Several decades before the Internet, copyright treaty negotiators were already laying the groundwork for a “making available” right. See Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 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.” *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.”⁶⁵ 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.⁶⁶

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.⁶⁷ 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.⁶⁸ And the legislative history indicates that this right was intended to incorporate the prior law’s “publication” right,⁶⁹ which included the mere offering of copies to the public.⁷⁰

⁶⁵ 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. MIHÁLY 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.

⁶⁶ 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).

⁶⁷ 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).

⁶⁸ 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)

⁶⁹ 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).

⁷⁰ 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.⁷¹ Some others have disagreed.⁷² 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.⁷³

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.”⁷⁴ 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.”⁷⁵

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

Right Available: 22nd Annual Horace S. Manges Lecture, February 3, 2009 33 COLUM. J.L. & ARTS 135, 160-61 (2010); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1986) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

⁷¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (“*Napster*”); *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185, 191 (D. Me. 2006); *Motown Records Co. v. DiPietro*, No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007); *UMG Recordings, Inc. v. Alburger*, Civil No. 07-3705, 2009 WL 3152153, at *3 (E.D. Pa. Sept. 29, 2009).

⁷² These cases have not, however, required direct evidence of the dissemination of copies, but have allowed proof based on circumstantial evidence or inference. See *Capitol Records, Inc. v. Thomas*, 579 F.Supp.2d 1210, 1225 (D. Minn. 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 169 (D. Mass. 2008); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981-84 (D. Ariz. 2008).

⁷³ Menell *supra* note 64; 2-8 NIMMER ON COPYRIGHT § 8.11[B][4][d].

⁷⁴ S. REP. NO. 105-190 (1998).

⁷⁵ Charles Clark, *The Answer to the Machine is in the Machine*, in THE FUTURE OF COPYRIGHT IN THE DIGITAL ENVIRONMENT (Hugenholtz, ed.) (1996).

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,

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.⁸² 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.⁸³

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.⁸⁴ TPM provisions modeled on the DMCA are also included in all subsequent U.S. free trade agreements.⁸⁵

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.⁸⁶ 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.⁸⁷

⁸² 17 U.S.C. §§ 1201(a)(2), (b)(1).

⁸³ 17 U.S.C. § 1201(c)(3).

⁸⁴ See WIPO, *Survey on Implementation Provisions of the WCT and WPPT* (2003), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_6.pdf; EU Copyright Directive art. 6; Australian Copyright Act of 1968 arts. 116AK-116AQ; Canadian Copyright Act arts. 41-41.21; Copyright Law of the People’s Republic of China art. 48(6); Japanese Copyright Law arts. 2(1)(xx), 30(1)(ii), 120bis; Japanese Unfair Competition Prevention Act Law arts. 2(1)(x)-(xi), 2(7), 3, 4, 21(2)(iv); Civil Code of the Russian Federation art. 1299.

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

⁸⁸ See, e.g., National Information Standards Organization, *Understanding Metadata* (2004), available at <http://www.niso.org/publications/press/UnderstandingMetadata.pdf>.

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*bis*(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,⁹² 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.⁹³ 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.⁹⁴

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.⁹⁵ At the same time, it is clear that existing exceptions can be extended into the digital

⁹² *Cartoon Network*, 536 F.3d 121.

⁹³ See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (“*Aereo*”); *Fox Television Stations, Inc., et al. v. BarryDriller Content Sys., PLC, et al.*, No. CV 12-6921-GW, 2012 WL 6784498 (C.D. Cal. Dec. 27, 2012) (“*Aereokiller*”). The European Court of Justice recently held that the unauthorized live streaming of TV broadcasts violates the EU Copyright Directive’s exclusive right of “communication to the public.” *ITV Broad. Ltd v. TVCatchup Ltd*, Case C 607/11 at ¶ 40 (ECJ Mar. 7, 2013).

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, 11*bis*, 11*ter*, 14, 14*bis*; 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.⁹⁶ 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.⁹⁷ 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.”⁹⁸ It is also a vital “built-in First Amendment accommodation[.]” in copyright law.⁹⁹ 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.¹⁰⁰

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,¹⁰¹ caching of web pages by a search engine,¹⁰² and a digital plagiarism detection service.¹⁰³

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.

⁹⁹ *Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (internal quotation marks and citation omitted).

¹⁰⁰ See Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 101 CAL. L. REV. (forthcoming 2014); MICHAEL C. DONALDSON, *CLEARANCE AND COPYRIGHT: EVERYTHING YOU NEED TO KNOW FOR FILM AND TELEVISION* 29, 363-67 (3d ed. 2008).

¹⁰¹ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815-16 (9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163-68 (9th Cir. 2007); but see *Associated Press v. Meltwater U.S. Holdings, Inc.*, No. 12 Civ. 1087, -- F. Supp. 2d --, 2013 WL 1153979 (S.D.N.Y. Mar. 21, 2013) (rejecting fair use defense for

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,¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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.”¹⁰⁷ 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.¹⁰⁸ 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).

¹⁰² *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1117-23 (D. Nev. 2006).

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.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%202012_Recommendation.pdf. In many other countries, these types of consumer activities are treated as “private copying,” 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.

¹⁰⁶ H.R. REP. NO. 1476 at 68-71 (1976).

¹⁰⁷ Bruce A. Lehman, *The Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference on Fair Use 2* (1998), available at <http://www.uspto.gov/web/offices/dcom/olia/confu/confurep.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.¹⁰⁹ 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.¹¹⁰ 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."¹¹¹

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.¹¹²

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.¹¹³ 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

¹⁰⁹ See <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>.

¹¹⁰ See <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.

¹¹¹ See Janet Landay, *CAA receives major Mellon grant*, College Art Association, <http://www.collegeart.org/news/2013/01/14/caa-receives-major-mellon-grant/> (Jan 14, 2013).

¹¹² U.S. Intellectual Property Enforcement Coordinator, *2013 Joint Strategic Plan on Intellectual Property Enforcement* 18 (June 2013) ("2013 Joint Strategic Plan") available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf>

¹¹³ See 17 U.S.C. § 108(b).

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,¹¹⁴ and noted that additional changes might be necessary.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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.¹¹⁸

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 Copyrights¹¹⁹ recommending an exception for digital distance education became the basis for the Technology, Education, and

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.

¹¹⁶ *See Video at Risk: Strategies for Preserving Commercial Video Collections in Libraries, Section 108 Guidelines* (Dec. 2012), available at http://www.nyu.edu/tisch/preservation/research/video-risk/VideoAtRisk_SECTION108_Guidelines_2013.pdf.

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/>.

¹¹⁸ The issue of limitations and exceptions for libraries and archives has been an ongoing topic of discussion for the WIPO Standing Committee on Copyrights, with discussions as recently as November 2012. *See* WIPO, *Standing Committee on Copyright and Related Rights, Agenda for Twenty-fifth Session* (Nov. 19, 2012), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_25/sccr_25_1.pdf; *see also* WIPO, *Study on Copyright Limitations and Exceptions for Libraries and Archives* (Aug. 2008), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf.

¹¹⁹ U.S. Copyright Office, *Report on Copyright and Digital Distance Education* (May 1999), available at http://www.copyright.gov/reports/de_rprt.pdf.

Copyright Harmonization (TEACH) Act of 2002.¹²⁰ 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.¹²¹

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.¹²² 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.¹²³

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.¹²⁴ 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.”¹²⁵

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-

¹²⁰ Pub. L. 107-273, Sec. 13301.

¹²¹ See H.R. Rep. 107-687, at 11-13 (2002).

¹²² See Christopher L. Ashley, *The TEACH Act: Higher Education Challenges for Compliance* (June 22, 2004), available at <http://net.educause.edu/ir/library/pdf/erb0413.pdf>; Kenneth Crews, *Copyright Law and Distance Education: Overview of the TEACH Act* (Aug. 17, 2010), available at <http://copyright.columbia.edu/copyright/files/2010/08/teach-act-summary-by-kenneth-crews.pdf>; Digital Media Project, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* (Aug. 9, 2006), available at <http://cyber.law.harvard.edu/media/files/copyrightandeducation.html>.

¹²³ Maria Pallante, Manges Lecture *supra* note 31 at 19.

¹²⁴ 17 U.S.C. § 121.

¹²⁵ See Register of Copyrights, *Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* 24 (Oct. 2012), available at http://www.copyright.gov/1201/2012/Section_1201_Rulemaking%20_2012_Recommendation.pdf.

makings discussed below, based on findings that some TPMs have been developed and deployed in ways that prevent such access.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.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.¹²⁸ Others allow circumvention in specific circumstances for federal law enforcement and intelligence activities,¹²⁹ reverse engineering of a computer program,¹³⁰ encryption research,¹³¹ preventing minors from accessing material on the Internet,¹³² or protecting personally identifying information.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.¹³⁴ This mechanism has operated to identify a number of circumstances in which an exemption is appropriate.¹³⁵ Upon demonstrating that the anti-circumvention

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).

¹²⁷ WIPO, *Historic Treaty Adopted, Boosts Access to Books for Visually Impaired Persons Worldwide* (June 27, 2013) available at http://wipo.int/pressroom/en/articles/2013/article_0017.html. The text of the treaty is available at http://wipo.int/meetings/en/doc_details.jsp?doc_id=241683.

¹²⁸ 17 U.S.C. § 1201(d).

¹²⁹ 17 U.S.C. § 1201(e).

¹³⁰ 17 U.S.C. § 1201(f).

¹³¹ 17 U.S.C. § 1201(g).

¹³² 17 U.S.C. § 1201(h).

¹³³ 17 U.S.C. § 1201(i).

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.

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,¹³⁶ proponents have succeeded in obtaining several exemptions in each of the rulemaking procedures since enactment of the DMCA.¹³⁷ 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.¹³⁸ 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.¹³⁹ 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”¹⁴⁰ 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.

¹³⁶ 17 U.S.C. §§ 1201(a)(1)(B), (C).

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.

¹³⁸ See Jon Healey, *Proponents of cellphone unlocking ask the White House for help*, LOS ANGELES TIMES (Feb. 18, 2013), available at <http://www.latimes.com/business/technology/la-fi-tn-cellphone-unlocking-petition-20130218,0,6053343.story>.

¹³⁹ R. David Edelman, Official White House Response to Make Unlocking Cell Phone Legal, *It's Time to Legalize Cell Phone Unlocking* (Mar. 4, 2013), available at <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/lg9KhZG7>.

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”¹⁴¹ – works created through changing and combining existing works to produce something new and creative.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.¹⁴³ But because remixes typically rely on copyrighted works as source material – often using portions of multiple works – they can raise daunting licensing issues.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,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;¹⁴⁶ others deal with “appropriation art.”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

Act, S. 517, H.R. 1123, 113th Cong. (2013); Wireless Device Independence Act, S. 467, 113th Cong. (2013); Wireless Consumer Choice Act, S. 481, 113th Cong. (2013); Unlocking Technology Act of 2013, H.R. 1892, 113th Cong. (2013).

¹⁴¹ Other terms such as “mashups” or “sampling” are also used, especially with reference to music.

¹⁴² See, e.g., KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING (2011); LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2009) (arguing that the health, progress, and wealth creation of a culture are tied to a participatory remix process); Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961 (2004); Electronic Frontier Foundation, *Fair Use: Remix Mash-ups, and Copyright*, available at <http://www.teachingcopyright.org/curriculum/hs/3>.

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*.

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).

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.*

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).

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).

litigation.¹⁴⁸

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.¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹

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,

¹⁴⁸ See *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004); *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991); Marc Hogan, *Kanye West's Latest Sample Lawsuit Puts Him in Good Company*, SPIN (Oct. 1, 2012), available at <http://www.spin.com/#articles/kanye-west-my-beautiful-dark-twisted-fantasy-sample-lawsuit-tuf-america>.

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/>.

¹⁵¹ See American University, Center for Social Media, *Code of Best Practices in Fair Use for Online Video*, <http://centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>. See also American University, Center for Social Media, *Remix Culture*, <http://www.centerforsocialmedia.org/fair-use/videos/podcasts/remix-culture>.

making it impossible to negotiate terms for their use.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.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.¹⁵⁴

U.S. law contains a few provisions that can ease the ability to make specific uses of orphan works in some circumstances.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.”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).”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.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

¹⁵² U.S. Copyright Office, Report on Orphan Works at 2 (2006), available at <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 ownership due to changes in ownership or changes in the copyright owner’s circumstances; limited existing copyright ownership information sources; and difficulties researching copyright information.

¹⁵³ See, e.g., David R. Hansen, *Orphan Works: Definitional Issues*, Berkeley Digital Library Copyright Project, White Paper #1 (2011). One study on books estimates that more than 25% of twentieth century publications should be considered orphans. See Michael Cairns, *580,388 Orphan Works – Give or Take*, Personanondata, <http://personanondata.blogspot.com/2009/09/580388-orphan-works-give-or-take.html> (Sept. 9, 2009). Many of the estimates focus on library and museum collections. A study of museums, archives, and libraries in the United Kingdom resulted in a conservative estimate of 25 million orphan works. JISC, *In From the Cold: An Assessment of the Scope of ‘Orphan Works’ and its Impact on the Delivery of Services to the Public* 6 (2009). The British Library has previously estimated that 40% of all books and other print works are orphaned. Gowers Review of Intellectual Property 69 (Dec. 2006), available at <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf>.

¹⁵⁴ See Marybeth Peters, *The Importance of Orphan Works Legislation*, U.S. Copyright Office, available at <http://www.copyright.gov/orphan/OWLegislation/> (Sept. 25, 2008).

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

¹⁵⁶ Orphan Works Report *supra* note 152 at 1.

¹⁵⁷ Copyright Office, *Orphan Works and Mass Digitization*, 77 Fed. Reg. 64555 (Oct. 22, 2012) (“Orphan Works NOI”).

¹⁵⁸ See Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008); the Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006).

copyright” and provided attribution where feasible.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.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.¹⁶¹ Although the 2008 bill attracted much interest and support, it did not ultimately become law.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.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.”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

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. *Id.* The Copyright Office would also have been instructed to create and maintain category-specific recommended practices to help guide searches. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See Peters supra* note 154.

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. *Orphan Works Legislation Passes 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.

¹⁶³ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011).

¹⁶⁴ *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. *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. *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. *Id.* at 455-56, 458-66.

basis.¹⁶⁵ Hungary, Japan, Korea, and India all have some form of government or compulsory licensing scheme for orphan works,¹⁶⁶ and China is considering similar legislation.¹⁶⁷ In the Nordic countries, the technique of extended collective licensing has been used to permit the licensing of orphan works through collective management organizations.¹⁶⁸ 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.¹⁶⁹

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, 2014.¹⁷⁰ The Orphan Works Directive will allow certain public interest entities¹⁷¹ 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.”¹⁷² A diligent search to locate the copyright owner is required in the Member State of first publication or broadcast.¹⁷³ 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.¹⁷⁴ If the owner subsequently appears, she will be entitled to fair

¹⁶⁵ See Copyright Act, R.S.C., c. C-42, s. 77 (1985) (Can.), available at <http://laws.justice.gc.ca/PDF/C-42.pdf>.

¹⁶⁶ See Government Regulation on the Detailed Rules Related to the Licensing of Certain Use of Orphan Works, arts. 2(1), 2(2), 3, Decree 100/2009, V. 8 (Hun.), available at http://www.hipo.gov.hu/English/jogforras/100_2009.pdf; Chosakuken-Ho [Copyright Law], Law No. 48 of 1970, 2009, arts. 67, 74(3) (Japan), unofficial translation available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&co=01&ky=copyright+law&page=16>; Korean Copyright Act art. 50 (S. Kor.); Copyright (Amendment) Act, 2012, at para. 17 (2012) (India), available at http://copyright.gov.in/Documents/CRACKT_AMNDMNT_2012.pdf.

¹⁶⁷ See, e.g., Dr. Prof. Hong Xue, *A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law* at <http://infojustice.org/wp-content/uploads/2012/04/hongxue042012.pdf>.

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).

¹⁶⁹ See Enterprise and Regulatory Reform Act 2013 at cl. 77 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>. One proposed approach is a two-tiered regime, with extended collective licensing for mass digitization by cultural institutions and individual licenses granted by a new agency for other types of uses. Hargreaves Report *supra* note 33 at 37-40. The U.K. government has indicated, however, that extended collective licensing and the orphan works licensing will operate separately. U.K. Intellectual Property Office, *The Enterprise and Regulatory Reform Act 2013 – Your photos and you* (Apr. 2013), available at <http://www.ipo.gov.uk/hargreaves-orphanmyth.pdf>; see also Government Policy Statement: Consultation on Modernising Copyright 7-11 (July 2012), available at <http://www.ipo.gov.uk/response-2011-copyright.pdf>.

¹⁷⁰ See Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works (2012/28/EU) (Oct. 25, 2012) (“Orphan Works Directive”).

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.

compensation.¹⁷⁵

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.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ And France has enacted legislation that allows

¹⁷⁵ *Id.* at art. 6(5).

¹⁷⁶ Copyright Office, *Orphan Works and Mass Digitization*, Docket No. 2012-12, 77 Fed. Reg. 64555 (Oct. 22, 2012).

¹⁷⁷ See generally, Peter S. Menell, *Knowledge Access and Preservation Policy in the Digital Age*, 44 Hous. L. Rev. 1013, 1042-55 (2007).

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-info/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 collecting 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

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. 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=4D8B77A47AA211DE6E336FD22AA18F60.tpdjo09v_2?cidTexte=JORFTEXT000025422700&dateTexte=20121016; see also International Federation of Reproduction Rights Organisations, *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>.

¹⁸⁰ The Library of Congress has made digitized versions of public domain materials from its collection available since 1994 and is regularly expanding such digital access. See <http://loc.gov/library/about-digital.html>. Other examples include: NGA Images at the National Gallery of Art, https://images.nga.gov/en/page/show_home_page.html; the Internet Archive, which contains digital versions of over 3.8 million books and texts, <http://archive.org/details/texts>; Project Gutenberg, which offers 40,000 free e-books, <http://www.gutenberg.org/>; Europeana, a partnership of a many organizations throughout Europe that have contributed digital resources that can be located through a centralized database, <http://www.europeana.eu/portal/>. For more examples of such projects, see U.S. Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document*, at Appendix C (2011) (“Mass Digitization Report”), available at http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

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. *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 447-49, 458-66 (S.D.N.Y. 2012) *appeal docketed*, No. 12-4547 (2d Cir. Nov. 14, 2012); 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 *supra* note 180.

¹⁸³ *Id.* at 14.

¹⁸⁴ *Id.* at 13.

¹⁸⁵ *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

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.

¹⁹⁵ See, e.g., David R. O’Brien, Urs Gasser, & John Palfrey, *E-Books In Libraries: A Briefing Document developed in preparation for a Workshop on E-Lending in Libraries* at 10 (2012), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/E-Books%20in%20Libraries%20\(O'Brien,%20Gasser,%20Palfrey\)-1.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/E-Books%20in%20Libraries%20(O'Brien,%20Gasser,%20Palfrey)-1.pdf); *The e-book business: Binding books*, *The Economist* (Oct. 25, 2012), available at <http://www.economist.com/blogs/prospero/2012/10/e-book-business>.

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.¹⁹⁷ 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,¹⁹⁸ 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?¹⁹⁹

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:

copy unusable at the time of its resale." *Id.* at ¶ 70. *Cf. Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010) (holding that "a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions").

¹⁹⁷ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013).

¹⁹⁸ See John Villasenor, *Rethinking a Digital First Sale Doctrine In A Post-Kirtsaeng World: The Case for Caution*, 2 COMPETITION POL'Y INT'L ANTITRUST CHRON. 10-12 (May 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2273022.

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.²⁰⁰ Today these include P2P file-sharing services²⁰¹ and cyberlockers²⁰²— which have a range of legitimate uses but also have become major sources of illegal content.²⁰³ A number of

²⁰⁰ See Nick Bilton, *Internet Pirates Will Always Win*, N.Y. TIMES (Aug. 4, 2012), available at <http://www.nytimes.com/2012/08/05/sunday-review/internet-pirates-will-always-win.html>; Alex Hudson, *Is piracy a Mega problem for Hollywood*, BBC NEWS (Feb. 3, 2013), available at <http://www.bbc.co.uk/news/technology-21251680>.

²⁰¹ Peer-to-Peer (P2P) technology, developed in the late 1990s and widely adopted since that time, allows individual consumers to exchange digital files of music, videos, and games. See Federal Trade Commission, *Peer-to-Peer File Sharing: A Guide for Business*, available at <http://business.ftc.gov/documents/bus46-peer-peer-file-sharing-guide-business>. Perhaps the most widely used current P2P file-sharing protocol is BitTorrent, which permits users to download a file in small pieces from multiple computers at a time, greatly increasing download speeds. See Carmen Carmack, *How BitTorrent Works*, How Stuff Works, <http://computer.howstuffworks.com/bittorrent.htm>.

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. ENTMT & 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 2012); Envisional, *Technical Report: An Estimate of Infringing Use of the Internet 2-3* (Jan. 2011) (finding 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, 2011-2016* 9 (May 2012), available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/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.prsformusic.com/aboutus/policyandresearch/researchandconomics/Documents/TheSixBusinessModelofCopyrightInfringement.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>.

²⁰⁵ See, e.g., United States Trade Representative, *Out-of-Cycle Review of Notorious Markets* (Dec. 13, 2012) available at <http://www.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, House of Representatives, 111th Cong., 1st Sess., December 16, 2009, Serial No. 111-94, available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr54075/html/CHRG-111hhr54075.htm>; Organisation for Economic Co-Operation and Development, *Piracy of Digital Content* (2009), available at http://www.keepeek.com/Digital-Asset-Management/oecd/science-and-technology/piracy-of-digital-content_9789264065437-en; Screen Digest, *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 Rights, *Working Document for a Treaty on the Protection of Broadcasting Organizations*, SCCR/24/10 (Sept. 21, 2012), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_24/sccr_24_10.pdf.

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, GA0-10-423, *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 Digital Content* (2009), available at http://www.keepeek.com/Digital-Asset-Management/oecd/science-and-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/iprenforcement/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

[report_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/observatory/index_en.htm) (report prepared for of the European Observatory on Counterfeiting and Piracy, *see* http://ec.europa.eu/internal_market/iprenforcement/observatory/index_en.htm).

²⁰⁸ Michael Masnick & Michael Ho, *The Sky is Rising: A Detailed Look at the State of the Entertainment Industry* (Jan. 2012), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/562830/the-sky-is-rising.pdf> (focusing on U.S. entertainment industries); Michael Masnick & Michael Ho, *The Sky is Rising Regional Study*, available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/561023/the-sky-is-rising-2.pdf> (examining industries in Germany, France, the U.K., Italy, Russia, and Spain).

²⁰⁹ *See, e.g.*, Harry McCracken, *The decline and fall of physical media retailing: A timeline*, TECHNOLOGIZER, <http://technologizer.com/2011/02/17/borders-bankruptcy/> (February 17, 2011) (noting the closure of bookstores, record stores, video rental stores and others since 2003 due to technological trends); *see also* David Goldman, *Music's lost decade: Sales cut in half*, CNNMONEY.COM, http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/ (February 3, 2010) (noting that U.S. music industry revenue plunged from \$14.6 billion in 1999 to \$6.3 billion in 2009).

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.

²¹¹ See, e.g., Intellectual Property Awareness Foundation, *Australian attitudes and activities in relation to illegally accessing online movies and television shows* at 33-34 (March 2012) available at <http://www.ipawareness.com.au/LiteratureRetrieve.aspx?ID=120375>; Twila Wingrove, Angela L. Korpas & Victoria Weisz, *Why were millions of people not obeying the law? Motivational influences on non-compliance with the law in the case of music piracy*, 17 PSYCHOL., CRIME & L. 261 (2011); Loraine Gelsthorpe, *Copyright Infringement: A Criminological Perspective*, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 401-02 (Lionel Bently, Jennifer Davis & Jane C. Ginsburg eds., 2010).

²¹² Some suggest that attempts to enforce in the online environment should be abandoned, and alternate means relied on to incentivize creators. See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002); Glynn S. Lunney Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001). Specific proposals have also been made for a system of remuneration for file-sharing. See, e.g., WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003); Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1 (2004). Such approaches have not yet been adopted anywhere. In addition to problems of incompatibility with international treaty obligations, there are issues of feasibility, both in terms of the resources required to establish and administer such a system, and the ability to generate sufficient revenues.

²¹³ See, e.g., 2010 Joint Strategic Plan on Intellectual Property Enforcement 17 (June 2010) (“2010 Joint Strategic Plan”) available at http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf.

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.²¹⁵ 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.²¹⁶ 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.²¹⁷

b) Civil and Criminal Enforcement

A number of civil and criminal enforcement mechanisms have been used by the government to combat online piracy.²¹⁸ The Departments of Justice (DOJ) and

²¹⁵ Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act), Pub. L. 110-403 (2008). The PRO-IP Act, also enhanced enforcement mechanisms and strengthened the forfeiture and restitution provisions for both civil and criminal infringement actions.

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).²¹⁹

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

²¹⁹ In early 2010, Attorney General Eric Holder created an Intellectual Property (IP) Task Force with the assistance of the IPEC to combat the growing number of domestic and international intellectual property crimes, protect the health and safety of American consumers, and safeguard the nation's economic security against those who seek to profit through intellectual property infringement. DOJ, *Justice Department Announces New Intellectual Property Task Force as Part of Broad IP Enforcement Initiative* (Feb. 12, 2010) available at <http://www.justice.gov/opa/pr/2010/February/10-ag-137.html>. Intellectual property crime is a DOJ priority, and it has focused much effort on online enforcement issues. See Deputy Attorney General James Cole, *Protecting America's Intellectual Property Assets*, DOJ Office of Public Affairs, <http://blogs.justice.gov/main/archives/1315> (Apr. 26, 2011). In addition, the ICE-led National Intellectual Property Rights Coordination Center (IPR Center) is an interagency task force that coordinates IP enforcement efforts across the U.S. government. See IPR Center, About Us, <http://www.iprcenter.gov/about-us>.

²²⁰ 18 U.S.C. § 2323(a).

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/>.

²²² See ICE, "Operation In Our Sites" Targets Internet Movie Pirates (June 30, 2010), available at <http://www.ice.gov/news/releases/1006/100630losangeles.htm>. Since the program began in 2010, over 2000 domain names have been seized, the majority of which have involved the sale of counterfeit merchandise. See ICE, *IPR Center Partners with National Crime Prevention Council to Teach Shoppers About Dangers of Buying Counterfeit Goods* (Apr. 26, 2013), available at <http://www.ice.gov/news/releases/1304/130426arlington2.htm>. The program has also received some criticism. See Brendan Sasso, *Lawmakers Question Administration's Crackdown on Pirate Websites*, THE HILL, <http://thehill.com/blogs/hillicon-valley/technology/247077-lawmakers-question-administrations-crackdown-on-pirate-websites> (Sept. 2, 2012).

²²³ ICE has recently partnered with Europol in a coordinated effort that led to the seizure of 132 domains, 31 through European registries. See ICE, *ICE, European Law Enforcement Agencies and Europol Seize 132 Domain Names Selling Counterfeit Merchandise in 'Project Cyber Monday 3' and 'Project Transatlantic' Operations* (Nov. 26, 2012), available at <http://www.ice.gov/news/releases/1211/121126washingtondc.htm>. The United States and 38 other nations are signatories to the Council of Europe Convention on Cybercrime, which requires establishing criminal offenses for copyright infringement. See Council of Europe, *Convention on Cybercrime*, ETS No. 185 (2001).

dropped and the return of the domain names to the registrants.²²⁴

Criminal prosecution. The DOJ also is empowered to bring criminal prosecutions for copyright infringement.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.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.²²⁷ And in 2005, Congress created criminal penalties for infringement of works being prepared for commercial distribution.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.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.²³⁰ Substantial assistance was provided by law enforcement entities around the world.²³¹

²²⁴ See, e.g., *Government Drops Domain Seizure Case Against Rojdirecta Streaming Websites*, BLOOMBERG LAW, Apr. 29, 2012, available at <http://about.bloomberglaw.com/law-reports/government-drops-domain-seizure-case>; *Electronic Frontier Foundation, In the Matter of the Seizure of the Internet Domain Name "DAJAZI.COM"*, available at <https://www.eff.org/cases/matter-seizure-internet-domain-name-dajaz1.com>.

²²⁵ 17 U.S.C. § 506.

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.

²²⁷ No Electronic Theft Act (NET Act) Pub. L. 105-147 (1997); 17 U.S.C. § 506(a)(1)(B).

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).

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.

²³⁰ *United States v. Kim Dotcom, et al.*, Case No. 12-cr-00003-LO, Doc. 34 at ¶ 1 (Superseding Indictment) (E.D.Va. Feb. 16, 2012), available at <http://www.washingtonpost.com/wp-srv/business/documents/megaupload-indictment.pdf>.

²³¹ These entities included police and prosecutors from New Zealand, Hong Kong, the Netherlands, the U.K., Canada, Australia, Germany, and the Philippines.

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.²³² Still to be resolved, however, is how to deal with those users who are storing noninfringing content on the sites.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,²³⁴ willful violations of the public performance right are punishable only as misdemeanors.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.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.²³⁷ The Task Force now repeats that call.

c) *International Initiatives*

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

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, *Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales* (March 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229349&download=yes.

²³³ See, e.g., Graeme McMillan, *EFF Launches 'MegaRetrieval' Site for Megaupload Users*, TIME TECH, Feb. 1, 2012, available at <http://techland.time.com/2012/02/01/eff-launches-megaretrieval-site-for-megaupload-users>.

²³⁴ See 17 U.S.C. § 506(a)(1)(A) (offense), 18 U.S.C. § 2319(b)(1) (felony for specified "reproduction or distribution"); 17 U.S.C. § 506(a)(1)(B) ("reproduction or distribution" offense), 18 U.S.C. § 2319(c)(1) (felony for specified "reproduction or distribution"); 17 U.S.C. § 506(a)(1)(C) (pre-release "distribution" offense), 18 U.S.C. § 2319(d)(1) (felony penalty).

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).

²³⁶ SOPA included a provision making illegal Internet streaming a felony. See 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 *supra* note 31 at 13.

²³⁷ See Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations 10 (March 2011) available at http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf; Statement of Maria A. Pallante, Register of Copyrights, June 1, 2011, available at <http://www.copyright.gov/docs/regstat060111.html>; John Eggerton, *AG Holder: Justice Should Be Able to Go After Some Illegal Streaming as Felony*, BROADCASTING & CABLE (May 15, 2013), available at http://www.broadcastingcable.com/article/493524-AG_Holder_Justice_Should_Be_Able_to_Go_After_Some_Illegal_Streaming_as_Felony.php.

standards for copyright protection and enforcement around the world.²³⁸ 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.²³⁹ This Special 301 Report is an assessment of the adequacy and effectiveness of the protection of IPR by U.S. trading partners.²⁴⁰ 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.²⁴¹ 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.

²³⁹ *See* Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act.

²⁴⁰ *See* USTR, *2013 Special 301 Report*, *available at* <http://www.ustr.gov/sites/default/files/05012013%202013%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.

²⁴¹ *See* USTR, *Out-of-Cycle Review of Notorious Markets*, December 13, 2012, *available at* <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>. In addition to the Administration’s list, the Congressional International Anti-Piracy Caucus publishes an annual list that focuses on copyright piracy in other countries. *See* The Congressional International Anti-Piracy Caucus, *International Anti-Piracy Caucus Country Watch List* (2012), *available at* <http://www.scribd.com/doc/106458437/Congressional-Anti-Piracy-Caucus-2012-Country-Watch-List>.

a) Direct Infringement Suits

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

²⁴² See Ryan Nakashima, *RIAA to Stop Suing Music Swappers*, HUFFINGTON POST, http://www.huffingtonpost.com/2008/12/19/riaa-to-stop-suing-music-n_152522.html (Dec. 19, 2008) (noting the average settlement amount of around \$3,500).

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.”²⁴⁴ 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.²⁴⁵

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:²⁴⁶

- **Contributory liability** requires that the defendant knew or had reason to know of the underlying infringement and caused or materially contributed to it.²⁴⁷
- **Vicarious liability** requires that the defendant had the right and ability to control the infringement and derived a financial benefit from it.²⁴⁸
- **Inducement liability** requires that the defendant distributed a device or provided a service with the demonstrated purpose of promoting its use for infringement.²⁴⁹

Some version of secondary liability exists in laws of most countries, although the legal theories and required elements differ.²⁵⁰

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

²⁴⁴ *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995); see also *CoStar Gp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008) (“*Cablevision*”).

²⁴⁵ See, e.g., *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 148-49 (S.D.N.Y. 2009) (finding direct infringement where defendants took active steps to maintain access to infringing digital music files (“*Usenet*”); *Playboy Enters. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (although decided before the DMCA, this case is still cited by courts for the proposition that volitional conduct by service providers can lead to direct liability). Service providers in other countries have also been found directly liable for infringement. See, e.g., *Jean Yves L. dit Lafesse v. MySpace*, Tribunal de Grande Instance de Paris, Ordonnance de référé (June 22, 2007); *Columbia Pictures v. Sohu.com*, Beijing First Intermediate Court (Dec. 27, 2006).

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

²⁴⁸ See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963); *Napster*, 239 F.3d at 1022-24.

²⁴⁹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005). It is not entirely clear whether inducement is a separate ground of secondary liability or simply a form of contributory infringement. See *Usenet*, 633 F. Supp. 2d at 150 n.17.

²⁵⁰ See, e.g., Daniel Seng, *Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries*, available at http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries.pdf.

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.²⁵¹ 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.²⁵²

Secondary liability claims have also been brought in the United States against other types of online services, including video hosting sites,²⁵³ BitTorrent sites,²⁵⁴ Usenet.com, which provided access to the USENET network,²⁵⁵ and cyberlockers.²⁵⁶ 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,²⁵⁷ Japan,²⁵⁸ China,²⁵⁹ and South Korea;²⁶⁰ against BitTorrent sites in Sweden,²⁶¹ Finland,²⁶² and the Netherlands;²⁶³ against a Usenet

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.

²⁵³ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, No. 09-55902, 2013 U.S. App. LEXIS 5100 (9th Cir. Mar. 14, 2013) (“*Veoh*”).

²⁵⁴ *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013) (“*Isohunt II*”); *Columbia Pictures, Inc. v. Bunnell*, No. 2:06-cv-01093, 2007 WL 4877701, *8 (C.D. Cal. Dec. 13, 2007).

²⁵⁵ *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 150-58 (S.D.N.Y. 2009).

²⁵⁶ *Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303, 1310-11 (S.D. Fla. 2011).

²⁵⁷ *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd*, [2005] FCA 1242.

²⁵⁸ *File Rogue*, Heisei 16 (Ne) 446 (2003) (Tokyo High Ct., Mar. 31, 2005).

²⁵⁹ See, e.g., *Go East Entm't Co. Ltd. (H.K.) v. Beijing Century Tech. Co., Ltd.*, (2004) Gao Min Zhong Zi No. 713 (Beijing High Court, Dec. 2, 2004); *Shanghai Push Sound Music & Entm't Co., Ltd. V. Beijing FashionNow Co. Ltd.*, (2005) Er Zhong Min Chu Zi No. 13739 (Beijing No. 2 Intermediate Court, Dec. 19, 2006).

²⁶⁰ *Soribada*, 2005 Da 11626 (2007) (Sup. Ct. Rep. of Korea, Jan. 25, 2007).

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).

²⁶⁵ *VKontakte*, No. A56-16627/2011 (Arbitrazh Court of St. Petersburg and Leningrad Region, Oct. 15, 2012) (13th Arbitrazh Court of Appeal, Jan. 21, 2013).

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 17 U.S.C. § 512(j)(3). In the trademark context, in contrast, U.S. courts have been willing to issue *ex parte* injunctions that require ISPs to permanently block access to domain names associated with infringing conduct. Nor have right holders been required to establish liability on the part of the ISP; rather, the injunction is issued for a default judgment against the infringer or under the preliminary injunction standard of the general rules of civil procedure. *See, e.g., Tory 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.²⁶⁹ 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.²⁷⁰ 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.²⁷¹

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.²⁷² 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 1999.²⁷³

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.²⁷⁴ As a result, the Copyright Office recommended limiting available monetary relief to only “reasonable compensation,” if an orphan work’s owner appears

²⁶⁹ See *Wolk v. Kodak Imaging Network, Inc.*, No. 10 Civ. 4135, 2011 WL 940056 at *7 (S.D.N.Y. Mar. 17, 2011).

²⁷⁰ 17 U.S.C. § 512(j)(1)(B)(ii).

²⁷¹ In 2002, the RIAA brought a suit against four major conduit ISPs seeking only an injunction under § 512(j)(1)(B)(ii) to block access to a Chinese-based unlicensed music service, Listen4ever. See *Arista Records, Inc. v. AT&T Broadband Corp.*, No. 02-CV-6554 (S.D.N.Y. filed Aug. 16, 2002); see also RIAA, *RIAA Statement on Listen4Ever Filing* (Sept. 4, 2002), available at <http://www.riaa.com/print.php?id=77585D52-E9D7-CF61-1F38-962F3FEB9597>; Billboard, *RIAA Drops ISP Suit, Vows to Remain Vigilant*, <http://www.billboard.com/articles/news/74478/riaa-drops-isp-suit-vows-to-remain-vigilant>.

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.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,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.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.²⁷⁸ These cases have led to calls for further calibration of levels of statutory damages.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.²⁸⁰

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.

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

²⁷⁶ See, e.g., Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 314-17 (2008-09); Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WISC. L. REV. 891, 940-41 (2012).

²⁷⁷ See, e.g., Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 246-49, 251 (2005); Douglas Lichtman & Willam Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 405-06 (2003).

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. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 911 (8th Cir. 2012), *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. See Greg Sandoval, *Jammie Thomas Rejects RIAA's \$25,000 Settlement Offer*, CNET, 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. *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 489-90 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 2431 (2012).

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

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. 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

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., *Usenet*, 633 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) (“*Isohunt I*”).

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).

²⁸⁵ 17 U.S.C. § 512(g)(2).

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), §§ 79, 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.²⁸⁷ 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.²⁸⁸ 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.²⁸⁹

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,²⁹⁰ a certain level of knowledge of infringement will trigger the need to take action in order to enjoy three of the four safe harbors.²⁹¹ The requisite

provide a notice to an ISP that a subscriber is infringing and the ISP must promptly forward that notice to the subscriber. See Bill C-11, The Copyright Modernization Act, §§ 41.25-27.

²⁸⁷ 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/>.

²⁸⁸ See, e.g., Mark Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 124 (2007). See also Peter S. Menell, *Design for Symbiosis: Promoting More Harmonious Paths for Technological Innovators and Expressive Creators in the Internet Age*, 55 COMM. ASS'N COMPUTING MACHINERY 31 (2012).

²⁸⁹ 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.mppaa.org/Resources/7960e748-c27e-4745-afe9-1012c85a4755.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/> (Jan. 9, 2013). Right holders have also had some success in notifying app 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, Feb. 28, 2013, available at <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.

²⁹⁰ 17 U.S.C. § 512(m)(1).

²⁹¹ 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 Commc'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 holder²⁹² or independently. It includes not only actual knowledge²⁹³ but awareness of “facts or circumstances from which infringing activity is apparent,” referred to as a “red flag” standard.²⁹⁴ 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.²⁹⁵ 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.²⁹⁶

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.²⁹⁷ 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.²⁹⁸ 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.²⁹⁹ 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).

²⁹³ 17 U.S.C. § 512(d)(1)(A); *see also* 17 U.S.C. § 512(c)(1)(A)(i).

²⁹⁴ 17 U.S.C. §§ 512(c)(1)(A)(ii), (d)(1)(B).

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).

²⁹⁶ H.R. REP. 105-551, at 53; S. REP. 105-190, at 44.

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.

(b) Burdens of Compliance

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.³⁰⁰

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.³⁰¹ 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.³⁰² 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

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%20filing%20in%20Internet%20Policy%20Task%20Force%20NoI%20on%20copyright%2012%2010%2010.pdf> (“Independent artists and creators find great frustration with a notice-and-takedown approach to enforcing their own rights online. [An i]ndependent 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.”).

³⁰¹ See Joint Submission of MPAA, RIAA, and NMPA *supra* note 289 at 19-20.

³⁰² See *id.* at 19.

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.³⁰³ 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.³⁰⁴

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.³⁰⁵

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.³⁰⁶ 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.³⁰⁷ The extent of inaccurate notices is subject to dispute, but is very small in relation to the many millions of notices sent.³⁰⁸ 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

³⁰³ 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).

³⁰⁴ See Brendan Sasso, *Music Industry Accuses Google of Slacking on Piracy Fight*, THE HILL, <http://thehill.com/blogs/hillicon-valley/technology/230143-music-industry-accuses-google-of-slacking-on-piracy-fight> (May 30, 2012).

³⁰⁵ See Comments of MPAA, NMPA & RIAA to IPEC *supra* note 289 at 19-20.

³⁰⁶ See, e.g., Google, *Google Transparency Report FAQ*, http://www.google.com/transparencyreport/removals/copyright/faq/#abusive_copyright_requests; see also Chilling Effects Clearinghouse, <http://chillingeffects.org/>; Electronic Frontier Foundation, *Takedown Hall of Shame*, <https://www.eff.org/takedowns>; John Paul Titlow, *5 Absurd Copyright Takedowns That Make the Law Look Outdated*, READWRITE.COM, <http://readwrite.com/2013/01/22/5-absurd-copyright-takedowns-that-make-the-law-look-outdated> (Jan. 22, 2013).

³⁰⁷ Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010), available at https://www.cdt.org/files/pdfs/copyright_takedowns.pdf.

³⁰⁸ 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.”³⁰⁹ Courts have interpreted this language to require subjective measurement of the copyright owner’s bad faith;³¹⁰ to require that a material misrepresentation “affect[] [the service provider’s] response to a DMCA letter;”³¹¹ and to require copyright owners to consider, in certain circumstances, whether a given use qualifies as fair use.³¹²

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.³¹³ 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,³¹⁴ held a series of public hearings in November 2012,³¹⁵ 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).

³¹¹ *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004); see also *Ground Zero Museum Workshop v. Wilson*, 813 F. Supp. 2d 678, 704-05 (D. Md. 2011); *Capitol Records, Inc. v. MP3Tunes, LLC*, 611 F. Supp. 2d 342, 346 (S.D.N.Y. 2009).

³¹² *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150, 1155-56 (N.D. Cal. 2008); *Lenz v. Universal Music Corp.*, No. 5:07-CV-03783-JF, 2013 WL 271673 at *8 (N.D. Cal. Jan. 24, 2013).

³¹³ Copyright Office, Remedies for Small Claims, 76 Fed. Reg. 66758 (Oct. 27, 2011).

³¹⁴ *Id.*; Copyright Office, Remedies for Small Copyright Claims: Additional Comments, 77 Fed. Reg. 51068 (Aug. 23, 2012); Copyright Office, Remedies for Small Copyright Claims: Third Request for Comments, 78 Fed. Reg. 13094 (Feb. 26, 2013).

³¹⁵ See U.S. Copyright Office, November 2012 Public Hearings, <http://www.copyright.gov/docs/smallclaims/public-hearings-112012.html>.

(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,

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>. 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.

³¹⁸ U.S. Copyright Office, Online Service Providers, Background, <http://www.copyright.gov/onlinesp/NPR>. See also Designation of Agent to Receive Notification of Claimed Infringement, 76 Fed. Reg. 188 at 59953, (Sept. 28, 2011).

³¹⁹ See U.S. Copyright Office, Designation of Agent to Receive Notification of Claimed Infringement, 76 Fed. Reg. 59953 (Sept. 28, 2011).

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).

³²³ H.R. REP. NO. 105-551, pt. II, at 61 (1998) (“[T]hose who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.”); S. REP. NO. 105-90, at 52 (1998) (same).

³²⁴ *See, e.g., Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1088 (C.D. Cal. 2004).

³²⁵ *See, e.g., Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1105 (W.D. Wash. 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. Gunter*, No. 10 C 6517, 2011 WL 3205399, at *10 (N.D. Ill. July 27, 2011) *rev’d on other grounds*, 689 F.3d 754 (7th Cir. 2012).

³²⁸ H.R. REP. NO. 105-551, pt. II, at 61 (1998) (footnote omitted); S. REP. NO. 105-90, at 52 (1998) (footnote omitted).

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.³³⁰ 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.³³¹ 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.³³² 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.³³³

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

³³⁰ 17 U.S.C. § 512(h).

³³¹ See *Recording Industry Ass'n of Am. v. Charter Commc'ns, Inc.*, 393 F.3d 771, 772 (8th Cir. 2005); *Recording Industry Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1233 (D.C. Cir. 2003) *cert denied*, 543 U.S. 924 (2004).

³³² Statement of Marybeth Peters, The Register of Copyrights, before the Committee on the Judiciary, *Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks*, U.S. Senate, 108th Congress, 1st Session, Sept. 9, 2003.

³³³ See, e.g., *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 567 (S.D.N.Y. 2004); *Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 8-9 (D.D.C. 2008). By contrast, in Germany, right holders work with Internet monitoring firms to identify large numbers of alleged infringers based solely on Internet Protocol addresses, obtain court orders directing ISPs to provide contact information, and send cease-and-desist letters directly to the subscribers seeking settlement. See Ben Knight, *The Lowdown on Downloads*, EXBERLINER, Feb. 28, 2012, available at <http://www.exberliner.com/articles/the-lowdown-on-downloads/>. By some accounts, 300,000 subscribers a month are identified through this process. See Janko Roettgers, *German Rights Holders Go After 300,000 P2P Users Per Month*, GIGAOM, <http://gigaom.com/2011/05/31/germany-mass-p2p-lawsuits> (May 31, 2011).

encourages stakeholders to take part in existing initiatives or to develop others relevant to their own sectors.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.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.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.³³⁷ While the bills

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.” 17 U.S.C. §§ 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. REP. 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.” See ICANN, New gTLD Registry Agreement, Specification 11.3.a (July 2, 2013) available at <http://newgtlds.icann.org/en/applicants/agb/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. See 2013 Joint Strategic Plan *supra* note 112 at 36.

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. See Statement of Maria Pallante, Register of Copyrights before the Committee on the Judiciary (Nov. 16, 2011), available at <http://www.copyright.gov/docs/regstat111611.html>; see also MPAA, RIAA, & NMPA IPEC Submission *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”).

³³⁶ See *supra* pp. 51-52.

³³⁷ Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, (PROTECT IP Act), S. 968, 112th Cong. (2011). Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011).

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.³³⁸ Specifically, 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.³³⁹ 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.³⁴⁰ The Administration shared some of these concerns, particularly with respect to the security implications of DNS redirection.³⁴¹ 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)³⁴² ultimately both bills were withdrawn.³⁴³

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).

³³⁹ The protests against the bills culminated on January 18, 2012, when a number of popular websites, including Wikipedia and Reddit, participated in a 24-hour blackout in which they shut down access to their sites. See Stephanie Condon, *SOPA, PIPA: What You Need to Know*, CBS NEWS, Jan. 18, 2012, available at http://www.cbsnews.com/8301-503544_162-57360665-503544/sopa-pipa-what-you-need-to-know.

³⁴⁰ See, e.g., Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, NY TIMES, Jan. 18, 2012; Mark Lemley, David S. Levine, & David G. Post, *Don’t Break the Internet*, 64 STAN. L. REV. ONLINE 34 (Dec. 19, 2011); Steve Crocker et al, *Security and Other Technical Concerns Raised by the DNS Filtering Requirements in the PROTECT IP Bill* (May 2011), available at <http://domainincite.com/docs/PROTECT-IP-Technical-Whitepaper-Final.pdf>.

³⁴¹ See 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-piracy-while-protecting-open-and-innovative-internet> (Jan. 14, 2012).

³⁴² See Comment of Senator Patrick Leahy on Internet Service Providers and the PROTECT IP Act (Jan. 12, 2012), available at <http://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-on-internet-service-providers-and-the-protect-ip-act>; Press Release, *Smith to Remove DNS Blocking from SOPA* (Jan. 20, 2012) available at <http://lamarsmith.house.gov/news/documentsingle.aspx?DocumentID=275770>.

³⁴³ See Paul Kane, *SOPA, PIPA votes to be delayed in House and Senate*, THE WASHINGTON POST, Jan. 20, 2012, available at http://www.washingtonpost.com/blogs/2chambers/post/sopa-senate-vote-to-be-delayed-reid-announces/2012/01/20/gIOApRWYDQ_blog.html. Senator Ron Wyden introduced as an alternative approach the Online Protection and Enforcement of Digital Trade Act (OPEN Act), S. 2029, 112th Cong., giving new powers to the ITC to target online piracy. The OPEN Act did not make it out of Committee. See <http://www.govtrack.us/congress/bills/112/s2029>.

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.”³⁴⁴ 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.³⁴⁵ Blocking orders have also been issued in several non-EU countries.³⁴⁶

The Task Force reiterates the Administration’s view that “[w]hile . . . 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.”³⁴⁷ 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.

³⁴⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, art. 8(3). See also Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (“Directive on Electronic Commerce”), at Recital 45; Directive 2004/48/EC of the European Parliament and 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 injunction.

³⁴⁵ See The Netherlands, *Stichting BREIN v. UPC Nederland B.V.*, Court of the Hague (Civil Division), Case No. 413085 / KG ZA 12-156 (May 10, 2012); U.K., *EMI Records Ltd. v. British Sky Broad. Ltd.* [2013] EWHC 379 (Ch) (Feb. 28, 2013); U.K., *Dramatico Entertainment Ltd. v. British Sky Broad. Ltd.* [2012] EWHC 1152 (Ch) (May 2, 2012); U.K., *Twentieth Century Fox Film Corp. v. British Telecommc’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, *Telener 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. FI-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 Feiler, *Website Blocking Injunctions under EU and U.S. Copyright Law—Slow Death of the Global Internet or Emergence of the Rule of National Copyright Law?*, TRANSATLANTIC TECH. L. FORUM WORKING PAPERS No. 13 at 22-26 (2012), available at http://www.law.stanford.edu/sites/default/files/publication/203758/doc/slspublic/feiler_wp13.pdf.

³⁴⁶ India, *Sagarika Music Pvt. Ltd. v. Dishnet Wireless Ltd.*, GA No. 187, CS No. 23 (Jan. 27, 2012 & Feb. 6, 2012); Israel, *HttpShare.com*, CSCE 3485/08, 000167/07, Haifa District Court (Feb. 25, 2008); Turkey, *TorrentFreak, The Pirate Bay Blocked in Turkey*, <http://torrentfreak.com/the-pirate-bay-blocked-in-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-piracy-while-protecting-open-and-innovative-internet> (Jan. 14, 2012).

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.³⁴⁸ 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.³⁴⁹ Such filtering could also raise technical concerns caused by increased “latency” (or delay) in content delivery caused by the filtering system.³⁵⁰ Any evaluation of these concerns will depend on the particular nature and implementation of the filtering technologies at issue.³⁵¹

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).³⁵²

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).³⁵³ 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

³⁴⁸ See Envisional, *Global Site Block Landscape and Analysis* 26-29 (July 2012), available at http://documents.envisional.com/docs/Envisional-Global_Site_Blocking_Landscape-July2012.pdf; Bill Rosenblatt, *The New Technologies for Pay TV Content Security* 25 (Dec. 5, 2011), available at http://irdeto.com/documents/New_Technologies_for_Pay_TV_Content_Security.pdf.

³⁴⁹ See, e.g., Mehan Jayasuriya et al., *Forcing the Net Through a Sieve: Why Copyright Filtering is Not a Viable Solution for U.S. ISPs* 47-49 (2009), available at <http://www.publicknowledge.org/pdf/pk-filtering-whitepaper-200907.pdf>.

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.”³⁵⁴ Among other things, the Principles require UGC services to filter content actively and to ensure that their filtering technology is up-to-date.³⁵⁵ Many companies with an online presence have adhered to the UGC principles since they were first adopted.³⁵⁶

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.³⁵⁷ Right holders can choose to monetize the infringing files, block them, or obtain statistics on their use.³⁵⁸ Other companies offer services to fingerprint and identify copyrighted material or to “crawl” the web to find copyrighted content.³⁵⁹

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.³⁶⁰ But as most filtering is accomplished through automated processes, the courts have rejected arguments that its implementation prevents safe harbor eligibility.³⁶¹ 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.³⁶² 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.

³⁵⁶ See PR Newswire, YouKu joins broad coalition in support of UGC principles, <http://www.prnewswire.com/news-releases/youku-joins-broad-coalition-in-support-of-ugc-principles-117512623.html> (March 7, 2011).

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

³⁵⁸ *Id.* According to YouTube, Content ID accounts for over one-third of its total monetized views. YouTube – Statistics, <http://www.youtube.com/yt/press/statistics.html>.

³⁵⁹ See, e.g., Audible Magic – About Audible Magic, <http://audiblemagic.com/company.php>.

³⁶⁰ See 17 U.S.C. §§ 512(c)(1)(B), (d)(2).

³⁶¹ See *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1113 (C.D. Cal. 2009) *aff’d by UMG Recordings, Inc. v. Shelter Capital Partners LLC*, -- F.3d --, 2013 WL 1092793 (9th Cir. Mar. 14, 2013).

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

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).

³⁶⁴ See PRS for Music & Google *The six business models for copyright infringement* (June 27, 2012), available at <http://www.prsformusic.com/aboutus/policyandresearch/researchandconomics/Documents/TheSixBusinessModelsofCopyrightInfringement.pdf> (concluding that many infringing websites rely on advertising and prominently display the logos of major payment processors); Rory Cellan-Jones, *The business and politics of piracy*, BBC News (July 2, 2012), available at <http://www.bbc.co.uk/news/technology-18670734>.

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,³⁶⁶ 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.³⁶⁷

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.³⁶⁸ As of December 2011, 24 music services had lost their payment processing and an additional 38 websites were under investigation.³⁶⁹

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.³⁷⁰ Denying infringing websites access to lucrative advertising has the potential to starve them of funds and substantially curtail

³⁶⁶ 2011 U.S. Intellectual Property Enforcement Coordinator Annual Report on Intellectual Property at 33 (Mar. 2012), available at http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf. Payment processors had begun work in a similar vein in 2009 to address the problem of sales of counterfeit goods online. See INTA, *Addressing the Sale of Counterfeits on the Internet*, available at <http://www.inta.org/Advocacy/Documents/INTA%20Best%20Practices%20for%20Addressing%20the%20Sale%20of%20Counterfeits%20on%20the%20Internet.pdf>.

³⁶⁷ See Visa Corporate, *Intellectual Property Rights*, available at http://corporate.visa.com/about-visa/security-and-trust/intellectual-property-rights.shtml?ep=v_sym_ReportBrandAbuse; MasterCard Anti-Piracy Policy, available at http://www.mastercard.com/us/wce/PDF/MasterCard_Anti-Piracy_Policy.pdf.

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 PhonpayPlus, *Provision of illegal music downloads using premium rate service billing*, <http://www.phonpayplus.org.uk/For-Business/Code-and-Help/Code-Compliance-Updates/Provision-of-illegal-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, *PhonpayPlus 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, *PhonpayPlus 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).

infringement.

Several private initiatives have been launched that should further this goal.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.³⁷² To be certified according to the Guidelines, networks and exchanges must inventory sites with content that is prohibited from sale, including infringing material.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.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.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.³⁷⁶

³⁷¹ A recent report by USC's Annenberg Innovation Lab highlights the powerful incentives, including brand protection, that are motivating advertisers to examine their role in online infringement. See Dawn C. Chmielewski, *Report Links Google, Yahoo to Internet Piracy Sites*, L.A. TIMES, Jan. 2, 2013, available at <http://articles.latimes.com/2013/jan/02/entertainment/la-et-ct-piracy-ads-20130102>. A follow-up reported that a number of prominent ad networks had "significantly reduced the number of infringing sites they are placing ads on." USC Annenberg Lab Ad Transparency Report (Feb. 14, 2013), available at http://www.annenberglab.com/sites/default/files/uploads/USCAnnenbergLab_AdReport_Feb2013.pdf; see also USC Annenberg Lab Ad Transparency Report (Mar. 29, 2013), available at http://www.annenberglab.com/sites/default/files/uploads/USCAnnenbergLab_AdReport_Mar2013.pdf; USC Annenberg Lab Ad Transparency Report (May 8, 2013), available at http://www.annenberglab.com/sites/default/files/uploads/USCAnnenbergLab_AdReport_Apr2013.pdf.

³⁷² IAB, Comments in Response to the USPTO & NTIA NOI on Copyright Policy, Creativity, and Innovation in the Internet Economy, at 2 (Dec. 10, 2010); IAB, *IAB Releases "Networks & Exchanges Quality Assurance Guidelines"* (June 24, 2010), available at http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-062410.

³⁷³ IAB Comments at 4.

³⁷⁴ ANA, *Industry Groups Urge Marketers to Take Affirmative Steps to Address Online Piracy and Counterfeiting* (May 3, 2012), available at <http://www.ana.net/content/show/id/23407>; see also ANA, *Statement of Best Practices to Address Online Piracy and Counterfeiting*, <http://www.ana.net/content/show/id/23417>; 2013 Joint Strategic Plan *supra* note 112 at 36.

³⁷⁵ See Victoria Espinel, *Coming Together to Combat Online Piracy and Counterfeiting*, WhiteHouse.gov, <http://www.whitehouse.gov/blog/2013/07/15/coming-together-combat-online-piracy-and-counterfeiting> (July 15, 2013).

³⁷⁶ See Dave Jacobs, *Ad Networks Best Practices*, AOL Blog, <http://blog.aol.com/2013/07/15/ad-networks-best-practices> (July 15, 2013).

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

³⁷⁷ GroupM, *GroupM Adopts Aggressive New Anti-Piracy Policy for Digital Media Buys*, June 8, 2011, available at <http://www.groupm.com/pressandnews/details/652>; see also Katy Bachman, *Can GroupM Really Take a Bite Out of Crime?*, ADWEEK (June 9, 2011), available at <http://www.adweek.com/news/technology/can-groupm-really-take-bite-out-crime-132370>.

³⁷⁸ Katy Bachman, *Ad Biz Takes Aim at Rogue Sites*, ADWEEK (May 15, 2012), available at <http://www.adweek.com/news/press/ad-biz-takes-aim-rogue-sites-140528>.

³⁷⁹ See whiteBULLET <http://www.white-bullet.com/>.

³⁸⁰ Bachman *supra* note 378.

³⁸¹ See Testimony of Victoria A. Espinel, IPEC, Office of Management and Budget, before the U.S. Senate Committee on the Judiciary 12 (May 9, 2012), available at <http://www.judiciary.senate.gov/pdf/12-5-9EspinelTestimony.pdf>; see also 2013 Joint Strategic Plan *supra* note 112 at 36-37.

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.³⁸⁴ This policy has resulted in the exclusion of notorious infringing services like The Pirate Bay from Autocomplete results.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.³⁸⁶ It remains to be seen whether this approach will be effective.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.³⁸⁸ The UK government has chaired these discussions between right holders, internet companies and other stakeholders.³⁸⁹

5. Graduated Response

One approach to curbing infringement that has gained ground internationally in recent years has been “graduated response.”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.

³⁸⁴ See Google, *Inside Search: Autocomplete*, <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”).

³⁸⁵ See Dara Kerr, *Google Wipes Pirate Bay from Autocomplete Searches*, CNET, http://news.cnet.com/8301-1023_3-57510052-93/google-wipes-pirate-bay-from-autocomplete-searches (Sept. 10, 2012); Jennifer Martinez, *Google Blocks File-Sharing Terms*, Politico, <http://www.politico.com/news/stories/0111/48292.html> (Jan. 27, 2011).

³⁸⁶ See Google Inside Search, *An Update to Our Search Algorithms*, <http://insidesearch.blogspot.com/2012/08/an-update-to-our-search-algorithms.html> (Aug. 10, 2012).

³⁸⁷ One recent study by the recording industry has been skeptical. See RIAA, *Google's Move to Demote Pirate Sites - Is it Really Working?*, 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).

³⁸⁸ See Josh Halliday, *Google and Bing Accused of Directing Users to Illegal Copies of Music*, THE GUARDIAN, Jan. 26, 2012, available at <http://www.guardian.co.uk/technology/2012/jan/26/google-bing-illegal-music>.

³⁸⁹ *Id.*

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, *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 infringers³⁹¹ has been supplemented by a voluntary Copyright Alert System spelling out a process for handling repeat infringement short of termination.³⁹² 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.³⁹³ 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.³⁹⁴ The Copyright Alert System is being implemented by the Center for Copyright Information (CCI), and began operating in February 2013.³⁹⁵ The Administration has encouraged this type of private agreement and supported this initiative.³⁹⁶

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

³⁹¹ 17 U.S.C. § 512(i)(1)(A). See above at 59-61.

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).

³⁹³ See RIAA, *Music, Movie, TV and Broadband Leaders Team to Curb Online Content Theft* (July 7, 2011), available at http://www.riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=7&news_year_filter=2011&id=2DDC3887-A4D5-8D41-649D-6E4F7C5225A5.

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.

³⁹⁶ Victoria Espinel, *Working Together to Stop Internet Piracy*, WhiteHouse.gov, <http://www.whitehouse.gov/blog/2011/07/07/working-together-stop-internet-piracy> (July 7, 2011).

include technology-based deterrents to infringement.³⁹⁷ 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.³⁹⁸

Several governments, including those of France,³⁹⁹ the United Kingdom,⁴⁰⁰ New Zealand,⁴⁰¹ Taiwan,⁴⁰² and South Korea,⁴⁰³ 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.⁴⁰⁴ 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.⁴⁰⁵

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).

³⁹⁸ See, e.g., Educause, *HEOA Role Models*, <http://www.educause.edu/focus-areas-and-initiatives/policy-and-security/educause-policy/issues-and-positions/intellectual-property/heoa-role-models>. Schools appear to be employing these educational and deterrent systems. See TorrentFreak, *University of Illinois Disconnects Pirating Students, Staffer Asked to Leave*, <http://torrentfreak.com/university-of-illinois-disconnects-pirating-students-staffer-asked-to-leave-130129> (Jan. 29, 2013).

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 Propriété 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>.

⁴⁰⁰ Digital Economy Act 2010 (UK) c 24.

⁴⁰¹ Copyright (Infringing File Sharing) Amendment Act 2011 (NZ).

⁴⁰² Copyright Act of Taiwan, art. 90quinquies.

⁴⁰³ Korean Copyright Act art. 133bis, 133ter.

⁴⁰⁴ In New Zealand, sanctions may include monetary damages up to \$10,000 or eventually account termination. Copyright (Infringing File Sharing) Amendment Act 2011 at 122O, 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](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.

⁴⁰⁵ 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.⁴⁰⁶ The Task Force believes that all of these concerns should be appropriately accommodated in any graduated response system.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.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.⁴⁰⁹

D. Public Education and Outreach

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

⁴⁰⁶ See, e.g., Annemarie Bridy, *Graduated Response American Style: "Six Strikes" Measured Against Five Norms*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2012).

⁴⁰⁷ See Victoria Espinel, *Working Together to Stop Internet Piracy*, WhiteHouse.gov, <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, *What is a Copyright Alert?*, <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert>.

⁴⁰⁸ See Rhonda Richford, *France Examines Even Tougher Anti-Piracy Laws*, BILLBOARD, Feb. 28, 2013, available at <http://www.billboard.com/biz/articles/news/branding/1550425/france-examines-even-tougher-anti-piracy-laws>; Hadopi, *Hadopi, 1 ½ Year After the Launch* (March 2012), available at <http://hadopi.fr/sites/default/files/page/pdf/note17EN.pdf>; Brett Danaher, Michael D. Smith, Rahul Telang, & Siwen Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France* (Jan. 21, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240; Mark Tighe, *Eircom Cut Off 100 Illegal Downloaders*, THE SUNDAY TIMES (London), Mar. 6, 2012, available at <http://www.thesundaytimes.co.uk/sto/news/ireland/article988221.ece>; *Three Strikes Rule has 'Halved Piracy' in New Zealand*, BBC NEWS, July 23, 2012, available at <http://www.bbc.co.uk/news/technology-18953353>.

⁴⁰⁹ See U.S. Patent and Trademark Office, *Request of the United States Patent and Trademark Office for Public Comments: Voluntary Best Practices Study* 78 Fed. Reg. 37210 (June 20, 2013); U.S. Patent and Trademark Office, *Extension of Comment Period for Request of the United States Patent and Trademark Office for Public Comments: Voluntary Best Practices Study* 78 Fed. Reg. 42758 (July 17, 2013).

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.⁴¹⁰ Right holders have engaged in public awareness campaigns, with public service announcements about the impact of copyright infringement.⁴¹¹ Nonprofit and educational organizations too are increasingly focusing on copyright education, including the benefits of fair use, working with a variety of audiences.⁴¹²

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).⁴¹³ 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.⁴¹⁴ 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.⁴¹⁵ Similar programs exist in France and Japan.⁴¹⁶ This information can help consumers identify

⁴¹⁰ See, e.g., RIAA, *Programs for Educators*, http://www.riaa.com/toolsforparents.php?content_selector=resources-programs-for-educators; Campus Downloading <http://www.campusdownloading.com/index.htm>; Childnet Int'l, *Music, Film, TV and the Internet*, available at http://www.childnet.com/ufiles/downloads_uk_edition.pdf; Copyright Alliance Education Foundation, https://copyrightalliance.org/education_foundation; Copyright Society of the U.S.A., *Copyright Kids*, <http://copyrightkids.org>; Electronic Frontier Foundation, *Teaching Copyright*, <http://www.teachingcopyright.org>; Copyright Clearance Center, *Education*, <http://www.copyright.com/content/cc3/en/toolbar/education.html>; Association of Research Libraries, *Know Your Copy Rights*, <http://www.knowyourcopyrights.org>.

⁴¹¹ See, e.g., MPAA, Public Awareness Campaigns, <http://www.mpaa.org/contentprotection/public-service-announcements>.

⁴¹² See, e.g., Stanford University Libraries, *Copyright and Fair Use*, <http://fairuse.stanford.edu>; Cornell University Copyright Information Center, <http://copyright.cornell.edu/training>; Harvard University Berkman Center for Internet and Society & Electronic Information for Libraries, *Copyright for Librarians*, http://cyber.law.harvard.edu/copyrightforlibrarians/Main_Page; Massachusetts Institute of Technology OpenCourseWare, *Introduction to Copyright Law*, <http://ocw.mit.edu/courses/electrical-engineering-and-computer-science/6-912-introduction-to-copyright-law-january-iap-2006/index.htm>; University of Texas Libraries, *Copyright Crash Course*, <http://copyright.lib.utexas.edu>.

⁴¹³ See, e.g., USPTO Global Intellectual Property Academy, <http://www.uspto.gov/ip/training/index.jsp>; U.S. Copyright Office, *Taking the Mystery Out Of Copyright*, <http://www.loc.gov/teachers/copyrightmystery/#>.

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.cdsonline.org/copyright-and-licensing-verification-program>.

⁴¹⁵ See Music Matters, <http://www.whymusicmatters.org>. IFPI maintains a central website that allows consumers around the world to locate licensed, legal music services in their countries. See Pro Music, <http://www.pro-music.org/legal-music-services.php>.

⁴¹⁶ See Hadopi Pur, www.pur.fr; RIAJ, <http://www.riaj.or.jp/lmark/index.html>.

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.

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

⁴¹⁷ The American Assembly, *Copyright Infringement and Enforcement in the US* at 4 (Nov. 2011), available at <http://piracy.americanassembly.org/wp-content/uploads/2011/11/AA-Research-Note-Infringement-and-Enforcement-November-2011.pdf>. Reports on Internet usage in Sweden, where the popular legal file-streaming service Spotify originated, have shown a "long-term trend [of] a sharp increase in legal streaming, while we see a reduction in illegal file sharing and downloading." IFPI, 2010 Digital Music Report at 15, available at <http://www.ifpi.org/content/library/dmr2010.pdf>. Other business models also appear to have reduced piracy. For example, in 2007, the largest Danish telecom launched a free "all you can eat" music download and streaming service. A survey of users showed that they were engaging in far less illegal music downloading. Analysis of network usage also suggests that legitimate services may help curb infringement; in the United States, as Netflix and YouTube have increased their relative share of network traffic, BitTorrent's (and filesharing in general) share of network traffic has decreased steadily. Sandvine Intelligent Broadband Networks, *Global Internet Phenomena Report 7*, 32 (2012), available at http://www.sandvine.com/downloads/documents/Phenomena_2H_2012/Sandvine_Global_Internet_Phenomena_Report_2H_2012.pdf. See also Owen Thomas, *Online Video Piracy is Fading Away, Thanks to Netflix*, BUS. INSIDER, NOV. 7, 2012, available at <http://www.businessinsider.com/netflix-bittorrent-sandvine-report-2012-11>.

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.”⁴¹⁸

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 2011.⁴¹⁹ 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.⁴²⁰ 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.⁴²¹ 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.⁴²² The largest services are already well-established,

⁴¹⁸ See Lance Whitney, *Illegal Music Downloads Dropped in 2012, Says Report*, CNET, http://news.cnet.com/8301-1023_3-57571318-93/illegal-music-downloads-dropped-in-2012-says-report (Feb. 26, 2013). The presence of spyware and viruses on P2P file-sharing networks was also cited as a factor.

⁴¹⁹ IFPI, *IFPI Digital Music Report 2011* at 13 available at <http://www.ifpi.org/content/library/dmr2011.pdf>; see also Pro Music, <http://pro-music.org/legal-music-services.php>.

⁴²⁰ RIAA, *RIAA CEO To Tout “Transformed” Music Business To Congressional Panel Reviewing “Future of Audio”* (June 2012), available at http://www.riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=6&news_year_filter=2012&id=61653611-420D-A290-7F6A-5BA99CF94721.

⁴²¹ The later launch has been ascribed to a number of factors, including broadband capacity constraints and different patterns of consumer consumption. See, e.g., Miguel Helft, *Netflix to Deliver Movies to the PC*, NY TIMES, Jan. 16, 2007, available at http://www.nytimes.com/2007/01/16/technology/16netflix.html?_r=0; see also European Commission, *Audiovisual Media Services and Connected Devices: Past and Future Perspectives*, COM (2012) 203 final (May 2012), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0203:FIN:EN:PDE>. A further explanation may be the historical reliance on “windowing,” whereby films are released at different times through different media, which results in most films being available online later than they appear in theatres. In part to avoid these delays contributing to piracy, some studios have recently experimented with alternative release strategies that include making works available online or through cable on-demand at the same time, or even before, they are released in theatres. See, e.g., Adam B. Vary, *‘Bachelorette’ and the Video-on-Demand Revolution: How Digital Distribution is Changing Indie Cinema*, ENTERTAINMENT WEEKLY, Aug. 24, 2012, available at <http://insidemovies.ew.com/2012/08/24/bachelorette-video-on-demand-indie-cinema>; Mark Hachman, *Time Warner Offering Top New Movies via VOD, Same Day as Theaters*, PC MAG, Oct. 14, 2011, available at <http://www.pcmag.com/article2/0,2817,2394739,00.asp>; Ben Child, *Time Warner CEO Predicts Release Date Shift to Combat Piracy*, THE GUARDIAN, May 11, 2012, available at <http://www.guardian.co.uk/film/2012/may/11/release-date-piracy-time-warner>.

⁴²² See MPAA, *Get Movies & TV Shows*, <http://mpaa.org/contentprotection/get-movies-tv-shows>; see also Where to Watch, <http://www.wheretowatch.org/>. Similar lists are available in a number of other countries

expanding their programming lineups, and serving consumers in the United States and abroad.⁴²³ More broadcast content is expected to be available online in the near future as copyright owners conclude negotiations with online video distributors.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,⁴²⁵ including substantial catalogs of e-textbooks.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.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.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.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.⁴³⁰ And whereas

as well. See, e.g., MPAA - Canada, *Legal Content Sites*, <http://www.mpa-canada.org/?q=content/legal-content-sites>; Find Any Film, <http://www.findanyfilm.com>.

⁴²³ Netflix reports that it is available in 40 countries, <http://ir.netflix.com/>; Amazon's Lovefilm operates streaming video on demand in the UK, Germany, Sweden, Denmark, and Norway, <http://corporate.blog.lovefilm.com/>; and YouTube is available in over 50 countries, <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, *Satellite Television Extension and Localism Act: Section 302 Report* at 121-27 (Aug. 29, 2011), available at <http://www.copyright.gov/reports/section302-report.pdf>.

⁴²⁴ See, e.g., Brian Stelter, *A CBS Deal Bolsters Amazon's Challenge to Netflix*, NY TIMES, Feb. 11, 2013, available at <http://mediadecoder.blogs.nytimes.com/2013/02/11/amazon-and-cbs-announce-deal-on-rights-to-under-the-dome>; 'All My Children on Hulu: 'AMC,' 'One Life to Live' Heading to Hulu, iTunes in Spring, HUFFINGTON POST, http://www.huffingtonpost.com/2013/01/25/all-my-children-hulu-itunes-one-life-to-live_n_2552320.html (Jan. 25, 2013).

⁴²⁵ RUEDIGER WISCHENBART, THE GLOBAL EBOOK MARKET: CURRENT CONDITIONS & FUTURE PROJECTIONS 8 (rev. Feb. 2013) ("Global eBook Market").

⁴²⁶ See CourseSmart, *About CourseSmart*, <http://www.coursesmart.com/overview>.

⁴²⁷ Office of Information Technology Policy E-Book Task Force, *Frequently Asked E-Book Questions from Public Librarians* (June 2011), available at http://www.ala.org/offices/sites/ala.org/offices/files/content/oitp/e-book_faq.pdf.

⁴²⁸ Mark Ware & Michael Mabe, *The STM Report: An Overview of Scientific and Scholarly Journal Publishing* 3 (3d ed., Nov. 2012), available at http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf

⁴²⁹ Brandon Butler, *Gartner: Cloud Putting Crimp in Traditional Software, Hardware Sales*, Network World, <http://www.networkworld.com/news/2012/071312-gartner-cloud-260882.html> (July 13, 2012).

⁴³⁰ Amy Konary, *Licensing for SaaS Applications: ISVs Take to the Cloud*, IDC Vendor Spotlight (Jan. 2012), available at www.safenet-inc.com/WorkArea/DownloadAsset.aspx?id=8589945627; see also Louis Columbus, *Roundup of Cloud Computing & Enterprise Software Market Estimates and Forecasts, 2013*,

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.⁴³¹

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.⁴³² Online distribution of movies, which generated worldwide revenues of \$1.2 billion in 2006, is projected to reach \$7.6 billion by 2015.⁴³³ 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 2011.⁴³⁴ 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%.⁴³⁵ 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.⁴³⁶

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.⁴³⁷ 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

FORBES, Feb. 1, 2013, available at <http://www.forbes.com/sites/louiscolumbus/2013/02/01/roundup-of-cloud-computing-enterprise-software-market-estimates-and-forecasts-2013/>.

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

⁴³² IFPI Digital Music Report 2011, *supra* note 419 at 13; IFPI, *IFPI Digital Music Report 2013* at 6 available at www.ifpi.org/content/library/dmr2013.pdf. In the United States alone, those numbers are \$190 million in 2004 and over \$4 billion in 2011. See RIAA, RIAA CEO to Tout “Transformed” Music Business to Congressional Panel Reviewing “Future of Audio” (June 2012), available at http://www.riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=6&news_year_filter=2012&id=61653611-420D-A290-7F6A-5BA99CF94721; RIAA, *2012 Year-End Industry Shipment and Revenue Statistics* (“RIAA 2012 Year-End Shipment Statistics”) available at <http://76.74.24.142/4A176523-8B2C-DA09-EA23-B811189D3A21.pdf>.

⁴³³ Paul Bond, *Film Industry, Led By Electronic Delivery, Will Grow in Every Category Though 2015: Report (Exclusive)*, HOLLYWOOD REP., June 14, 2011, available at <http://www.hollywoodreporter.com/news/film-industry-led-by-electronic-200881>.

⁴³⁴ Global eBook Market, *supra* note 425 at 8-9.

⁴³⁵ STM Report, *supra* note 428 at 99.

⁴³⁶ See Entertainment Software Association, *Games: Improving the Economy* available at <http://www.theesa.com/games-improving-what-matters/economy.asp>.

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”),⁴³⁸ 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.⁴³⁹ 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.⁴⁴⁰ Moreover, although a virtually complete set of public performance licenses for musical compositions can be obtained through licenses with the three PROs,⁴⁴¹ 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.⁴⁴²

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.⁴⁴³

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.⁴⁴⁴ 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.⁴⁴⁵ The music publishers, record companies, and digital music services also agreed that non-interactive streaming does not implicate the

from ASCAP, BMI, BILLBOARD, Feb. 1, 2013, available at <http://www.billboard.com/biz/articles/news/publishing/1537554/universal-music-publishing-plots-exit-from-ascap-bmi>.

⁴⁴² 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).

⁴⁴³ 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), available at <http://www.copyright.gov/docs/regstat062105.html>.

⁴⁴⁴ 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 Celco P'ship*, 663 F. Supp. 2d 363, 374 (S.D.N.Y. 2009) (transmitting ringtones does not require public performance license).

⁴⁴⁵ 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-rights/music-royalty-settlement-announced-on-mechanical-royalties-not-a-decision-on-webcasting-rates/> (Apr. 11, 2012).

mechanical right, only the public performance right.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.⁴⁴⁷

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.⁴⁴⁸ Licenses for interactive transmissions and other uses like permanent downloads and ringtones must be individually negotiated.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.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.⁴⁵¹

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.

⁴⁴⁶ See DiMA, NMPA, RIAA, NSAI, and SGA, *Major Music Industry Groups Announce Breakthrough Agreement*, available at <http://www.riaa.com/newsitem.php?id=C9C68054-D272-0D33-6EDB-DF08022C7E3A>.

⁴⁴⁷ Oxenford *supra* note 445.

⁴⁴⁸ 17 U.S.C. § 114. *See also supra* pp. 10-12.

⁴⁴⁹ Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995); S. REP. NO. 104-128, at 14 (1995). In 1998, the DMCA clarified that the digital performance right and corresponding statutory license applies to non-interactive webcasting services. The statutory license terms can be found in 17 U.S.C. § 114.

⁴⁵⁰ *See, e.g.,* Touve *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”).

⁴⁵¹ *See* U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings 175-77* (Dec. 2011), available at <http://www.copyright.gov/docs/sound/pre-72-report.pdf>.

	Examples	Sound Recording Licenses	Musical Composition Licenses
Non-interactive streaming	Sirius XM, Pandora, iHeartRadio	Section 114 statutory license	Public performance licenses from PROs or individual publishers
Interactive streaming	Spotify, Rhapsody	Individual licenses from record companies and aggregators	Public performance licenses from PROs or individual publishers; Mechanical licenses from individual publishers (and/or HFA) ⁴⁵²

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.⁴⁵³ 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 2012.⁴⁵⁴

The interactive streaming market is also growing in the United States,⁴⁵⁵ 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

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.

⁴⁵⁴ See SoundExchange Press Release, *SoundExchange Ends Record-Setting Year with \$462 Million in Total Distributions* (Jan. 16, 2013) <http://www.soundexchange.com/2013/01/16/soundexchange-ends-record-setting-year-with-462-million-in-total-distributions/>. In 2011, approximately \$292 million in statutory royalties was distributed to artists and right holders, an almost three-fold increase from 2008. See SoundExchange 2011 Annual Report available at http://www.soundexchange.com/wp-content/uploads/2012/07/2011-Annual-Report_FINAL_POST-AUDIT_ISSUED.pdf and SoundExchange 2008 Annual Report available at <http://www.soundexchange.com/wp-content/uploads/2011/03/2008-Annual-Report-PDF-FINAL-03-29-10.pdf>. Under the terms of the statutory license for non-interactive services, the royalties are split evenly between the right holder and the artists, with the artist share split between the featured artist (45%) and the non-featured artists (5%). 17 U.S.C. § 114(g).

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-B9C8-CE5F55BBC050.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 States⁴⁵⁶ 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

⁴⁵⁶ See Don Reisinger, *Spotify (finally) launches in the U.S.*, CNET News (July 14, 2011), available at http://news.cnet.com/8301-13506_3-20079400-17/spotify-finally-launches-in-the-u-s/; Don Reisinger, *Spotify competitor Deezer sets sights on U.S.*, CNET News (Dec. 21, 2012), available at http://news.cnet.com/8301-1023_3-57560437-93/spotify-competitor-deezer-sets-sights-on-u-s/.

⁴⁵⁷ See IFPI Digital Music Report 2013 *supra* note 432 at 7; RIAA 2012 Year-End Shipment Statistics *supra* note 432. Moreover, in Europe, subscription services account for 20% of total digital revenues, which far exceeds the percentage in the U.S. See IFPI Digital Music Report 2013 *supra* note 432 at 7; RIAA, 2012 Year-End Shipment Statistics *supra* note 432.

⁴⁵⁸ See, e.g., Ben Sisario, *As Music Streaming Grows, Royalties Slow To a Trickle*, The New York Times (Jan. 28, 2013), available at <http://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html>.

⁴⁵⁹ The possibility of comprehensive licensing reform was raised in a hearing on internet radio performance royalties in late 2012. 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. 112-158 at 1-2 (Nov. 28, 2012), available at http://judiciary.house.gov/hearings/printers/112th/112-158_77042.PDF.

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>.

⁴⁶¹ 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).

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.”⁴⁶⁴

Recent litigation over these issues has occurred in the context of how decades-old publishing contracts determine the right to publish e-books,⁴⁶⁵ and the digital exploitation of musical compositions.⁴⁶⁶ 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.⁴⁶⁷ Considerable work is being done to address these concerns, including a pending directive on collective management.⁴⁶⁸

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

158 at 2 (Nov. 28, 2012), available at http://judiciary.house.gov/hearings/printers/112th/112-158_77042.PDF.

⁴⁶⁴ *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 486 (2d Cir. 1998).

⁴⁶⁵ *Random House, Inc. v. Rosetta Books, LLC*, 150 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 490 (2d Cir. 2002).

⁴⁶⁶ *Reinhardt v. Wal-Mart Stores, Inc.*, 547 F. Supp. 2d 346 (S.D.N.Y. 2008); *Batiste v. Island Records, Inc.*, 179 F.3d 217, 223 (5th Cir. 1999); *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881 (9th Cir. 1996).

⁴⁶⁷ Each member state of the EU has its own copyright laws, its own collecting societies, and sometimes different right holders for the same work, with a total of more than 250 collecting societies for different rights. See European Commission, Press Release, *Proposed Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions* (July 7, 2012) available at http://europa.eu/rapid/press-release_MEMO-12-545_en.htm.

⁴⁶⁸ European Commission, Proposal for a Directive of the European Parliament and of the Council on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372 final arts. 21-33 (July 11, 2012), available at http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf (establishing requirements for multi-territorial licensing by collective management organizations).

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.⁴⁶⁹ 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.⁴⁷⁰ 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.⁴⁷¹ And a number of independent record labels offer licensing of their catalogs directly through the Internet.⁴⁷²

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.

⁴⁷⁰ See ASCAP Websites & Mobile Apps License, <http://www.ascap.com/licensing/types/web-mobile.aspx>; BMI Klik-Thru Digital Licensing Center at <https://naxoasp01.bmi.org/licensing/nmwebsite.jsf>.

⁴⁷¹ A “sync” (short for synchronization) license permits the use of a song in the soundtrack of an audiovisual work; in other words, synchronized with moving images. Sync licenses must be obtained for both the sound recording and musical composition. See, e.g., Sir Groovy at <http://sirgroovy.com/services/music-licensing-online>; Rumblefish Music Licensing Store at <http://www.musiclicensingstore.com/>; Steve O’Hear, *SoundCloud Partners With Getty Images Music – Users Can ‘Sync’ License Tracks For Commercial Use*, Techcrunch (Oct. 9, 2012) <http://techcrunch.com/2012/10/09/soundcloud-partners-with-getty-images-music-users-can-sync-license-their-tracks-for-commercial-use/>; GreenLight Music Licensing at <http://www.greenlightmusic.com/music-licensing/education/how-it-works>.

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.⁴⁷³ For print works, the Copyright Clearance Center (CCC) has led in providing sophisticated licensing tools.⁴⁷⁴ 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.⁴⁷⁵ CCC also offers a service called RightsLink that allows individual right holders to provide automated licenses directly from their own websites.⁴⁷⁶

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.⁴⁷⁷ Museums are also increasingly offering licenses online for reproductions of at least some of the works in their collections.⁴⁷⁸

One innovative and well-known mechanism for online licensing by any type of right holder is the Creative Commons.⁴⁷⁹ 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

⁴⁷³ 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 <http://www.ccli.com/WhatWeOffer/ChurchCopyrightLicense.aspx>.

⁴⁷⁴ 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 <http://www.copyright.com/content/cc3/en.html>. For more information on reprographic rights organizations, see WIPO Collective Management in Reprography (2005), available at http://www.wipo.int/freepublications/en/copyright/924/wipo_pub_924.pdf.

⁴⁷⁵ See Copyright Clearance Center at <http://www.copyright.com/search.do?operation=show&page=ppu>; Copyright Clearance Center, Pay-Per-Use Services at <http://www.copyright.com/content/dam/cc3/marketing/documents/pdfs/Search-Instructions-PPU.pdf>.

⁴⁷⁶ RightsLink at <http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions/rightslink.html>.

⁴⁷⁷ See, e.g., Getty Images, License Information at http://www.gettyimages.com/Corporate/LicenseInfo.aspx?isource=usa_chp_userAssistance_licensing; Flickr at http://www.gettyimages.com/creative/frontdoor/flickrphotos?isource=usa_nav_images_whatsnew_flickr; Corbis Motion at <http://www.corbis.com/motion.com/>; Corbis Images at <http://www.corbisimages.com/>.

⁴⁷⁸ See, e.g., Art Institute of Chicago Images at <http://www.artinstituteimages.org/index.asp>; Art Resource at <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).

⁴⁷⁹ Creative Commons at <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 <http://creativecommons.org/about/history>; CC Wiki – Frequently Asked Questions at http://wiki.creativecommons.org/FAQ#Can_I_use_a_Creative_Commons_license_for_software.3F. Cf. Open Source Initiative – The Open Source Definition at <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).

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.⁴⁸⁰ Today, copyright protection applies automatically to “original works of authorship fixed in any tangible medium of expression,”⁴⁸¹ whether or not they are registered with the Copyright Office.⁴⁸² 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.⁴⁸³ 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.⁴⁸⁴

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

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.

⁴⁸¹ 17 U.S.C. § 102(a).

⁴⁸² 17 U.S.C. § 408(a). The prior requirement in U.S. law was eliminated in order to comply with the prohibition on formalities in the Berne Convention. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, 2859.

⁴⁸³ 17 U.S.C. § 410(a).

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.⁴⁸⁵ Since 1988, recordation has been voluntary, but again there are statutory incentives to do so.⁴⁸⁶

The Copyright Office makes all registrations and recordings 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.⁴⁸⁷ The online Copyright Office Catalog contains approximately 20 million records for works registered and documents recorded with the Copyright Office since 1978.⁴⁸⁸

For pre-1978 registrations, the Copyright Office maintains approximately 45 million physical cards, which are reproduced in a *Catalog of Copyright Entries* (CCE), published in printed format and on microfiche. The CCE does not, however, include pre-1978 recordings. 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.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;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.

⁴⁸⁵ 17 U.S.C. § 205; see also U.S. Copyright Office, Circular 12: *Recordation of Transfers and Other Documents* available at <http://www.copyright.gov/circs/circ12.pdf>.

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 *supra* note 485 at 5.

⁴⁸⁷ U.S. Copyright Office, *Priorities and Special Projects of the United States Copyright Office* at 3 (Oct. 2011) (“Priorities and Special Projects”), available at <http://www.copyright.gov/docs/priorities.pdf>.

⁴⁸⁸ See U.S. Copyright Office, Circular 23: *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.

⁴⁸⁹ See *id.*

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 *supra* note 485.

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.⁴⁹¹ Finally, the Office is digitizing older copyright assignments, licenses and other records relating to the chain of title.⁴⁹² 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.⁴⁹³ 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.⁴⁹⁴ 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.”⁴⁹⁵

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.⁴⁹⁶ The major obstacle to doing so is the existing framework of international treaties containing a prohibition on imposing formalities as

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(aliz)ing 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.⁴⁹⁷ 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.⁴⁹⁸

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.⁴⁹⁹ HFA provides an online tool enabling the public to search for songwriter and publisher information for all songs that have been

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(aliz)ing Copyright for the Internet Age? (Apr. 2013) <http://www.law.berkeley.edu/formalities.htm>.

⁴⁹⁹ ASCAP's database is called ACE and is available at <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>. SESAC's repertory database is available at <http://www.sesac.com/Repertory/Terms.aspx>.

registered with it.⁵⁰⁰ 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.⁵⁰¹ 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.⁵⁰² 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.⁵⁰³ 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.⁵⁰⁴ 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.⁵⁰⁵ The Photographer Registry, a joint project of several photographers associations, provides a database of information that is searchable by photographer name and by URL.⁵⁰⁶ 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.⁵⁰⁷ Again, however, these lists are not

⁵⁰⁰ HFA Songfile, <http://www.harryfox.com/public/songfile.jsp>.

⁵⁰¹ SoundExchange PLAYS, <https://plays.soundexchange.com/index.php>.

⁵⁰² See 28 U.S.C. § 4001.

⁵⁰³ *Id.*

⁵⁰⁴ The WGAw database is available at <http://www.wga.org/coveredprojects/default.aspx>. The DGA database is available at <http://www.dga.org/Employers/SignatoryDatabase.aspx>. The SAG-AFTRA database is available at <http://www.sagaftra.org/search-signatory-database>.

⁵⁰⁵ CCC, Get Permission, <http://www.copyright.com/content/cc3/en/toolbar/getPermission.html>.

⁵⁰⁶ PPA AVA Copyright Holder Searchable Database, <http://photographerregistry.com/index.php>.

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.

Foreign collective management organizations also maintain databases of the repertoires they manage.⁵⁰⁸ Not all of them, however, provide their repertoires or ownership information online.

ii) Other Private Databases

Other entities have also developed online databases of ownership information.⁵⁰⁹ 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.⁵¹⁰ 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.⁵¹¹ 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.⁵¹² 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.⁵¹³

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

⁵⁰⁸ See, e.g., Korea Music Copyright Association, Work Search, <http://www.komca.or.kr/CTLJSP>; PRS for Music, http://www.prsformusic.com/SiteCollectionDocuments/webservicesguides/Guide_to_Search_our_database.pdf; SABAM, Find Work, [https://www.sabam.be/pls/apex/f?p=113:1:15035423951033; Sacem, Oeuvres, http://www.sacem.fr/oeuvres/oeuvre/index.do?fwkLangue=en](https://www.sabam.be/pls/apex/f?p=113:1:15035423951033;Sacem, Oeuvres, http://www.sacem.fr/oeuvres/oeuvre/index.do?fwkLangue=en).

⁵⁰⁹ In 2011, WIPO released a survey of "private copyright documentation systems." See WIPO, Survey of Private Copyright Documentation Systems and Practices (2011), available at http://www.wipo.int/meetings/en/2011/wipo_cr_doc_ge_11/pdf/survey_private_crdocsystems.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)." *Id.* at 24.

⁵¹⁰ Digital Public Library of America, dp.la. The access to the individual works is determined by the underlying collections that are participating in the project.

⁵¹¹ Open Library, <http://openlibrary.org/>.

⁵¹² Harry Ransom Center, The University of Texas, <http://norman.hrc.utexas.edu/watch/about.cfm>.

⁵¹³ Copyright Registry, <http://www.c-registry.us/pages/index.php?pid=20>.

reach using interoperable standards to communicate with one another.⁵¹⁴

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.⁵¹⁵ 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.⁵¹⁶ An operational GRD with some data is anticipated to be available in 2015.⁵¹⁷ 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.⁵¹⁸

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),⁵¹⁹ and the Musical Works Information Database (WID),⁵²⁰ 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

⁵¹⁴ 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 <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 <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.

⁵¹⁵ Global Repertoire Database, <http://www.globalrepertoiredatabase.com/>.

⁵¹⁶ Hooper Report II *supra* note 514 at 41.

⁵¹⁷ PRS for Music, *Global Repertoire Database makes strong progress with plans for 2013 well underway* (Jan. 24, 2013) available at <http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/GlobalRepertoireDatabasemakesstrongprogresswithplansfor2013wellunderway.aspx>; see also Hooper Report II *supra* note 514 at 42.

⁵¹⁸ Tim Ingham, *License to Thrill*, MUSIC WEEK (Aug. 8, 2012); see also Hooper Report II *supra* note 514 at ¶¶ 67-70. The PPL database is available at <http://repsearch.ppluk.com/ARSWeb/appmanager/ARS/main?cont=A>.

⁵¹⁹ IDA Communication Space, <http://www.ida-net.org/index.php>.

⁵²⁰ Musical Works Information Database, <http://www.widb.com/default.asp>.

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."⁵²³ 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.

⁵²⁴ *Id.* at ¶¶ 162-165. The U.K. government recently provided £150,000 in funding to the Copyright Hub. See Press Release, *Government gives £150,000 funding to kick-start copyright hub* (Mar. 25, 2013) <https://www.gov.uk/government/news/government-gives-150-000-funding-to-kick-start-copyright-hub>.

⁵²⁵ See The Copyright Hub, <http://www.copyrighthub.co.uk/>.

⁵²⁶ See WIPO, Participants in the IMR Stakeholder Dialogue, http://www.internationalmusicregistry.org/portal/en/who_we_are.html.

⁵²⁷ See Nicholas Garnett, *Study on the Role and Functions of the International Music Registry* at 5-6 available at http://www.internationalmusicregistry.org/export/sites/imr/portal/en/pdf/imr_scoping_study.pdf.

⁵²⁸ International Music Registry, <http://www.internationalmusicregistry.org/portal/en/index.html>.

⁵²⁹ See Frequently Asked Questions, <http://www.internationalmusicregistry.org/portal/en/faqs.html>.

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,⁵³⁰ the more notable standards include: (1) International Standard Recording Code (ISRC), which identifies sound recordings;⁵³¹ (2) the International Standard Work Code (ISWC), which identifies musical compositions;⁵³² (3) International Standard Audiovisual Number (ISAN), which identifies films, television shows, and other audiovisual works;⁵³³ and (4) International Standard Book Number (ISBN), which identifies books.⁵³⁴ Other standards have been developed for purposes beyond identification, including improving licensing and distribution of royalties.⁵³⁵

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).⁵³⁶ 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.⁵³⁷ In April 2013, the LCC released a technical

⁵³⁰ In 2011, WIPO produced a report that provides additional information about the operation of certain standards used in copyright databases. See WIPO, *Private Copyright Documentation Systems and Practices: Collective Management Organizations' Databases* (Preliminary Version) (Sept. 2011), available at http://www.wipo.int/meetings/en/2011/wipo_cr_doc_ge_11/pdf/collective.pdf.

⁵³¹ See IFPI, Resources-ISRC, http://www.ifpi.org/content/section_resources/isrc.html.

⁵³² See ISWC International Agency, <http://www.iswc.org/>.

⁵³³ See ISAN (International Standard Audiovisual Number), http://www.isan.org/portal/page?_pageid=168.1&_dad=portal&_schema=PORTAL.

⁵³⁴ See U.S. ISBN Agency, <http://www.isbn.org/standards/home/about/index.html>.

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/>.

⁵³⁶ Project Plan: Linked Content Coalition at 2 (Oct. 27, 2011), available at http://media.wix.com/ugd//bff7bc_ffefdfc161440b32d37e7bb227b8a4d2.pdf.

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.⁵³⁸

D. Role of Government

Building the online marketplace is fundamentally a function of the private sector, and that process is well underway.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_b0233171da77596c3d436a98a1f5addf.pdf.

⁵³⁸ Linked Content Coalition, News Release, *Unique Industry Collaboration Launches New Rights Model To Improve Legal Access To Online Content* (Apr. 8, 2013) available at http://media.wix.com/ugd//bff7bc_a0477746b9d46df1c923c96d66dba4f5.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%20PRONSAI%20%20response%20to%20Music%20HearingChaffetz%20bill%20111912.pdf>.

initiative,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.

⁵⁴⁰ 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.")

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.
 - 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.
 - 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.
 - 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.
 - 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. 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 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 Doroshov, 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

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Gene Mopsik, American Society of Media Photographers

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Thomas Rubin, Microsoft

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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
NetCoalition
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

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