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HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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THURSDAY, JULY 24, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 1:31 p.m., in room 2141, Rayburn Office Building, the Honorable Howard Coble, (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Marino, Chabot, Farenthold, Holding, Collins, DeSantis, Nadler, Conyers, Chu, Deutch, DelBene, Jeffries, Cicilline, and Lofgren.

Staff Present: (Majority) Joe Keeley, Chief Counsel; Olivia Lee, Clerk; (Minoity) Jason Everett, Counsel; and Norberto Salinas, Counsel.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order.

Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

We welcome all the witnesses and those in the audience as well. Folks, we are going to have a battle on our hands with votes on the floor. We are going to have votes that will interrupt us imminently. I am thinking maybe within 30 minutes. We will do the best we can.

Mr. Nadler, how are you?

Mr. NADLER. All right.

Mr. COBLE. By traditional, we always administer the oath, so if you all would please stand and let me administer the oath to you.

[Witnesses sworn.]

Mr. COBLE. Let the record show that all responded in the affirmative.

I welcome you again, and I apologize in advance because of the interruption. But the interruption is going to be inevitable, I can promise you that. But we will do the best we can.

As the cochair of the Creative Rights Caucus, I am well aware of having rights without the ability to enforce them is the same as having no rights at all.

Remedies for copyright infringement may include seizure of infringing goods, injunctive relief, awards of damages and profits, attorneys' fees and costs, or statutory damages.

Our witness from the Department of Justice can speak to the effort that they have taken to fight criminal piracy in the United States and abroad. I am pleased to see their efforts, but I am the first to recognize that as one pirate site is taken down, another will inevitably pop up.

Since the Department of Justice can go after only the worst pirates, civil enforcement allows copyright owners to help protect their own property from theft by creating strong financial disincentives to stealing.

However, just like erecting fences around your cattle takes time and money, so does your intellectual property, and most of us would declare that lawyers cost more than fences. And I would probably sign up on that side of the argument.

If you are a large copyright owner, you can work within the civil system to file lawsuits, and many of them do that. However, it does seem to be an endless effort.

As much as larger copyright owners find the civil litigation system expensive, smaller copyright owners find it not worth their time or money. Having to choose to go out and earn income by working or staying home to consider contracting an attorney to file a lawsuit on their behalf that they cannot afford in the first place is not much of a choice at all.

Several years ago, the Copyright Office agreed that smaller copyright owners were at a significant disadvantage when it came to protecting their rights and recommended the creation of a small claims system. This system would allow plaintiff and defendants a potentially quicker, cheaper, less expensive way of resolving disputes.

I look forward to learning more about these issues, and thanks to all of our witnesses again for making time to be with us today.

I am now pleased to recognize the distinguished gentleman from New York, the Ranking Member of the Subcommittee, Mr. Jerry Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

Today, we consider ways in which our copyright laws are enforced, and the relief available to copyright holders should someone infringe upon their copyrighted material.

Along with all of my colleagues on the Subcommittee, I recognize the importance of ensuring that copyright owners have sufficient remedies when their works are infringed. We know that infringements not only damage the financial interests of copyright owners, but our Nation's economy as well. And as the legal maxim goes, there is no right without a remedy.

I welcome this opportunity to hear from our witnesses about whether our current copyright infringement remedies are effective, and whether or not any changes may be necessary and appropriate at this time.

As we know, copyright infringement occurs when someone does not obtain authorization or does not have a license to lawfully use copyrighted material and violates one of the exclusive rights given to a copyright owner.

There are two basic principles that should guide our consideration of copyright infringement remedies. First, the remedy should serve to deter potential infringers and, when warranted, to penalize criminal infringement efforts. Second, they should compensate the copyright owner for losses resulting from infringement.

Federal law, which governs copyright infringement claims, requires such claims to be brought in Federal court. To prevail on an infringement claim, a copyright owner must prove actual ownership over the alleged infringed material and that at least one exclusive right granted to a copyright holder has been violated.

Current copyright law provides various criminal and civil remedies for copyright infringement, including preliminary and permanent injunctions as well as statutory damages. The Copyright Act, for example, authorizes statutory damages of $750 to $30,000 per infringed work. Willful infringement, however, may authorize the award of damages as high as $150,000 per work. Innocent infringement, on the other hand, may result in the award of damages as low as $200.

The issue of damages also includes the possible award of attorney's fees and expenses to the prevailing party, when the court finds such awards to be appropriate. In addition, the copyright owner may ask the court to enjoin further infringement, either temporarily or permanently.

If a copyright owner elects to pursue statutory damages, the copyrighted work must have been registered with the Copyright Office before the violation started, or, if it is a published work, within 3 months of publication.

As we examine these issues, we should study whether the penalties for copyright infringement are sufficient. We should consider today whether there is a need to clarify that felony infringement includes infringement by streaming. Felony penalties for copyright infringement are currently only available for reproduction or distribution of copyrighted material.

About 3 years ago, the Office of U.S. Intellectual Property Office Enforcement Coordinator issued a report making several recommendations to Congress that would increase intellectual property protection. Included among these recommendations was a suggestion that the criminal law should be clarified to make infringement by streaming a felony.

For example, downloading a copy of the movie Captain America illegally is a felony. But if you were to simply stream the same movie illegally, it would only be a misdemeanor. Does this distinction make sense?

Accordingly, I look forward to hearing the witnesses discuss their thoughts about whether we should amend the law to make it clear that streaming is a distribution of copyrighted works and, thereby, a felony.

In addition, I understand that some of the witnesses today will argue that the Copyright Act's statutory damage provisions adequately reflect the two basic principles of deterrence and just compensation.

Yet other witnesses will likely say that statutory damages have grown to an unreasonably high level in copyright cases and have a chilling effect on innovation.

Another factor involved in the pursuit of statutory damages is the oftentimes prohibitive costs of asserting a claim for copyright infringement, which can entail extensive litigation. We must ascertain whether the cost to access justice is just too high.

Individual copyright owners such as authors, photographers, graphic artists, and illustrators complain that even when their works are clearly and repeatedly infringed, they simply lack the financial means to fund such litigation.

These concerns may warrant consideration of whether there should be a streamlined judicial or administrative process to determine infringement claims below certain dollar thresholds. I look forward to hearing from the witnesses about how this process might work.

Additionally, some have argued that the registration requirement needed to assert statutory damages places individuals and smaller entities at a disadvantage, because it is difficult and burdensome for them to meet the statutory requirement for timely registration. Again, I would like to hear from the witnesses about changes we should consider regarding the registration requirement.

Whether or not we decide to make changes to statutory damages, to increase the penalties for streaming, or to set up new administrative processes to handle small copyright infringement claims depends in part on what we hear from our witnesses today.

We have excellent panel before us, and I look forward to their testimony.

I thank you, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman from New York.

The Chair now recognizes the distinguished gentleman from Michigan, Mr. Conyers, the Ranking Member of the full Committee.

Mr. CONYERS. Thank you, Mr. Chairman. I am happy to join you and our distinguished witnesses today.

The question that comes to mind is how we improve the system for resolving modest-sized copyright infringement claims, especially for individual creators with limited resources. Attorney Nancy Wolff has done a lot on that, but I want to hear from the other four of you as well.

We often hear about large damage awards or settlements. Yet, many claims for copyright infringement seek much smaller damages. Any discussion on available remedies must include how the current system impacts small copyright holders.

The estimated median cost for a party to litigate a copyright infringement lawsuit with less than $1 million at stake through appeal can normally average out to $350,000. Such costs are obviously much more than what many individuals can afford to invest in a lawsuit that may or may not be successful.

In fact, the costs may well exceed any potential recovery that any individual copyright holder could obtain in a relatively modest infringement case.

These factors may deter small owners from pursuing legitimate infringement claims.

In September of last year, the Copyright Office released a report focusing on this issue, observing that most infringements will never be prosecuted because they are economically infeasible. The report

also noted that because the potential for recovery of damages is limited, small copyright holders have difficulty finding counsel willing to take the case on.

So the Copyright Office has recommended the option of addressing small claims by streamlined adjudication processes, in which the parties can participate by consent. I hope that helps.

And then we come to the whole issue of examining whether current law regarding remedies for copyright infringement is sufficient or effective. I know that we are here meeting on a moving target. Every 6 months, something new comes out. But we would like to get your views on how efficient these remedies for infringement are, in fact, and how we can make them as effective as possible. And so, statutory and actual damages, injunctions and impoundments, court costs and attorneys fees, all add up.

And some contend that these remedies, especially the threat of high statutory damages, have chilled the creation of innovative services. I would like to see where you stand on that.

Mr. Chairman, I will submit the rest of my statement for the record. Thank you for this opportunity.

Mr. COBLE. Without objection.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr. for the Hearing on Copyright Remedies Before the Subcommittee on Courts, Intellectual Property and the Internet

Thursday, July 24, 2014, at 1:30 p.m.
2141 Rayburn House Office Building

Today's hearing provides us an opportunity to examine the remedies available to copyright holders whose work is infringed.

As I have noted many times during our review of the Copyright Act, we must ensure that the copyright system treats creators fairly and fosters their continuing creativity.

To that end, there are several points we should keep in mind as we consider today the issue of copyright infringement remedies.

As an initial matter, we should examine whether the current law regarding remedies for copyright infringement is sufficient and effective.

When people misappropriate the work of others, they are unjustly enriched while depriving copyright owners of their rights and income.

To prevent this from happening, the current copyright enforcement system should fully compensate the injured copyright holder and serve to deter future infringement.

Copyright holders have various remedies available to them. These include statutory and actual damages, injunctions, impoundment, and court costs and attorney's fees.

Some contend that this panoply of remedies, especially the threat of high statutory damages, has chilled the creation of innovative services. Others disagree.

I would like to hear from today's witnesses their views about whether the current remedies need to be revised.

Second, we should consider whether the current criminal enforcement laws have kept pace as technology has evolved and become increasingly international.

New technologies give copyright owners the ability to distribute their works to a much broader and bigger audience.

At the same time, some have learned to use those new technologies to infringe and sometimes profit off of the hard work of others.

In response, Congress has attempted to keep abreast of these new forms of infringement by updating the criminal law to better combat them.

But, perhaps more needs to be done.

Accordingly, I would like our witnesses to discuss whether the current criminal laws effectively protect copyright holders, deter copyright infringement, and encourage copyright licensing, while not chilling innovation.

Finally, we should consider how to improve the system for resolving modest-sized copyright infringement claims, especially for individual creators with limited resources.

We often hear about large damage awards or settlements for copyright infringement claims. Yet, many claims for copyright infringement seek much smaller damages. Any discussion on available remedies must include how the current system impacts small copyright holders.

The estimated median cost for a party to litigate a copyright infringement lawsuit with less than $1 million at stake through appeal is $350,000.

Such costs are more than what most individuals can afford to invest in a lawsuit that may or may not be successful. In fact, the costs could well exceed any potential recovery that an individual copyright holder could obtain in a relatively modest infringement case.

These factors may deter small copyright owners from pursuing legitimate infringement claims.

In September 2013 the Copyright Office released a report focusing on this issue, observing: "most [infringements] will never be prosecuted because it is economically unfeasible for the creators to commence an action in federal court."

The report also noted that because the potential for recovery of damages is limited, small copyright holders have difficulty finding counsel willing to take copyright cases that are unlikely to yield much in damages.

Based on these findings, the Copyright Office recommended that the most promising option to address small copyright claims may be a streamlined adjudication process in which parties could participate by consent.

Such a process could benefit individual creators and contribute to the goal of improving the overall copyright system.

I would like the witnesses to discuss this issue and provide their views on the Copyright Office's report.

I thank the chairman for holding today's hearing and I look forward to hearing testimony from the witnesses.

Mr. COBLE. And without objection, the statements from other Members will also be made a part of the record.

Our first witness today is Mr. David Bitkower, Acting Deputy Assistant Attorney General in the Criminal Division of the United States Department of Justice. Mr. Bitkower supervises the division's investigations and prosecutions involving computer crime and intellectual property. Mr. Bitkower received his J.D. from Harvard Law School and his B.S. from Yale University.

Mr. Bitkower, good to have you with us.

Our second witness is Mr. Stephen Tepp, President and Chief Executive Officer for Sentinel Worldwide, where he counsels clients on protecting intellectual property. Prior to forming Sentinel Worldwide, Mr. Tepp was Chief Intellectual Property Counsel for the Global Intellectual Property Center of the United States Chamber of Commerce. He received his J.D. from American University Washington College of Law, and his undergraduate degree from Colgate University.

Mr. Tepp, good to have you with us.

Our third witness is Mr. Matt Schruers, Vice President for Law and Policy for the Computer & Communications Industry Association. Mr. Schruers also served as Adjunct Professor teaching intellectual property courses at Georgetown University Law Center. He received his J.D. from the University of Virginia School of Law and his B.A. from Duke University.

Mr. Schruers, I studied law 9 miles from your school, and the spirited rivalry is still alive. I am sure you know that. Good to have you with us as well.

The fourth witness is Mr. Sherwood Siy, Vice President of Legal Affairs at Public Knowledge. Before joining Public Knowledge, he served as Staff Counsel for the Electronic Policy Information Center, working on consumer and communications issues. He received his J.D. from the University of California-Berkeley Boalt Hall School of Law and his B.A. from Stanford University.

Good to have you with us, Mr. Siy, as well.

Our final witness is Ms. Nancy Wolff, Partner in Cowan, DeBaets, Abrahams & Sheppard LLP. In her position, Ms. Wolff advises traditional and new media clients in copyright, trademark, and digital media law. She received her J.D. from Rutgers School of Law and her B.S. in business management from the University of Maryland.

Good to have you with us as well, Ms. Wolff.

Mr. Bitkower, we will let you be the leadoff today.

Folks, we try to comply with the 5-minute rule. When the light goes from green to amber, that is your notice that you have 1 minute remaining. You won't be severely punished if you violate that, but if you can wrap it up on or about 5 minutes, we would appreciate that.

I have also been advised that the vote that was initially scheduled for 2 o'clock probably will come later than that, so maybe the gods are shining on us.

Mr. Bitkower, you are recognized for 5 minutes.

TESTIMONY OF DAVID BITKOWER, ACTING DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. BITKOWER. Thank you. Good afternoon, Chairman Coble, Ranking Member Nadler, Ranking Member Conyers. Thank you for the opportunity to discuss criminal copyright enforcement with you here today.

Criminal enforcement of copyright law plays an essential role in preserving the rights of American authors, artists, and creators. Protecting those rights adds to our Nation's artistic, literary, and musical culture, and our scientific and technical knowledge. It also protects a vital segment of our Nation's economy, given the increasing prominence of copyrighted works, ranging from books and music, to movies and computer software.

Although copyright protection predates our country's founding and is rooted in the Constitution, Congress has repeatedly updated our laws to keep pace with new technology and new methods of intellectual property theft. For example, a century ago, Congress responded to a Supreme Court decision involving player pianos by passing the Copyright Act of 1909, which created the first compulsory license scheme for mechanical reproduction of music.

Decades later, as commercial radio and sound recording technology gained popularity, Congress again updated laws to protect popular music recordings from unlawful duplication with the Copyright Act of 1976.

And, more recently, as Internet usage became widespread, the copying and distribution of digital content made large-scale Internet piracy far cheaper than physically manufacturing pirated discs. To combat the emergence of Internet piracy, Congress enacted the No Electronic Theft Act of 1987, which broadened criminal penalties to encompass certain cases of piracy not conducted for financial gain.

The Department of Justice, through its Computer Crime and Intellectual Property Section, or CCIPS, U.S. Attorneys Offices around the country, and the Federal Bureau of Investigation, and in partnership with other agencies, most prominently, Immigration and Customs Enforcement's Homeland Security Investigations, has successfully used the tools and resources already provided by Congress to develop a focused but robust criminal enforcement program.

To highlight just one example, in January 2012, the department unsealed charges against members of a worldwide criminal organization, the Mega Conspiracy, who are alleged to have engaged in criminal copyright infringement with estimated criminal proceeds of more than $175 million and harm to rights-holders in excess of half a billion dollars.

We are currently seeking to extradite these defendants to the Eastern District of Virginia to face the charges against them.

The indictment alleges that Megaupload.com reproduced and distributed unauthorized copies of copyrighted content on a massive scale, including the latest movies, music, video games, and other computer software, and boasted more than 1 billion page visits.

The case against the Mega Conspiracy highlights our commitment to combating large-scale international copyright infringe-

ment. The case also highlights two trends in copyright infringement that have created challenges for criminal enforcement.

First, we have seen Internet streaming emerge as the preferred means of disseminating many types of copyrighted content online. Reports indicate that the amount of bandwidth devoted to infringing video streaming grew by more than 470 percent between 2010 and 2012. Nevertheless, under our current laws, infringing streaming, even where conducted for financial gain, is not clearly punishable as a felony.

To deter pirate streaming Web sites from illegally profiting from copyrighted works of others, we recommend that Congress amend the law to create a felony penalty for unauthorized Internet streaming. We would welcome the opportunity to address this issue with Congress.

A second fundamental development is the globalization of the intellectual property market. The same commercial and technological changes that have broadened the legitimate market for creative works have also facilitated the globalization of intellectual property crime. The department works to disrupt foreign-based infringement through American prosecutions and forfeitures, where appropriate, but also through diplomatic and trade-based pressure, training and support for foreign partners to promote enforcement in other countries, and increasing public awareness about the harms of copyright piracy.

Our Intellectual Property Law Enforcement Coordinator program, essential to these efforts, has allowed us to put specialized prosecutors on the ground in Bangkok, Thailand, and in Eastern Europe. We know that this program gets results.

To further these efforts, the department proposes the creation of additional positions to broaden our reach abroad. The program would permit the department to address legal and operational hurdles to effective international intellectual property enforcement.

Thank you for the opportunity to discuss the department's work in this area, and I look forward to answering any questions that you might have.

[The prepared statement of Mr. Bitkower follows:]



Department of Justice

STATEMENT OF

DAVID BITKOWER
ACTING DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY
AND THE INTERNET
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

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PRESENTED ON
JULY 24, 2014

David Bitkower
Acting Deputy Assistant Attorney General
Criminal Division
U.S. Department of Justice
Statement Before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet
Washington, D.C.
July 24, 2014

Good afternoon and thank you for the opportunity to discuss criminal copyright enforcement with you here today.

Criminal enforcement of the copyright laws plays an essential role in preserving the rights of American authors, artists, and creators. By protecting authors' rights to their creative works, copyright protections encourage the creation of more works, and add to our nation's artistic, literary, and musical culture, and our body of scientific and technical knowledge. Although copyright law predates our country's founding and is rooted in our Constitution, in recent decades the volume and variety of copyrighted materials and their importance to our nation's economy has exploded. Today, copyrighted works—ranging from traditional printed books, music, and artwork to movies, computer software, and video games—make up a larger proportion of our national and global economy than ever before. This rise in economic significance has occurred in large part because of the explosive growth of communications technologies like the Internet. Just as these developments have enabled Americans to enjoy the benefits of their creativity and innovation, however, they have also enabled copyright pirates to operate on a larger scale and with greater impact on business and the public at large.

As you are aware, the Department has made the enforcement of intellectual property rights a priority, and in recent years we have undertaken several groundbreaking prosecutions to protect copyright holders here in the United States and creators around the world. For example, in January 2012, the Department unsealed charges against the members of a worldwide criminal organization, the Mega Conspiracy, who are alleged to have engaged in criminal copyright infringement and money laundering with an estimated harm in excess of $500,000,000 and reported proceeds from their crimes in excess of $175,000,000. Five defendants are currently facing extradition to the Eastern

District of Virginia to face charges of racketeering, copyright infringement, money laundering, and wire fraud.

Before the takedown, Megaupload.com was a tremendously popular commercial website that reproduced and distributed copies of unauthorized copyrighted content. The website boasted of more than one billion visits, over 150 million registered users, and 50 million daily visitors. In fact, use of Megaupload.com accounted for as much as four percent of the total traffic on the Internet. According to the indictment in the case, the operators of the site intentionally made available for downloading infringing material including the latest motion pictures, television programs, musical recordings, electronic books, video games, and other computer software. The case against the Mega Conspiracy is the largest case against an international copyright piracy organization ever brought by the Department, and it highlights our ongoing commitment to combating the international organized piracy groups that profit from the hard work of others.

But the conduct alleged in this case is not only an example of the Department's commitment; it is also an example of how technology, and specifically the Internet, has enabled copyright infringement and distribution on an unprecedented scale. While current law criminalizes many of the most serious infringements, technological advances and the increasingly international nature of intellectual property crime present new challenges to our enforcement efforts. Today, I would like to discuss how the Department is working to keep pace with these technological advances and the international scale of copyright infringement. And just as the Department must adapt to the ever-changing landscape, so must our laws. Therefore, I will also suggest some proposals to enhance the enforcement tools and resources available to the Department.

The Department's Track Record

The Department has successfully used the tools and resources provided by Congress to develop a robust enforcement program with many successful prosecutions. Here, I outline a sample of our recent successes in using criminal enforcement to vindicate our U.S.-held copyrights. These prosecutions are the result of careful coordination between the intellectual property experts in the Department's Computer

Crime and Intellectual Property Section (CCIPS), the over 260 Computer Hacking and Intellectual Property (CHIP) coordinators in U.S. Attorneys' Offices around the country, and the 25 CHIP Units housed in the judicial districts with the heaviest intellectual property and cybercrime load. The investigative expertise of the Federal Bureau of Investigation (FBI) and the Department of Homeland Security's U.S. Immigration and Customs Enforcement's Homeland Security Investigations (HSI) are critical to the identification and development of cases. I would also like to make note of the National Intellectual Property Rights Coordination Center, which has done tremendous work to share information and increase investigations among the 17 U.S. agencies and four international partners represented at the Center. These examples I describe below demonstrate that federal agents and prosecutors are committed to being as flexible and adaptive as the offenders we prosecute. But, they also highlight that we must remain vigilant for developing trends in criminal activity and technologies that skirt the edges of existing law:

- ***Members of Android Mobile Device App Piracy Group Plead Guilty.***
  Earlier this year, in a case investigated by the FBI and prosecuted by CCIPS and the U.S. Attorney's Office for the Northern District of Georgia, three defendants pleaded guilty for their roles in a scheme to distribute more than one million copies of copyrighted Android mobile device "apps" without authorization, with a total retail value of more than $700,000. From August 2010 to August 2012, the group conspired to reproduce and distribute more than one million copies of copyrighted apps through the Appbucket alternative online market without permission from the copyright owners of the apps. These represent the first U.S. charges and convictions for the distribution of counterfeit apps. Sentencing is scheduled for later this year.

- ***Chinese Citizen Sentenced to 12 Years in Prison for Cyber-Theft and Piracy of Over $100 Million in Sensitive Software and Proprietary Data.***
  In June 2013, Xiang Li, a resident of China was sentenced to 12 years in prison for selling online $100 million worth of pirated, sensitive, industrial-grade software to more than 400 customers located in at least 28 states and over 60

foreign countries. The infringed software was owned by approximately 200 different American software manufacturers, ranging from large corporations to small businesses. Li sold to customers in embargoed countries in the Middle East and foreign government employees. He also sold to U.S. government employees and contractors, including the sale of over $1.2 million in pirated software to a NASA electronics engineer who subsequently uploaded the pirated software to a NASA computer network for use in his private consulting business, and sales to a Kentucky-based government contractor that serviced U.S. and foreign military and law enforcement agencies. The contractor then used the pirated software to design components for Patriot missiles and the Army's Black Hawk helicopters. The NASA engineer and government contractor were separately prosecuted for copyright infringement as well. The case was investigated by HSI, and the Defense Criminal Investigative Service and NASA's Inspector General, and prosecuted by the U.S. Attorney's Office for the District of Delaware.

- ***Leaders of Internet Piracy Group "IMAGiNE" Sentenced for Criminal Copyright Conspiracy.***

  The IMAGiNE group was a well-organized and technically savvy online piracy group that specialized in disseminating motion pictures only available in theaters or before their commercial release. Through a sophisticated infrastructure that included private FTP servers, IRC channels, and websites, IMAGiNE reproduced and distributed over the Internet tens of thousands of illegal copies of copyrighted works for more than two years. They targeted and released nearly every major movie released in the U.S. during this time period and were the first to upload numerous blockbuster motion pictures without authorization. The industry estimated that this release group was responsible for approximately 43 percent of the pirated pre-release movie content available on the Internet at that time. To date, five defendants have pleaded guilty and been sentenced to incarceration ranging from two to five years for their roles in the network. Additionally, the court ordered restitution to repay the more than $400,000 invested by the Motion Picture Association of America in uncovering the scheme. This case was

investigated by HSI and prosecuted by CCIPS and the U.S. Attorney's Office for the Eastern District of Virginia.

- ***Operator of Delaware-Based Software Piracy Websites Sentenced to 58 Months for Copyright Infringement and Identity Theft.***

  In January 2013, Jamie Lynn Snyder was sentenced to almost five years in prison and ordered to pay over $1 million in restitution for selling over 24,000 copies of pirated software with an estimated retail value of more than $5.9 million. Between January 2008 and April 2010, Snyder sold infringing copies of software through her websites to thousands of customers, netting $971,935 in illegal proceeds. She advertised approximately 400 software titles on the website. The infringed software was owned by at least 81 different software manufacturers, including Adobe, Apple, Autodesk and Microsoft. Snyder was also convicted of embezzling approximately $40,000 from her employer, forging numerous checks payable to herself and to her creditors, and making unauthorized purchases of personal items on a company credit card. This case was investigated by the FBI and the Delaware State Police, and prosecuted by the U.S. Attorney's Office for the District of Delaware.

Copyright law must be updated to address advances in technology

As our record indicates, the Department has been successful in prosecuting a broad array of criminal copyright cases. But the creativity of copyright infringers and the technological changes that they exploit will likely only become more salient with time.

Throughout our nation's history, new technologies have dramatically changed how artists disseminate creative media and how audiences receive it. At the same time, technology has changed how individuals illegally copy and profit from works originally created by others. Congress has repeatedly been called upon to update our copyright law to account for new forms of intellectual piracy. A century ago, the player piano was making music available to new audiences, and manufacturers were enthusiastically producing piano rolls with songs composed by others. In 1908, the Supreme Court considered the legal status of player piano rolls for the first time and held that manufacturers of the rolls did not need to pay royalties to composers. Congress

responded in the Copyright Act of 1909 by creating the first compulsory license scheme for companies making mechanical reproductions of music.

Many decades later, but before the advent of widespread Internet use, large-scale copyright piracy generally required the making of physical copies of creative works, through photocopies, or on vinyl records, cassettes or VHS tapes and floppy discs. The time and expense of making these physical copies resulted in large-scale copyright pirates generally charging a fee. Perhaps unsurprisingly, criminal copyright penalties were therefore limited to for-profit piracy. The rise of personal computers and the Internet, however, made copying and distributing digital content virtually free. Congress responded by passing the No Electronic Theft Act (the "NET Act") in 1997 to provide criminal penalties for piracy not conducted for profit in certain cases involving large-scale reproduction or distribution of copyrighted works.

Similarly, the early 2000s witnessed a growing problem when leaked copies of movies, music, and video games appeared online before these works were legitimately released. Recognizing the damaging impact that this type of "pre-release" piracy was having on many copyright owners, Congress enacted the Artists' Rights and Theft Prevention Act of 2005 to provide enhanced penalties for those who distribute pre-release works online.

In short, throughout our history, copyright infringers have taken advantage of new technologies, and Congress has responded by updating the law to combat the new methods of infringement. CCIPS and other Department prosecutors remain vigilant about identifying challenges before they become obstacles, and we work in close coordination with our enforcement partners and in particular with the office of the Intellectual Property Enforcement Coordinator in the Executive Office of the President to develop policy and legislative proposals that will preserve our ability to enforce intellectual property rights in appropriate cases through criminal law. We look forward to working with the Committee to do the same.

A growing problem: Infringing Internet streaming

One new challenge confronting copyright owners and law enforcement authorities is the rise of Internet "streaming" as the dominant means of disseminating many types of copyrighted content online. Like the evolving technology discussed above, this activity also derives from advances in technology: in this case, the growth in availability of high-speed Internet to the average consumer. Several popular legitimate streaming services include those offered by Netflix, YouTube, Hulu, Pandora, and Spotify. At the same time, numerous pirate websites stream infringing content online. Research by private organizations indicates that the amount of bandwidth devoted to infringing video streaming grew by more than 470% between 2010 and 2012, even following the loss of Megaupload.com subsidiary and widely-used streaming host MegaVideo, which was taken offline during the takedown of the Mega Conspiracy.

The structure of existing copyright law does not favor prosecution of such illicit streaming sites. Criminal law currently provides felony penalties for infringements of two rights afforded under copyright law: reproduction and distribution of copyrighted works. Internet streaming, however, generally implicates a different right: the right to public performance, violations of which currently correspond only to misdemeanor charges. Consequently, in most cases, infringing streaming can be prosecuted only as a misdemeanor, even when sites are willfully streaming pirated content to large numbers of users, and turning huge profits through advertising revenue and subscriptions.

To deter pirate streaming websites from illegally profiting from others' efforts and creativity, the Administration recommends that Congress amend the law to create a felony penalty for unauthorized Internet streaming.[1] Specifically, we recommend the creation of legislation to establish a felony charge for infringement through unauthorized public performances conducted for commercial advantage or private financial gain. Such a change could be accomplished without changing the structure of existing criminal copyright law. Although this change would not create a new category of criminal

[1] *See Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations*, March 2011. http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf

behavior—since such conduct is already deemed a misdemeanor crime—it would emphasize the seriousness of the threat that unauthorized streaming poses to legitimate copyright holders, clarify the scope of conduct deemed to be illegal in order to deter potential infringers, and provide the Department with an important tool to prosecute and deter illicit Internet streaming.

Any legislative amendment creating new penalties for infringement by streaming is likely to confront several key policy questions. For instance, it may invoke the question of whether to create a new offense for Internet streaming specifically, or increase penalties for public performances more generally; and the question whether changes in the business model of streaming-based infringement counsel corresponding changes in the way we set harm thresholds for felony penalties. We would welcome the opportunity to work with Congress to address these questions.

Internationalization of Copyright Infringement

Besides technological change, a second fundamental development in copyright infringement is the globalization of the market, both the legitimate market for creative works and the illegitimate market for pirated works. A quick browse through current Internet piracy sites makes abundantly clear that online intellectual property crime is a truly international phenomenon. We can download books, music, or movies almost anywhere due to the expansion of Internet commerce. However, a growing percentage of those downloads are pirated content. Individuals and groups around the world have found that there is profit to be made in distributing the expressions of others.

In addition to the Mega Conspiracy described above, we have seen The Pirate Bay start as a file sharing site for unauthorized copies of works in Sweden, expand to other countries, and even develop its own political party in Europe. The allofmp3.com website, operating from Russia, has made it easy for users to download pirated music. Each of these has been tremendously profitable at exploiting the works of others, and equally brazen about flouting domestic laws and international agreements intended to protect copyrights.

The Department, in coordination with other U.S. agencies, works to disrupt these illegal operations through prosecution, diplomatic and trade-based pressure, training and support for law enforcement in other countries, and public awareness and education about the harms of copyright piracy. Despite these efforts, however, the economic benefit often outweighs the risks for illegal distributors of these protected materials.

International Enforcement and the ICHIP Program

One way in which the Department has achieved success in combating international intellectual property crime is with its Intellectual Property Law Enforcement Coordinator (IPLEC) programs in Asia and Eastern Europe. A Department-funded IPLEC has operated in Southeast Asia from the U.S. Embassy in Bangkok, Thailand since 2006. Meanwhile, using anticrime funds provided by the State Department Bureau for International Narcotics and Law Enforcement Affairs (INL), the Justice Department operated an IPLEC from Sofia, Bulgaria from 2008 to 2011, and we will recommence our Eastern European presence in 2014 as we stand up a new INL-funded IPLEC at the U.S. Embassy in Bucharest, Romania. We expect the Bucharest IPLEC to be of particular help assisting the new authorities in Ukraine.

Over the years, the IPLECs have proven useful in coordinating INL-funded training and technical assistance to foreign law enforcement. This system has proven effective, as the IPLECs have coordinated delivery of hundreds of training sessions on intellectual property enforcement in support of broader U.S. government goals to reduce and eliminate "weak links" in global intellectual property enforcement. The program has realized numerous successes, including a Ukrainian police officer who, after receiving training, was able to use a dial-up Internet connection from his home computer to bring down the largest illegal file sharing service in his country. In Asia, an IPLEC spearheaded the creation of an Intellectual Property Crimes Enforcement Network involving law enforcement agencies in 17 countries that has resulted in greater regional coordination on intellectual property crime, the identification and training of cyber experts, and an increased dialogue with Chinese law enforcement to address the source of much of the counterfeit and pirated material distributed around the world.

To further the Department's work in this regard, and as reflected in the President's 2015 Budget, the Administration proposes expanding and making permanent this program through the creation of two new International Computer Hacking and Intellectual Property (ICHIP) Coordinator positions within the Criminal Division. These positions would result in the posting of highly-trained Justice Department prosecutors in U.S. Embassies in parts of the world that face high rates of intellectual property and cybercrime. The ICHIPs would provide an efficient and cost-effective way to support and coordinate U.S. investigations that have a foreign nexus, including the majority of online copyright piracy cases, and to train and assist foreign prosecutors, investigators, and judges in handling intellectual property and cyber matters.

The expanded reach of the proposed ICHIP Program would create a unified program to address issues such as Internet copyright piracy at the source. It would increase the operational capacity of the posted attorneys. And, it would permit the Department to address technical, procedural, and legal hurdles to effective intellectual property enforcement, both directly and in coordination with the authorities exercising jurisdiction over international intellectual property and cyber criminals. We are closely coordinating with INL so that these new positions could fully leverage existing training and technical assistance resources and seamlessly weave into the existing IPLEC activities.

Conclusion

The Department appreciates the time this Committee has devoted to the important matter of copyright protection, and I want to thank you in particular for the opportunity to raise the Department priorities I have described. We look forward to working with Congress to improve the law in this developing area.

I would be happy to take any questions you may have.

Mr. COBLE. Thank you, Mr. Bitkower. You ought to be commended. You beat the illuminating red light.

I failed to tell you, ladies and gentlemen, that timers on your desk keep you advised when that illumination occurs.

Thank you, Mr. Bitkower.

Mr. BITKOWER. Thank you.

Mr. COBLE. Mr. Tepp?

TESTIMONY OF STEVEN TEPP, PRESIDENT AND CEO, SENTINEL WORLDWIDE

Mr. TEPP. Thank you, Chairman Coble, Ranking Member Nadler, Ranking Member Conyers, Members of the Subcommittee. Thank you for the opportunity to appear before you today to discuss copyright remedies as part of your ongoing review of the American copyright system.

My name is Steven Tepp. I am President and CEO of Sentinel Worldwide. Previously, I enjoyed a career of 15 years of government service to your counterpart in the Senate and to the U.S. Copyright Office. I now provide intellectual property counsel to companies and associations with interests in protecting and enforcing intellectual property rights, including the Global Intellectual Property Center of the U.S. Chamber of Commerce.

I am also a professorial lecturer in law at the George Washington University Law School. Previously, I also taught at George Mason University Law School and the Georgetown University Law Center.

Today, however, I am here before you in my personal capacity as an expert in copyright. The views expressed are my own and not necessarily reflective of the views of any client or employer.

Copyright is a property right. Those who apply their talents to produce creative, tangible expression earn their copyright. Infringement of that right is a distortion of the marketplace incentives to create and distribute copyrightable works that must be addressed if our copyright system to be maintained as an engine of economic growth, job creation, innovation, and creative expression.

It is axiomatic that property rights that exist only on paper and cannot be effectively enforced are no rights at all.

The copyright review hearings this Subcommittee has conducted thus far have presented nuanced issues of the scope and duration of exclusive rights, and the scope and application of exceptions and limitations.

Today's hearing is different. Most remedies are available only after a court has resolved all the nuances of copyright law and found the defendant to have infringed.

The subject of today's hearing is the appropriate redress for violations of the law.

Effective enforcement of copyright entails three fundamental goals: compensation to the injured right holder; deterrence against future infringement; and in the most egregious cases, punitive measures against the infringer.

The Copyright Act is designed to achieve these through the availability of a variety of civil remedies and criminal penalties. My written testimony offers a brief overview of the history of the various remedies available for copyright infringement, including injunctions, seizure and destruction of infringing copies, monetary

damages, awards of costs and attorney's fees, as well as criminal enforcement and enforcement at the border.

For the remainder of my time, I would like to focus on statutory damages for copyright infringement as they have been critiqued in some of my fellow panelists' testimony.

Statutory damages for civil copyright infringement are among the most venerable aspects of American copyright law. Even prior to the ratification of the Constitution, several State copyright statutes provided for statutory damages, and they have been part of the Federal Copyright Act since the first Congress enacted the Copyright Act of 1790.

They are a needed aspect of a complete remedy system, because so often, actual copyright damages are difficult or even impossible to prove. That is truer than ever in today's digital network environment.

Over the decades, and, indeed, centuries, Congress has repeatedly and carefully reassessed and revised our statutory damages system to ensure it meets its goal of compensation and deterrence while avoiding excessive awards. It does so by trusting courts with a wide range of discretion to do what is just in a given case.

The level of statutory damages today is lower than it has been in at least a century, comparing it to the initial levels of the 1909 act and the 1976 act, adjusted for inflation.

Again, today's statutory damages are lower than they have been in a century, compared to the initial levels of 1909 and 1976, adjusted for inflation rate.

If the potential for large statutory damages awards is great today than in the past, it says more about the scope and volume of infringements today than it does about the statute.

The undeniable reality is that copyright infringement is a massive problem. Efforts to address that must surely be multifaceted, but it is equally certain that effective legal remedies must be among those facets. If anything, this Subcommittee should be looking for ways to improve the effectiveness of copyright remedies in terms of compensation, and especially deterrence. The very last thing that you should consider is weakening them.

Thank you for the opportunity to present my views and participate in this historic copyright review process. It is my hope that it demonstrates to you the longstanding and thoughtful place that remedies have in making the Copyright Act the success it has been to date.

It would be my pleasure to assist the Committee in any other way that I am able.

In closing, Mr. Chairman, I would like to add it has been a privilege to work with you and your staff over the many years that I have been working on copyright, and to observe the gentlemanly and capable way in which you have run this Subcommittee. The field of intellectual property law and policy is much better for your efforts, and you will be missed after your retirement. Thank you.

[The prepared statement of Mr. Tepp follows:]

Testimony of Steven Tepp
President & CEO of Sentinel Worldwide
on
"Copyright Remedies"
before the
Subcommittee on Courts, Intellectual Property, and the Internet
House Judiciary Committee
July 24, 2014

Mr. Chairman, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss copyright remedies as part of your ongoing review of the American copyright system.

My name is Steven Tepp and I am President & CEO of Sentinel Worldwide. Previously, I enjoyed a career of 15 years of government service to your counterpart committee in the Senate and the U.S. Copyright Office. I now provide intellectual property counsel to companies and associations with interests in protecting and enforcing intellectual property rights, including the Global Intellectual Property Center of the U.S. Chamber of Commerce. I am also a Professorial Lecturer in Law, teaching copyright at the George Washington University Law School. I have previously taught at the George Mason School of Law and the Georgetown University Law Center.

I am here before you today in my personal capacity as an expert in copyright. The views expressed are my own and do not necessarily reflect the views of any client or employer.

The Role of Copyright Remedies

Copyright is a property right. Those who apply their talents to produce creative, tangible expression earn their copyright. But copyright protection does not guarantee that the creator will earn any money; the marketplace decides that.

When a copyrightable work[1] is a commercial success, there is no shortage of people who seek to participate in the profit making, including some who run afoul of the law and violate copyright. When people misappropriate the work of others, the copyright owners are deprived of their rights and their legitimate income, and the infringers obtain unjust enrichment. This is a distortion of the marketplace incentives to create and distribute copyrightable works that must be addressed if our copyright system is to be maintained as an engine of economic growth, job creation, innovation, and creative expression. It is axiomatic that property rights that exist only on paper and cannot be effectively enforced are no rights at all.

The copyright review hearings this subcommittee has conducted thus far have presented nuanced issues of the scope and duration of exclusive rights and the scope and application of exceptions and limitations, including statutory licenses. Today's hearing is different. Most remedies are available only after a court has resolved all the nuances in copyright law and found the defendant to have infringed. The subject of today's hearing is the appropriate redress for violations of the law.

The Three Goals of Remedies

The effective enforcement of copyright entails three fundamental goals: full compensation to the injured right holder, deterrence against future infringement

[1] Throughout my testimony I refer to "works" and "copies". Although the Copyright Act also uses the term "phonorecords," for purposes of my remarks today I use those terms to include all subject matter within the scope section 102 of the Copyright Act.

(including disgorgement of profits by infringers), and in the most egregious cases punitive measures against the infringer.

The Copyright Act is designed to achieve these through the availability of a variety of equitable and monetary remedies in civil cases and the imposition of fines, imprisonment, and forfeiture in criminal cases. Chapter 5 of the Copyright Act sets out the specific remedies that are available: injunctions; impoundment of infringing articles, implements, and records regarding such and destruction of the former; monetary damages; court costs and attorney's fees; and should the case rise to the level of a criminal offense, fines and terms of imprisonment. Copyright is also enforced at the border, where the Office of Customs and Border Protection ("CBP") has the authority to seize pirated copies that are sent into the United States.

Injunctive Relief

The first duty of a remedies system must surely be to end infringements, or ideally to prevent them from occurring. Equitable, injunctive relief is available for precisely these purposes.

The federal Copyright Act vested federal courts with original jurisdiction for copyright suits for the first time in 1819.[2] That enactment specified:

> That the circuit courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries: and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts in equity, to prevent the violation of the rights of any

[2] An Act to extend the jurisdiction of the circuit courts of the United States to cases arising under the law relating to patents (Feb. 15, 1819).

> authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable.[3]

That authority has remained in the statute to date. Section 502 of the Copyright Act authorizes courts to grant "temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."[4] In addition, courts may grant temporary restraining orders on an *ex parte* basis pursuant to Federal Rule of Civil Procedure 65 if the plaintiff copyright owner can show that "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."

In 2006, the Supreme Court issued its decision in *EBay, Inc. v. MercExchange, LLC.*[5] That case involved a request for a permanent injunction in regards to a patent infringement. In resolving the correct test to apply for such a request, Justice Thomas wrote for a unanimous Court that:

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[6]

Importantly, the Court also noted that, "[t]his approach is consistent with our treatment of injunctions under the Copyright Act," and rejected "the rule that an injunction automatically follows a determination that a copyright has been infringed."[7] While at the time many practitioners understood this to be a narrowing

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[3] *Id.*
[4] 17 U.S.C. §502(a).
[5] 547 U.S. 388 (2006).
[6] *Id.* at 391.
[7] *Id.* at 392-93.

of the opportunity to obtain injunctions, and it probably has been, this system has generally operated well.

Impoundment

Consistent with the goal of preventing infringement, section 503 of the Copyright Act grants courts the authority to order the impounding of infringing copies, the means by which those copies are reproduced, and records documenting the manufacture and sale related to the infringement. At the conclusion of the litigation, courts may order the destruction of infringing copies and the means by which they may be made.

This authority has a pedigree all the way back to the Copyright Act of 1790, which provided that, "offenders shall forfeit all and every copy and copies...to the author or proprietor...who shall forthwith destroy the same...."[8]

Indeed, it can scarcely be argued that allowing infringing copies or the implements with which they are produced to remain in the hands of infringers is good policy. So it is not surprising that this provision was included in the first federal Copyright Act and has remained, although occasionally updated and improved, without interruption since that time.

Monetary Damages

No less fundamental a remedy is the award of damages to compensate fully the aggrieved copyright owner. Since the beginning of federal copyright law, the Act has provided for two distinct calculations of monetary damages: actual damages and statutory damages. The purpose of these alternatives has been to ensure as best as

[8] An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned (1 Stat. 124) (May 31, 1790)(hereinafter "1790 Act") §2.

possible that the copyright owner is duly compensated and to deter future infringements.

Actual Damages

The 1790 Act provided that "any person or persons who shall print or publish any manuscript, without the consent and approbation of the author or proprietor thereof...shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury."[9]

The 1909 Copyright Act added for the first time the explicit right for the injured copyright owner to recover "such damages as the copyright proprietor may have suffered due to the infringement, *as well as all the profits which the infringer shall have made from such infringement.*"[10] The rationale is clear. If actual damages are the only method of calculating awards, and the damages the copyright owner can prove are less than the infringer's profits, the infringer will enjoy financial gain notwithstanding the fact that they have been caught and found liable. Both as a matter of plain justice and to ensure the Copyright Act maintains a deterrent effect, infringers must be disgorged of the entirety of their illicit gain.

Some confusion arose over the statutory language of the 1909 Act as to whether damages and defendant's profits were meant to be alternative bases for calculating monetary awards, or additive.[11] The 1976 Copyright resolved that confusion in favor of the latter, with language that remains in force today:

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are

[9] 1790 Act §6.
[10] Pub. L. 60-349 (1909) §25(b)(emphasis added).
[11] *See* 5 *Nimmer on Copyright* §14.01[A].

> attributable to the infringement and are not taken into account in computing the actual damages.[12]

The final phrase ensures that the disgorgement of the infringer's profits does not result in a double counting with the actual damages. Also, in calculating the infringer's profits, there is an opportunity for the defendant to prove deductible expenses and elements of profit not attributable to the infringement.[13]

While there has been litigation over the decades concerning the proper methodology for calculating actual damages and the infringer's profits, this area of the law appears to be well settled and functioning adequately.

Statutory damages[14]

The ability of actual damages and infringer's profits calculations to provide a basis for monetary awards is limited by the practical fact that the records needed to establish such calculations are in the hands of the infringers, if they were ever kept at all. Thus, the Copyright Act has always included an amount or range of monetary damages pre-established in the statute itself.

Statutory damages for civil copyright infringement are among the most venerable aspects of American copyright law. Even prior to the ratification of the Constitution, several state copyright statutes provided for either a statutory maximum and minimum award (Massachusetts, New Hampshire, and Rhode Island) or a fixed sum to be paid for each infringing copy (Maryland and South Carolina).[15]

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[12] 17 U.S.C. §504(b).
[13] *Id.*
[14] Much of the historical review of statutory damages in this testimony is taken from a prior law review article, Tepp, *"The Constitutional Challenge to Statutory Damages for Copyright Infringement: Don't Gore Section 504,"* first published at 19 N.Y. St. B.A. Ent., Arts and Sports Law J. 24 (Special Edition 2008, No. 1).
[15] William S. Strauss, U.S. Copyright Office, *Studies on Copyright Law Revision Prepared for the Sen. Subcomm. on Patents, Trademarks, and Copyrights: The Damage*

The Copyright Act of 1790 included a provision for statutory damages; it was "fifty cents for every [infringing] sheet . . . one [half] thereof to and for the use of the United States."[16] It is noteworthy that from the very first instance of federal copyright protection, statutory damages have served a hybrid purpose of both compensating the copyright owner and deterring future infringements.

Through much of the nineteenth century statutory damages were increased and expanded to apply to the infringement of newly protected categories of works.[17] However, in the Copyright Act of 1895, Congress began the evolution from the original manner of calculation of statutory damages (per infringing copy/performance) to a range with a statutory maximum and minimum.[18] While maintaining the traditional method for some categories of works, the Act provided:

> In the case of infringement of a copyrighted photograph made from any object not a work of fine arts, the sum recovered was to be not less than $100 nor more than $5,000, and that in the case of infringement of a copyright in a painting, drawing, engraving, etching, print, or model or design for a work of art, or a photograph of a work of the fine arts, the sum to be recovered was to be not less than $250 nor more than $10,000. One half of such sum accrued to the copyright proprietor and the other half to the United States.[19]

Provisions of the Copyright Law (Study No. 22) 1 (1956).

[16] 1790 Act ,§25.

[17] See Copyright Act of 1802 (2 Stat. 171 (1802) (making designs, engravings, and prints eligible for copyright protection and providing for statutory damages of $1 for every infringing print)); Copyright Act of 1831 (4 Stat. 436 (1831) (making musical works eligible for copyright protection and providing for statutory damages of $1 for every infringing sheet)); Copyright Act of 1856 (11 Stat. 138 (1856) (granting performance and publication rights in dramatic compositions and providing for statutory damages of not less than $100 for the first unauthorized performance and $50 for every subsequent unauthorized performance)); Copyright Act of 1870 (16 Stat. 198) (setting statutory damages for the infringement of paintings and statues at $10 for each infringing copy)).

[18] 28 Stat. 956 (1895).

[19] Strauss, *supra* note 15 at 2.

The Copyright Act of 1909 generally carried forward the statutory damages provisions of the 1895 Act, but two aspects of that enactment are noteworthy. First, Congress reduced the real-dollar maximum level of statutory damages to $5,000. This appears to have been in direct response to the testimony of a prominent attorney who believed that an adverse judgment in a prior infringement action was a direct result of the judge's unwillingness to impose the level of statutory damages that the law would have compelled had infringement been found, but which "were altogether incommensurate with any suffering which [the plaintiff] had endured or with any profit which our opponent had derived from the practice."[20]

Second, in setting the levels of statutory damages, it is evident that Congress made an effort to approximate realistic levels of actual damages. The legislative history contains examples of this with regard to musical works reproduced in the form of player piano rolls[21] and newspaper reproduction of photographs.[22] Historically, Congress has specifically acted to set statutory damages at levels that were compensatory and deterrent, but not likely to produce manifestly unjust or extravagant awards.

The Copyright Act of 1976 put in place the statutory damages structure that remains the law today.[23] Those amendments did away entirely with the "per infringing copy" standards in favor of a single "per infringed work" framework applicable to all

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[20] *Arguments Before the Comms. on Patents of the Senate and House, Conjointly, on S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright*, 59th Cong., 142 (Dec. 7-8, 10-11, 1906) (statement of Ansley Wilcox, Esq., of Buffalo, N.Y.). See H.R. Rep. No. 60-2222, at 15 (1909).

[21] *See, Arguments Before the Comms. on Patents of the Senate and House, Conjointly, on S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright*, 59th Cong., 123-24, 199 (June 6-9, 1906)(statement of Charles S. Burton, Esq. of Chicago, Ill.).

[22] *See, Hearings Before the Comms. on Patents of the Senate and House on Pending Bills to Amend and Consolidate the Acts Respecting Copyright*, 60th Cong., 150-60 (Mar. 26-28, 1908); H.R. Rep. No. 60-2222, at 15 (1909).

[23] 17 U.S.C. §504(c).

copyrightable works: $250 to $10,000. In order to address concerns about the unjust application of statutory minimums to "innocent" infringers, a sub-minimum of $100 was established.[24] Conversely, a ceiling of $50,000 was established for instances where the plaintiff demonstrates that the infringement was willful.[25]

The extensive legislative history of the 1976 Act provides useful insight into how and why statutory damages are structured the way that they are. In a report to this Committee, the Register of Copyrights reviewed the principles undergirding statutory damages:

> The need for this special remedy arises from the acknowledged inadequacy of actual damages and profits:
>
> • The value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine. As a result, actual damages are often conjectural, and may be impossible or prohibitively expensive to prove.
>
> • In many cases, especially those involving public performances, the only direct loss that could be proven is the amount of a license fee. An award of such an amount would be an invitation to infringe with no risk of loss to the infringer.
>
> • The actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements.
>
> • An award of the infringer's profits would often be equally inadequate. There may have been little or no profit, or it may be impossible to compute the amount of profits attributable to the infringement. Frequently, the infringer's profits will not be an adequate measure of the injury caused to the copyright owner.

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[24] S. Rep. 94-473, at 162-63 (1975). Innocent infringers are those who "sustain[] the burden of proving . . . that [they] were not aware and had no reason to believe that his or her acts constituted an infringement. . . ." 17 U.S.C. § 504(c)(2).
[25] *Id.*

> In sum, statutory damages are intended (1) to assure adequate compensation to the copyright owner for his injury and (2) to deter infringement.[26]

During the extensive review and study that ultimately produced the 1976 Act, as Congress was preparing to make the fundamental shift from a "per infringement" calculus to a "per infringed work" approach, great attention was paid to both the adequacy of the compensation and deterrent effect of statutory damages, as well as to the desire to avoid exorbitant awards.[27]

In contemporary times, some have questioned the current statutory damages provisions, especially with regard to the potential for large awards arising from findings of infringement of large numbers of works. This issue of multiple infringements was specifically considered during the 1976 Act review process, resulting in the current framework. On this question, the Copyright Office Report to this Committee in 1961 considered that:

> We believe that the danger of exorbitant awards in multiple infringement cases is more theoretical than real. In a few cases involving multiple infringements – e.g., where various items in a copyrighted catalog were reproduced in a series of infringing catalogs – the courts have used this formula of multiplying the number of infringements by $250, but they did so to reach a result they thought just. We know of no case in which the court has felt constrained to use this formula where the resulting total was considered excessive....
>
> We believe that the courts should, as they do now, have discretion to assess statutory damages in any sum within the range between the maximum and minimum. In exercising this discretion the courts may take into account the number of works infringed, the number of infringing acts, the size of the audience reached by the

[26] Register of Copyrights, 87th Cong., *Report on the General Revision of U.S. Copyright Law* 102-03 (Comm. Print 1961).
[27] *Id.* at 103-07.

> infringements, etc. But in no case should the courts be compelled, because multiple infringements are involved, to award more than they consider reasonable.
>
> We propose that the statute be clarified and made more flexible. It should provide that statutory damages within the minimum and maximum range are to be assessed as the total award for all infringements for which the defendant is liable....
>
> Section 101(b) now permits the court to exceed the $5,000 maximum with no limit specified, in the case of "infringements occurring after the actual notice to a defendant....Some fear has been expressed that this might result in exorbitant awards.....
>
> The possibility that a court, in its discretion, might award statutory damages greatly exceeding the usual maximum, merely because a notice had been sent, seems remote. In the very few cases where statutory damages of more than $5,000 were awarded, other factors such as willful infringement on a large scale were involved....
>
> We believe, however, that a still better solution was proposed in some of the other revision bills. They would have made the maximum – raised to $10,000 or $20,000 – an absolute ceiling, with no special provision for infringements committed after notice or willfully. This would allow the court to take willfulness into account in awarding statutory damages up to the maximum.[28]

This passage puts forward several key points. First, is that courts retain great flexibility to assign statutory damages in a way that produces a result the court finds just. Even in cases in which the copyright owner sustains the burden of showing the infringement was committed willfully, the court is not required to enhance the statutory damages award at all. Indeed, an award of the modern minimum of $750 per infringed work is perfectly permissible even with regard to willful infringements. Of course, the maximum of $150,000 per infringed work would also

[28] *Id*. at 104-06.

be permissible in such a case. That wide range allows copyright owners to request very high damages at the outset of the litigation, but as the foregoing quotation highlights, the statute is designed to rely on the judgment of the courts to arrive at just awards. Policy need not, and should not, be set based on the fact that litigants may choose to take the most extreme possible position as to the *potential* award under the statute.

Second, it is interesting that the Copyright Office in 1961 recommended that the statutory range be the single measure of all infringements before the court. While recommending greater flexibility in other respects, this approach would have reduced the court's flexibility to arrive at a just award. And, in fact, the Copyright Office reversed its position on this question in a subsequent report to this Committee.[29] Both the 1961 and 1965 Copyright Office reports are also sources of the recommendation, ultimately adopted, to allow reduction or even complete remission of statutory damages for certain cases of "innocent infringement."[30]

Third, it highlights that prior to the 1976 Act, there were instances in which statutory damages had no ceiling; it was entirely left to the court's discretion. In this regard, the maximum that was ultimately adopted for all statutory damages awards constitutes a significant limiting factor that continues to apply today.

In the end, this Committee was satisfied that its approach allowed the statutory damages system to serve its purpose and courts with sufficient flexibility without imposing undue levels of liability, by allowing multiples of the statutory damages range for the infringement of multiple works, but not for multiple infringements of the same work, nor for "multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations."[31]

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[29] Register of Copyrights, 89th Cong., *Supplemental Report on the General Revision of U.S. Copyright Law* 135-37 (Comm. Print 1965).
[30] *Id.*
[31] H.R. Rep. 94-1476 at 162 (1975).

The dollar amounts for statutory damages were doubled by the Berne Convention Implementation Act of 1988.[32] Those amounts were later raised by fifty percent (except the innocent infringer level, which remained at $200) by the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999,[33] bringing us to the current range of $750 to $30,000, or up to $150,000 where the infringement was willful.[34] The legislative history of the latter clearly states this Committee's concerns that misuse of digital technology and the Internet had resulted in substantial economic costs to copyright owners and the U.S. economy as a whole. This Committee saw a need to increase the level of statutory damages because:

> [m]any computer users . . . simply believe that they will not be caught . . . [a]lso, many infringers do not consider the current copyright infringement penalties a real threat and continue infringing, even after a copyright owner puts them on notice. . . . In light of this . . . H.R. 1761 increases copyright penalties to have a significant deterrent effect on copyright infringement.[35]

This also further illustrates Congress' historical view that statutory damages must both provide compensation to the copyright owners and deterrence against future infringements.

What is the final product of all this deliberation? Are statutory damages in 2014 radically higher than they were under previous statutes? It turns out the answer is no. The following chart shows that statutory damages are lower today that they have been in at least a century, compared to the initial levels of the 1909 Act and the 1976 Act, adjusted for inflation and expressed in 2014 dollars:[36]

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[32] 102 Stat. 2853, 2860 (1988).
[33] 113 Stat. 1774 (1999).
[34] 17 U.S.C. §504(c).
[35] H.R. Rep. 106-216 at 3 (1999).
[36] Calculations made on the Bureau of Labor Statistics CPI Inflation Calculator, available at: http://data.bls.gov/cgi-bin/cpicalc.pl. The calculator only goes back to

	Innocent Infringer	Ordinary Minimum	Ordinary Maximum	Enhanced
1909 Act	N/A	$6,007.58	$120,151.52	N/A (later unlimited)
1976 Act	$0/$418.10	$1,045.25	$41,810.19	$209,050.97
2014 statute	$0/$200	$750	$30,000	$150,000

If the potential for large statutory damages awards is greater today than in the past, it says more about the scope and volume of infringements today than it does about the range of damages of the statute.

It is also important to note that eligibility to obtain statutory damages is conditioned on the formality of timely registration of the infringed work. Specifically, registration must be made within three months of first publication of the work, or no more than a month after the copyright owner has learned of the infringement.[37] This is a significant limiting factor to the availability of statutory damages.

Court Costs and Attorney's Fees

The Copyright Act of 1870 provided for a mandatory award of "full costs" to prevailing plaintiffs.[38] The 1909 Act provided mandatory awards to any prevailing party, also stipulating that reasonable attorney's fees must also be awarded.[39] This was changed to a discretionary award by the 1976 Act, and remains in force as such

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1913, so those numbers were used for the 1909 Act. Presumably, if 1909 figures were available, they would be even higher. Because of the change from "per infringement" in 1909 to "per infringed work" in 1976 and 2014, the "ordinary maximum" comparison is necessarily imperfect.

[37] 17 U.S.C. §412.

[38] 1870 Act, §108.

[39] 1909 Act, §40.

today.[40] Earlier this year, the Supreme Court cited to this provision with approval in the context of determining the circumstances under which attorney's fees should be awarded under the Patent Act.[41] However, it should be noted that like statutory damages, the availability of awards of attorney's fees is subject to the prerequisite of timely registration.[42]

Sovereign Immunity

Another limitation on the availability of remedies exists with regard to suits against the United States and suits against States and their instrumentalities, due to their sovereign immunity. The United States has waived its sovereign immunity, but the remedies are limited to "reasonable and entire compensation...including the minimum statutory damages set forth in section 504(c)...."[43] The United States has also foregone copyright protection it creates.[44]

Copyright owners who wish to pursue infringement claims against States or instrumentalities of States may be considerably worse off. As a result of a broad Supreme Court annunciation of State sovereign immunity, it has been held that States are not liable for any monetary damages for copyright infringement.[45] States may waive their immunity, but many have not done so. While there is not evidence of widespread systematic infringement of copyright at the State level as a result, there are unfortunate anecdotes. For example, earlier this year the Copyright Office held a roundtable discussion of orphan works issues. At least one institutional user of orphan works noted that they have no need to seek legislation because they are

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[40] 17 U.S.C. §505.
[41] *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).
[42] 17 U.S.C. §412.
[43] 28 U.S.C. §1498(b).
[44] 17 U.S.C. §105.
[45] *Chavez v. Arte Publico Press*, 200 F.3d 601, 605 (5th Cir. 2000)(citing *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

instrumentalities of States and can simply fall back on their State's sovereign immunity.[46]

Congress has looked at this issue before. In the 106th Congress, Senator Leahy introduced a bill to condition federal intellectual property protection for works of States on that State's waiver of its immunity from infringement suits.[47] Senator Hatch requested a study by the General Accounting Office, which agreed that, "Intellectual Property Owners Have Few Alternatives or Remedies Against State Infringement."[48] And legislation was again introduced in the 107th Congress, both by you, Mr. Chairman, and Senator Leahy.[49] Unfortunately, those bills were not enacted and so this problem continues to rear its head.

Importation

Section 30 of the 1909 Copyright Act prohibited "the importation into the United States...of any piratical copies of any work copyrighted in the United States." The customs authorities were authorized to seize such copies. That authority has remained intact to this day and is now codified at section 602(a)(2). The remedies explicitly provided for in the statute now also include civil infringement actions under section 501 and criminal prosecution under section 506.[50]

Section 603 authorizes CBP to make regulations regarding its enforcement against the importation of piratical copies, and specifically to require the person seeking to

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[46] *See* http://www.copyright.gov/orphan/transcript/0310LOC.pdf at 18.
[47] S. 1835, "*The Intellectual Property Protection Restoration Act of 1999*," 106th Cong. (Oct. 29, 1999).
[48] U.S. General Accounting Office, "*Intellectual Property: State Immunity in Infringement Actions*," at 13 (Sept. 2001)(available at: http://www.gao.gov/assets/240/232603.pdf).
[49] H.R. 3204, "*Intellectual Property Protection Restoration Act of 2001*," 107th Cong. (Nov. 1, 2001); S. 1611, "*Intellectual Property Protection Restoration Act of 2001*," 107th Cong. (Nov. 1, 2001); S. 2031, "*Intellectual Property Protection Restoration Act of 2002*," 107th Cong. (March 19, 2002).
[50] 17 U.S.C. §602(a)(2).

exclude products from importation to furnish proof of valid copyright protection. A U.S. Copyright Office Certificate of Registration is regarded a such proof, and in fact CBP requires not only that copyright owners have that document, it requires a separate recordation of the copyright registration certificate with CBP before any enforcement action will be taken against piratical imports. Both logic and efficiency clearly point to the creation of compatible electronic systems at the Copyright Office and CBP, so that successful registration of a copyright by the former would automatically and instantaneously be communicated to the latter. Unfortunately, the funding to provide such a system does not exist, particularly on the side of the Copyright Office.

In the 1976 Act, Congress expanded the importation provision so that the authorization of the copyright owner is required for the importation of non-piratical copies as well.[51] However, unlike the importation of pirated copies, CBP is not authorized to seize non-piratical copies. The remedy that is available is a civil infringement suit under section 501 of the Copyright Act.

In 2008, Congress added to section 602 the authority of the copyright owner to authorize the exportation of pirated copies of their works. Both civil remedies under section 501 and criminal prosecution under section 506 are available for violations of this provision.

As this Subcommittee is well aware, the provision regarding the importation of non-piratical copies, and its interaction with the exhaustion of the distribution right, commonly known as the First Sale Doctrine,[52] was the subject of a Supreme Court decision last year. Whatever one thinks of the Supreme Court decision in *Kirtsaeng*

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[51] 17 U.S.C. §602(a)(1).

[52] While originally an accurately descriptive name, the "First Sale Doctrine" has been a misnomer ever since the enactment of the 1976 Act, in which the exhaustion of the distribution right turns on ownership of a lawfully made copy. *See* 17 U.S.C. §109(a). Whether a first sale has occurred has been irrelevant under the statute for nearly four decades.

v. John Wiley & Sons, Inc.,[53] it is beyond serious dispute that the result of that decision is the effective deletion of the remedy Congress enacted in the 1976 Act, to provide copyright owners with the right authorize the importation into the United States of non-piratical copies.

This Subcommittee has already held a hearing earlier this year the scope of which included the exhaustion of the distribution right, and it is not my intent to review those in significant depth here. However, in terms of restoring the remedy Congress clearly created in the 1976 Act, I note that the deletion of the phrase "of the exclusive right to distribute copies or phonorecords under section 106" from section 602(a)(1) would restore the effectiveness of the importation right and remedy. I hasten to add that this approach would *not* overturn the ruling in *Kirtsaeng* with regard to the application of the exhaustion of the distribution right/First Sale Doctrine, and thus would not be subject to the concerns that motivated certain parties that supported Mr. Kirtsaeng in the litigation. That is, the importation of a given non-piratical copy would be subject to authorization of the right holder. But, once such a copy had entered the United States, that copy would be regarded as lawfully made and thus the distribution right exhausted.

Criminal Prosecution

The importance and appropriateness of criminal penalties for the most egregious copyright infringements was clear to Congress over a century ago. An 1897 amendment to the Copyright Act provided, "If the unlawful performances and representation [of a dramatic or musical composition] be willful and for profit, such person or persons shall be guilty of a misdemeanor and upon conviction be imprisoned for a period not exceeding one year."[54]

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[53] 133 S. Ct. 1351 (2013).
[54] An Act to amend title sixty, chapter three, of the Revised Statutes relating to copyrights. (Jan. 6, 1897).

The 1909 Act expanded on the 1897 enactment so that "any person who willfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both...."

That basic formulation remained in the 1976 Act, although the notion of "profit" was unpacked to include private financial gain and commercial advantage.[55] Since that time, the No Electronic Theft Act[56] added as an alternative to commercial advantage or private financial gain, "the reproduction or distribution...during any 180-day period, of...copyrighted works, which have a total retail value of more than $1,000."[57] And the Artists' Rights and Theft Prevent Act of 2005[58] added another alternative basis, infringement of a work being prepared for commercial distribution (e.g., pre-release copies).[59] To be clear, under any circumstance, the infringement must have been willful in order for criminal penalties to apply.

In contrast to the 1909 Act, criminal infringement of copyright can now be punished as a felony if the infringement, during any 180-day period, consists of 10 or more copies of copyrighted works, which have a retail value of more than $2,500.[60] However, that status is only available with regard to infringements of the reproduction or distribution rights. Willful infringements of the public performance right can never be more than misdemeanors, no matter how extensive or harmful they may be.

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[55] 17 U.S.C. §506(a)(1)(A).
[56] Pub. L. No. 105-147 (1997).
[57] 17 U.S.C. §506(a)(1)(B).
[58] Pub. L. No. 109-9 (2005).
[59] 17 U.S.C. §506(a)(1)(C).
[60] 18 U.S.C. §2319(b)(1).

Criminal copyright cases are subject to the prosecutorial discretion of federal prosecutors and the limited resources they have. The result is that criminal prosecutions are few in comparison to civil cases and certainly in comparison to the scope of infringing activity in the modern environment. Nonetheless, when criminal prosecutions are brought they can be tremendously important, such as the ongoing case against Megaupload founder and operator Kim Schmitz (aka "Kim Dotcom").

Conclusion

The undeniable realty is that copyright infringement is a massive problem. Efforts to address that must surely be multi-faceted, but it is equally certain that effective legal remedies must be among those facets. If anything, this subcommittee should be looking for ways to improve the compensatory and especially the deterrent effects of remedies. The very last thing that should be done is to weaken them.

Thank you for the opportunity to present my views and participate in this historic copyright review process. This testimony represents my attempt to provide the Subcommittee with a broad overview of the remedies available in copyright. It is my hope that this document will serve you as a reference tool, and also that it demonstrates to you the historic and thoughtful place that remedies have in making the Copyright Act the success it has been to date.

It would be my pleasure to assist the Subcommittee in any other way that I am able, beginning with any questions you may have at this time.

Mr. COBLE. I thank you for that, Mr. Tepp.
I will give you 5 additional minutes. [Laughter.]
Mr. TEPP. I will reserve those for later, sir.
Mr. COBLE. But I appreciate that.
Ms. Schruers, you are recognized.

TESTIMONY OF MATT SCHRUERS, VICE PRESIDENT FOR LAW AND POLICY, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Mr. SCHRUERS. Thank you, Mr. Chairman, Ranking Member, Members of the Committee. My name is Matt Schruers. I am VP for Law and Policy at CCIA. I appreciate the opportunity to speak with you today.

Your initial remarks adequately identified many of the remedies available in copyright—injunctions, actual damages, defendants' profits, attorneys' fees, criminal penalties.

I would like to focus today on statutory damages, which, as was mentioned, can range between $750 and $30,000 per work infringed, requiring no proof of injury or harm, and in cases of willfulness, up $150,000 per work infringed.

Unfortunately, these high statutory awards disconnected from any requirement to prove injury or harm caused two problems. They incentivize copyright trolls, and they discourage investment. So first, let me focus on trolls.

We are seeing predatory copyright litigation as a business model in which shell entities indiscriminately sue many individuals at once demanding settlements. These shotgun-style suits now comprise the majority of copyright cases in over 20 percent of Federal trial courts.

So many involve adult content plaintiffs that over a third of the entire Federal copyright caseload now involves pornography.

But not all trolling is about adult content. In fact, an entity known as Righthaven pioneered the model using news, harassing blogs or Web sites who copied or quoted news, in some cases, as few as five sentences. Its victims included a U.S. Senate candidate, who was posting news about herself to our her campaign Web site; a former assistant U.S. attorney, whose Web site collected information on unsolved murders; and a decorated veteran, who posted a column while participating in Internet debate about public employee pensions.

But Righthaven is not unique. Several Federal judges have sanctioned and even asked for criminal action against trolls who were "seeking to outmaneuver the legal system."

So the second issue: deterring investment. Today's civil copyright disputes involving digital technologies often implicate thousands of works. Thousands of users with large, lawfully acquired media libraries using services to store content in the cloud, to devices to time and place shift in the home, thousands of users multiplied by thousands of works, even at the smallest statutory damage, can still reach astronomical levels. And these risks deter investment.

Consider the case of Veoh, a promising startup that offered user-generated content alongside licensed content from major media companies. They were sued. Three years of litigation grounded Veoh into bankruptcy.

This did not end the case. The plaintiffs renewed their claim against Veoh's investors, seeking to hold the investors responsible for what the company's customers had allegedly done.

Now, ultimately, Veoh and its investors were exonerated, but not before Veoh went broke. These lawsuits against investors, founders, officers in their personal capacity are not uncommon, and they are extraordinarily chilling.

I know of no other place in Federal law where plaintiffs receive an aggregating statutory award on a strict liability basis, requiring no proof of injury or harm, against investors in companies where the companies themselves were only indirectly liable for the actions at issue.

So given that, what might we do? My written testimony is a lot more specific, but some ideas could include reassessing the minimum, the $750 minimum, or the maximum amounts, and whether to allow those amounts to aggregate indefinitely.

Just like in tort, these jackpot judgments that we hear about tax the perceived legitimacy of the IP system, which all rights holders depend on since the IP laws largely require voluntary compliance to succeed.

We could also provide courts with guidance, ensure some predictability in secondary liability cases. We could cap awards or we could limit them to only intentional cases.

Now, if in any case there is a limit, and the plaintiff's injury exceeds that limit, they should always have the opportunity to pursue actual damages and the defendant's profits.

So in conclusion, copyright is an essential tool in the innovation toolbox. I am a copyright lawyer. I love it. I think it is great. I also think you can have too much of a good thing, and it might be time to recalibrate the system.

Thanks for your time, and I look for to your questions.

[The prepared statement of Mr. Schruers follows:]

Statement of

Matt Schruers

Vice President for Law and Policy

at the Computer & Communications Industry Association

"Copyright Remedies"

Subcommittee on Courts, Intellectual Property, and the Internet

Committee on the Judiciary, U.S. House of Representatives

July 24, 2014

Chairman Coble, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, and Members of the Subcommittee, my name is Matt Schruers, and I serve as Vice President for Law and Policy at the Computer & Communications Industry Association, which represents Internet, technology, and communications firms. I appreciate the opportunity to appear today on the subject of copyright remedies.

My testimony addresses the scope of current copyright remedies, in particular statutory damages. I describe two unintended consequences of high statutory damages: they empower copyright trolls and create extraordinary liability risks that discourage tech innovation, particularly by start-ups. I suggest several ways that Congress can adjust statutory damages to better reflect the realities of the digital environment: (1) reassessing current maximums and minimums; (2) ensuring greater predictability in secondary liability cases; (3) requiring timely election of remedies by plaintiffs; and (4) providing additional guidance to courts.

I. The Scope of Copyright Remedies

The remedies that Congress has granted to copyright holders are more numerous, varied, and more potent than any other form of intellectual property. By any measure, the existing remedies are more than adequate for Congress's purposes of stimulating new creativity and providing the public lawful access to copyrighted works. In some cases the existing remedies are punitive, which discourages innovation, and defeats Congress's purposes. In these cases, less may be more.

Before explaining why, I will briefly review a rights-holder's current arsenal of remedies. First, the Copyright Act offers injunctions. As this Committee has heard in the patent context, the ability to force a business to cease operations is a powerful one, which grants extraordinary leverage to a plaintiff.

Second, the Copyright Act entitles a plaintiff to recover *both* actual damages and profits, to the extent there is no double counting.[1] This is similar to the conventional remedy in patent law. The ability to recover losses and the defendant's profits restores the *status quo* and ensures that wrongful gains are disgorged. Many civil forms of relief simply stop here.

But the Copyright Act goes further, recognizing that there may be small cases – cases where the amount either lost by plaintiff or gained by defendant is minimal. Section 504(c) allows a plaintiff to elect a statutory award of between $750 and $30,000 in damages for each work infringed, regardless of the actual injury suffered.[2] In cases involving willful infringement, the statutory damages can rise to $150,000 per work infringed.

[1] 17 U.S.C. § 504(b).

[2] *Columbia Pictures Tel., Inc. v. Krypton Broad., Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001) (plaintiff may elect statutory damages "regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant's profits.").

Since 1909, Congress increased the statutory amounts on several occasions.[3] In 1909, statutory damages initially ranged from $250 to $5,000.[4] With the 1976 Act, the maximum for ordinary infringement was doubled to $10,000, and a newly created willful infringement cap permitted damages up to $50,000.[5] With the Berne Convention Implementation Act in 1988, everything doubled again. The lower limit was increased to $500, the non-willful maximum increased to $20,000, and willful infringement increased to $100,000.[6] In 1999, Congress increased everything by 50%, bringing the minimum to where it is today, at $750, and raising the maximum for non-willful infringement to $30,000, and the maximum for willful infringement to $150,000.[7]

Critically, plaintiffs have great freedom in choosing from the Copyright Act's array of remedies. Unlike most other civil litigants, a copyright holder can ask the jury to award both its actual damages and defendant's profits, and in the alternative to award statutory damages. After the jury verdict comes back, the plaintiff can then choose which of these remedies it wishes to receive.[8] There is thus no situation under existing law in which a copyright holder can be under-compensated.[9] However, as I discuss below, in many instances the threat of high statutory damages, unconnected to any conceivable loss by plaintiff or gain by defendant, has chilled the creation of innovative services.

In addition to actual and statutory damages, the Copyright Act also provides a number of other remedies: (a) attorney's fees;[10] (b) impoundment and destruction of defendants' property,[11] and; (c) as the Committee heard earlier this year, extrajudicial relief from online infringement by means of takedown claims that may be made to online services under Section 512.[12] In addition to that, there are also criminal penalties in the Copyright Act for willful infringement, unlike

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[3] Statutory damages are arguably as old as copyright itself, *see Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349 (1998), but the practice of continuously increasing the statutory amount did not begin until the 20th century.

[4] Pub. L. No. 60-349, §§ 25 *et seq.*, 35 Stat. 1075 (1909).

[5] Pub. L. No. 94-553, title I, § 101, 90 Stat. 2585 (1976). The damages floor for innocent infringers at this time was $100.

[6] Pub. L. No. 100-568, § 10(b), 102 Stat. 2860 (1988). The damages floor for innocent infringers was raised to $200.

[7] Pub. L. No. 106-160, § 2, 113 Stat. 1774 (1999). In 2008, this Committee considered legislation and hosted a roundtable on a proposal to allow for greater statutory awards in the case of compilations. Copyright holders presented no evidence that the existing regime had stifled the creation of new works, and this particular proposal was ultimately removed from the PRO-IP Act.

[8] 17 U.S.C. § 504(c)(1) (giving option for plaintiff to choose among remedies "at any time before final judgment").

[9] Modern copyright remedies are so potent that there is a trend of plaintiffs with unrelated causes of action in other areas, such as privacy, migrating into copyright to vindicate their alleged injury. These examples of plaintiffs 'migrating' to copyright causes of action provide strong anecdotal evidence that copyright remedies are more potent than whatever else the law has to offer. *See, e.g., Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012); *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014).

[10] 17 U.S.C. § 505.

[11] 17 U.S.C. § 503(a)-(b).

[12] In addition to these remedies in Chapter 5, the Digital Millennium Copyright Act remedies in Chapter 12 give plaintiffs remedies if defendants remove identifying information from copyrighted works, which include up to $25,000 per violation. Furthermore, Chapter 12 grants plaintiffs remedies against the circumvention of technological measures that protect copyrighted works, which brings its own statutory damages awards of up to $2,500 in addition to potential criminal prosecution.

patent law.[13] Although both copyright and patent spring from the Constitution's Progress Clause,[14] only copyright has criminal remedies and taxpayer-funded enforcement by federal law enforcement authorities.

Note that neither willfulness nor intent is required to obtain these civil remedies against a defendant. Many inherently assume that some combination of knowledge, intent, or monetary gain are prerequisite elements of violating copyright, but they are mistaken. One can unknowingly infringe, for no commercial purpose, and still face liability.

II. Unintended Consequences of High Statutory Damages

(a) *Empowering copyright trolls*

The existing statutory damages framework has created incentives for so-called copyright trolling, or predatory enforcement. The problems caused by "patent assertion entities," *i.e.*, patent trolls, have been widely reported and have been the focus of scrutiny in this Committee. Trolls, with the resulting chilling effect on creativity, exist in the copyright system as well. Just as in patent law, we are seeing the use of litigation as a business model, in which shell entities initiate legal proceedings against a large number of individuals and immediately seek settlements. Many such cases have been based on allegations that the defendant offered infringing pornographic materials for upload. By threatening to make public the fact of litigation over embarrassing content, combined with the prospect of high, six-figure statutory awards, these entities often obtain quick settlements. One such scheme obtained at least seven figures worth of settlements, even though the claims were, in at least some cases, entirely without merit.[15]

Recent empirical research by Professor Matthew Sag indicates that these cases are very prevalent in federal court IP dockets.[16] In 2013, shotgun-style multi-defendant John Doe complaints comprised the majority of copyright cases in over 20% of the nation's federal trial courts. This predatory litigation is not trivial in quantity; according to Sag's research, over a third of the entire federal courts' copyright caseload involves pornography, and anecdotal evidence indicates that many of these litigants are using predatory tactics.[17] This is not a unique view; other federal judges, scholars, and journalists are also increasingly "troubled by 'copyright

[13] 17 U.S.C. § 506(a) (criminal penalties, referencing 18 U.S.C. § 2319).

[14] Art. 1, § 8, cl. 8.

[15] *Ingenuity 13 LLC v. John Doe*, No. 12-8333, 2013 WL 1898633 (C.D. Cal. May 6, 2013); *see also* Joe Mullin, *Prenda hammered: Judge sends porn-trolling lawyers to criminal investigators*, Ars Technica, May 6, 2013, *at* http://arstechnica.com/tech-policy/2013/05/prenda-hammered-judge-sends-porn-trolling-lawyers-to-criminal-investigators/; *see generally*, Ars Technica series, *Who's Behind Prenda Law?*, *available at* http://arstechnica.com/series/whos-behind-prenda-law/.

[16] *See* Matthew Sag, *Copyright Trolling, An Empirical Study*, IOWA L. REV. (2014 forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404950 ("While patent trolls hog the limelight, a particular type of copyright troll has been taking over the dockets of several United States District Courts, and yet copyright trolls have received comparatively little attention in policy and academic circles").

[17] Notably, multi-defendant suits enable plaintiffs to utilize a large amount of federal court resources without paying filing fees. *See In re: BitTorrent Adult Film Copyright Infringement Cases*, No. 12-1147 (E.D.N.Y. July 31, 2012) (complaining that "plaintiffs' counsel apparently ignored, or tried to circumvent, the very safeguards the undersigned put in place to help prevent unfair litigation tactics").

trolling,' specifically as it has evolved in the adult film industry."[18] Scholars have identified the prospect of high statutory awards as fueling this misbehavior.[19]

To be clear, copyright trolling is not limited to adult content. A pioneer of the tactic was an entity known as Righthaven, which essentially subcontracted lawsuits with various news publications, such as the *Las Vegas Review-Journal*. Righthaven entered into "right to sue" contracts with these publications and then searched the Internet for blogs or sites that copied or quoted the stories. Righthaven then sued website operators and bloggers for reposting as little as five sentences from these articles.

Victims of such suits included a Republican candidate for U.S. Senate, who posted news about herself to her own website,[20] and a former Assistant U.S. Attorney who reposted content to his website, which collects information on unsolved murders. In the latter case, not only did Righthaven demand $75,000, it also attempted to seize the domain name of the website.[21] In another case, *Righthaven LLC v. Hoehn*, Righthaven sought $150,000 from a decorated veteran who had merely shared an editorial in an online forum about public employee pensions. A district court granted summary judgment to Hoehn, concluding that there was "no genuine issue of material fact that Hoehn's use of the work was fair."[22] After numerous lawsuits, the Ninth Circuit affirmed a ruling that Righthaven did not have standing to sue because it was not the legal or beneficial owner of the copyrights.[23] Righthaven was subsequently sanctioned for misconduct, and its assets were seized, causing it to seek bankruptcy protection.[24]

Unfortunately, however, Righthaven was not unique. In *Brownmark Films v. Comedy Partners*, Judge Frank Easterbrook recently noted that a plaintiff suing over a parody in an episode of the cartoon *South Park* had engaged in litigation tactics that gave it "the appearance of a 'copyright troll'" engaged in "baseless shakedowns."[25]

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[18] *Third Degree Films v. Does 1-47*, 286 F.R.D. 188, 189-91 (D. Mass. 2012) ("The Court is not alone in its concern. Judges, scholars, and journalists alike have noted the recent trend … Against this backdrop of mass lawsuits and potentially abusive litigation tactics, courts nationwide have become skeptical of allowing the adult film companies unfettered access to the judicial processes of subpoenas and early discovery") (cited in Sag, *supra* note 16, at n.94). *See also Ingenuity 13 LLC*, *supra* note 15, at *1 (lawyers' elaborate scheme nearly "outmaneuvered the legal system", leading to sanctions).

[19] *See e.g., Sag*, *supra* note 16.

[20] *Sharron Angle Slapped With Copyright Infringement Lawsuit Over Las Vegas Review-Journal Articles*, Sept. 4, 2010, *at* http://www.huffingtonpost.com/2010/09/06/sharron-angle-slapped-wit_n_706467.html.

[21] Electronic Frontier Foundation, *Righthaven v. DiBiase, available at* https://www.eff.org/cases/righthaven-v-dibiase.

[22] *Righthaven LLC v. Hoehn*, 792 F. Supp. 2d 1138, 1151 (D. Nev. 2011). On appeal, the fair use holding was vacated on procedural grounds, as the court concluded that Righthaven had no standing to sue in the first place, and therefore had no jurisdiction to decide the fair use issue.

[23] *Righthaven LLLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013). *See generally* Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723 (2013) (assessing Righthaven litigation).

[24] Timothy B. Lee, *Defendant Asks U.S. Marshals to Drag Righthaven Principals to Court*, ARS TECHNICA, Dec. 20, 2011, *at* http://arstechnica.com/tech-policy/2011/12/defendant-asks-court-to-drag-defeated-righthaven-into-court.

[25] *Brownmark Films v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012).

(b) *Effect of aggregation of statutory damages*

Whereas the troll problem arises from the high *maximum* bound of statutory damages ($150,000), online services' and manufacturers' concerns about extraordinary awards in the digital context are due mostly to the *minimum* bound ($750). Under today's copyright law, every fixed work containing even a modicum of creativity is copyrighted, from the moment of creation. Nearly every email, blog post, and "selfie" – even this written testimony – qualifies for a century or more of copyright protection. Each day, millions of copyrighted works are created. Many popular online service providers process millions of copyright-protected postings daily,[26] and modern consumer electronics can hold millions of copyrightable works. Because copyright disputes involving digital technologies often implicate hundreds or thousands of works, providers of information technology products and services can face truly astronomic damages liability, even assuming the smallest statutory award.[27] The threat of enormous damages encourages rights-holders to view "being infringed" as a business model,[28] and to assert aggressive theories of secondary liability in the hopes of coercing quick settlements. In the tech and Internet sector, plaintiffs electing for actual damages are a rarity.

One justification volunteered for these astronomical awards is that statutory damages have historically been viewed not solely as a compensatory mechanism where injury is difficult to measure, but in fact as a punitive tool, "designed to discourage wrongful conduct."[29] But even wrongful conduct needs to be proportionally punished: we do not impose the death penalty for illegal parking. Nor is the goal of deterring misconduct being served in cases where the individual engaged in misconduct is not before the court, as is the case with damages sought against intermediaries. When cases are brought solely against an intermediary, based on the conduct of a third party not before the court, a punitive mechanism is generally inappropriate.

Regardless of the propriety of the remedy, however, to whatever extent statutory damages deter misbehavior, they also deter investment by creating substantial uncertainty and risk. Scholarly studies of statutory damages show punitive and inconsistent outcomes,[30] and threats of

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[26] *See* Raffi Krikorian, *New Tweets per second record, and how!*, The Twitter Engineering Blog, Aug. 16, 2013, *available at* https://blog.twitter.com/2013/new-tweets-per-second-record-and-how (typically 500 million tweets/day); YouTube Statistics, *available at* https://www.youtube.com/yt/press/statistics.html (last accessed July 22, 2014) (100 hours of video per minute uploaded to YouTube); Sriram Sankar *et al.*, *Under the Hood: Building out the infrastructure for Graph Search*, Facebook Engineering Notes, Mar. 6, 2013, *available at* https://www.facebook.com/notes/facebook-engineering/under-the-hood-building-out-the-infrastructure-for-graph-search/10151347573598920 (over 2.5 billion new pieces of Facebook content added per day).

[27] *See* Pamela Samuelson, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

[28] *See* Dan Heller, *Making Money From Your Stolen Images*, June 27, 2007, *at* http://danheller.blogspot.com/2007/06/making-money-from-your-stolen-images.html (characterizing statutory damages as a "windfall", "Vegas-style slot machine" and stating that "a little copyright infringement can actually do your business good").

[29] *See N.A.S. Import, Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d Cir. 1992) (citing *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952)); *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 353-54 (1998).

[30] Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009). *See also* J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004).

personal liability for statutory damages are a severe deterrent to exploring new business models.[31] Surveys of investors have confirmed that uncertainty around liability risks deter investment in services regulated by copyright.[32] It isn't hard to understand why.

Consider the case of Veoh. Veoh was described by media as a "promising start-up" that offered user-generated video content alongside licensed content from major media companies and broadcasters.[33] It might have competed with YouTube and Hulu. Despite having licensed content deals, Veoh was sued on the claim that its users had uploaded infringing works to the platform, and Veoh's DMCA Section 512 compliance was allegedly insufficient.[34]

More than three years of litigation ground Veoh into bankruptcy. This did not end the case, however. The plaintiffs renewed their litigation against Veoh's *investors*, seeking to hold those who had provided capital to Veoh responsible for the actions of Veoh's users. Ultimately, Veoh and its investors were exonerated of any liability.[35] It was too late for the promising start-up, however; employees had been laid off and millions in investment capital were gone.[36]

It is increasingly common to see investors, founders, and officers, being sued *in their personal capacity* for alleged copyright infringement by users of the company's products. The prospect of personal liability for the actions of your company's customers is extraordinarily chilling. I know of no other place in federal law where plaintiffs receive (1) an aggregating statutory award, (2) requiring no proof of harm, (3) on a strict liability basis, (4) against investors in defendant businesses, (5) which are themselves only *indirectly* involved in the infringing acts.

The trend of plaintiffs suing investors, officers, and founders because of what other people do with the company's product is particularly troubling. Extensive interviews conducted by Prof. Michael Carrier revealed that the decade after the *Napster* decision was characterized as "a wasteland" of "scorched earth" by investors, and interest in funding start-ups that involved music declined noticeably. One innovator told him, "Any VC I would go to – the first thing they would say is: Music business? You're crazy."[37] Professor Carrier's research also revealed that the threat of personal liability of founders and corporate officers for multi-million dollar statutory awards is deliberately invoked by plaintiffs to intimidate defendants into capitulation. It is self evident that threatening the home or college education of a corporate officer's children with a civil claim regarding misconduct by that company's *customers* is not going to create a

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[31] Michael Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 944 (2012), *available at* http://wisconsinlawreview.org/wp-content/files/2-Carrier.pdf. *See also UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (litigation by UMG against Shelter Capital and two other investors in online service Veoh).

[32] Matthew Le Merle et al., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, BOOZ ALLEN & CO. (2011), *available at* http://www.booz.com/media/file/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf.

[33] Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, WIRED, Feb. 12, 2010, *at* http://www.wired.com/business/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/.

[34] *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013).

[35] *Id.* at 1032-33.

[36] *See* Van Buskirk, *supra* note 33 (stating that "[h]istory will add online video site Veoh to the long list of promising start-ups driven into bankruptcy by copyright lawsuits").

[37] Carrier, *Copyright and Innovation: The Untold Story*, *supra* note 31, at 916-17.

healthy environment to invest.[38] Even a record label official agreed that innovative services "never came to life" because of "the threat of potential lawsuits from content owners."[39]

It is important to bear in mind that in the 1980s, Sony's VCR was compared to the Boston Strangler,[40] and it came one Supreme Court vote away from being branded a pirate enterprise because parents were using its product to tape *Mr. Rogers' Neighborhood*.[41] The history of tech innovation may have been very different if Sony's officers had been sued in their personal capacity.

All of these problems occur against the backdrop of a regulatory regime with fuzzy boundaries. Copyright scholars have long acknowledged that, unlike real property, the boundaries of what copyright regulates is inherently unclear. The vagueness of copyright, combined with the attraction of aggregated statutory awards, likely leads to over-enforcement of rights. This would cause what scholars have called "copyright enforcement false positives" — cases in which rights-holders misconstrue the bounds of their federal entitlement, and are motivated "to seek enforcement of rights that are nonexistent or outside the scope of copyright. Such misguided enforcement actions impose significant social costs."[42] One social cost is the cost of unnecessary litigation, and another is the disincentives to innovate that arise from the prospect of having to take unnecessary licenses.

The deterrent effect on investment is magnified by the fact that awards are entirely unmoored from any actual injury. In Viacom's unsuccessful 7-year long litigation against YouTube, the company sought over $1 billion dollars in damages, for 160,000 alleged infringements,[43] despite the fact that Viacom's *own employees* were uploading Viacom content to YouTube.[44] In another recent case, a district court was presented with a damages theory that "could reach into the trillions," which it rejected as "absurd," holding that the record label plaintiffs should not be entitled to "more money than the entire music recording industry has made since Edison's invention of the phonograph in 1877."[45]

III. Possible Solutions to Statutory Damages

Amending the statutory damages framework has been identified as a possible reform by the Green Paper,[46] Register Pallante,[47] and scholars. The Copyright Principles Project, some of

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[38] *Id.* at 943-44.

[39] *Id.* at 938.

[40] Nate Anderson, *100 Years of Big Content Fearing Technology—In Its Own Words*, ARS TECHNICA, Oct. 11, 2009, *at* http://arstechnica.com/tech-policy/2009/10/100-years-of-big-content-fearing-technology-in-its-own-words/.

[41] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[42] Ben Depoorter & Robert K. Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 321 (2013), *available at* http://ndlawreview.org/wp-content/uploads/2013/05/NDL107_Depoorter.pdf.

[43] Garth Johnston, *Viacom Files Federal Copyright Complaint Against YouTube and Google*, BROADCASTING & CABLE, Mar. 13, 2007, *at* http://www.broadcastingcable.com/news/news-articles/viacom-files-federal-copyright-complaint-against-youtube-and-google/82105.

[44] Jay Yarow, *The Most Damning Information Google Dug Up On Viacom*, BUSINESS INSIDER, Mar. 22, 2010, *at* http://www.businessinsider.com/google-on-viacom-filings-2010-3.

[45] *See Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 313, 317 (S.D.N.Y. 2011).

[46] Department of Commerce Internet Policy Task Force, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, at 51-52 (July 2013).

whose members appeared before this Committee in the first of this sequence of hearings, has also suggested reforms.[48] These specific proposals are certainly worthy of the Committee's consideration. Today, I suggest several approaches to revising the statutory damages provision of Title 17 that would help to promote predictability and fairness to manufacturers, service providers, and consumers.

(a) *Reassess aggregation, the statutory minimum and maximum.*

Courts have implored Congress to reassess them in cases where damages awarded "are wholly disproportionate to the damages suffered by Plaintiffs."[49] The existing statute contains a range of damages, but it imposes in all cases a minimum amount. For example, a consumer is liable for a minimum of $750 for infringement of one song that he could purchase on iTunes for under $1.00. An award 750 times actual damages is unreasonable, possibly unconstitutional so.[50] Even if the court finds the infringement is innocent, the minimum is still $200 per work infringed. Moreover, courts have held that the "innocent infringer" provision is not available with respect to works that were published in "hard copy" with a copyright notice—a limitation that makes little sense in the online world and even less sense with respect to an intermediary.[51] Given plaintiffs' increased preference for statutory damages and the Supreme Court's "concerns over the imprecise manner in which punitive damages systems are administered,"[52] the statutory minimum should be reassessed in cases involving aggregation of many awards.

In fact, the $200 floor in innocent infringement has been criticized previously. In the 103rd Congress, the House passed H.R. 897, which would have lowered the floor for statutory damages in cases of innocent infringement from $200 to zero. This legislation died in the Senate. In a 1961 Report, the Register of Copyrights explained that "certain users of copyright materials – broadcasters, periodical publishers, motion picture exhibitors, etc." had argued that a "minimum of $250 can bear too heavily on innocent infringers." He observed that "[t]he only purpose of awarding damages for an innocent infringement is to compensate the copyright

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[47] Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 329 (2013), *available at* http://www.copyright.gov/docs/next_great_copyright_act.pdf.

[48] Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. J.L. 1175 (2010), *available at* http://scholarship.law.berkeley.edu/facpubs/563.

[49] *See, e.g.*, *Capitol Records v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) ("The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court"); *Sony BMG Music Entm't v. Tenenbaum*, 660 F. 3d 487, 490 (1st Cir. 2011) ("this case raises concerns about application of the Copyright Act which Congress may wish to examine"). Other courts have noted potential due process concerns. *In re Napster Copyright Litig.*, 7 U.S.P.Q. 2d 1833 (N.D. Cal. 2005) (noting that "under certain circumstances, large awards of statutory damages can raise due process concerns."); *UMG Recordings v. Lindor*, No. 05-Civ-1095, slip. op. at 6 (E.D.N.Y. Nov. 9, 2006) (permitting motion to add affirmative defense of unconstitutionality where plaintiffs sought statutory damages, noting that "plaintiffs' actual damages are 70 cents per recording and that plaintiffs seek statutory damages under the Copyright Act that are 1,071 times the actual damages suffered.").

[50] *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581 (1996) (awarding "more than 4 times the amount of compensatory damage" might be "close to the line... of constitutional impropriety."). Federal courts do not agree whether the due process constraints that limit punitive damages also apply to statutory damages.

[51] *See Maverick Recording Co. v. Harper*, 598 F.3d 193 (5th Cir. 2010) (citing 17 U.S.C. § 402(d)), *cert. denied*, 131 S.Ct. 590 (2010) (Alito, J., dissenting); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005) (same).

[52] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

owner. The other purpose of statutory damages – to deter infringement – is not present as to infringements committed innocently."[53]

The $750 floor means that – in a market where most new digital products and online services (such as cloud storage) contemplate many thousands of users manipulating hundreds of thousands of lawfully acquired works – potential damages quickly reach uninsurable levels that deter investment. Even halving the minimum would still provide damages that are 50-100 times greater than the going rate for many works. The $150,000 maximum, by contrast, empowers trolls as previously described. Because a plaintiff who is injured can always furnish proof of his injury and receive actual damages, the only plaintiffs who would be harmed by reining in the maximum would be those who cannot prove they suffered any injury.

Many scholars have offered proposals to reform these limits. Professor Sag suggests that the "constitutionally plausible range of statutory damages for a first-time defendant found liable for illegal file-sharing should be between $250 and $3000;" Professor Peter Menell suggests limiting statutory damages to $10 per work infringed for noncommercial uses.[54] Other scholars have also proposed reassessing these limits.[55]

In some cases, outcomes are troublesome because of the potential for limitless aggregation. In litigation involving an individual infringing 24 songs via a file-sharing network, repeated trials produced aggregated awards of $1.92 million and $1.5 million.[56] Absent proof of corresponding injury, these awards tax the perceived legitimacy of the entire copyright system, which largely depends upon voluntary compliance of the public to succeed. Because these large awards result from aggregating many individual awards into one enormous sum, Congress should reassess whether it is desirable to aggregate awards in all situations. A recent Canadian reform, for example, limits the maximum statutory award available to $5,000 for all non-commercial infringements in a single proceeding.[57]

In any event, adjusting statutory minimums and maximums would not impede the interests of plaintiffs with actual injuries. If statutory awards are insufficient, plaintiffs will always have the option of seeking actual damages.

(b) *Ensure predictability of statutory damages in secondary liability cases.*

Of all forms of intellectual property, copyright arguably permits the broadest theories of secondary liability. Secondary liability, of course, is where one party is held responsible for the wrongdoing of another party. Under current secondary liability theories, an Internet service or consumer electronics manufacturer could be found liable for statutory damages for each work a

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[53] REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW (1961), 87TH CONG., 1ST SESS. (H. Judiciary Comm. Print 1961), at 104.

[54] Sag, *supra* note 16, at 35; Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age* (U. C. Berkeley Public Law Research Paper No. 2347674, Oct. 30, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347674.

[55] Samuelson & Wheatland, *supra* note 30, at 509-10.

[56] *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 900-01 (8th Cir. 2012).

[57] Bill C-11, *An Act to amend the Copyright Act*, Statutes of Canada, Sec. 38.1(1)(b) (2012), *available at* http://www.parl.gc.ca/content/hoc/Bills/411/Government/C-11/C-11_4/C-11_4.PDF.

third party infringes while using the service or product. In fact, even the well-established boundary between direct and secondary liability is under attack by litigants, who seek to blur the line between these two concepts, and allege as direct infringement causes of action that are properly brought as secondary liability cases.[58]

This potential exposure to large damages, often for the acts of customers, chills innovation and discourages capital investment in new products and services. There are several possible approaches for addressing this problem. Section 504(c)(2) could limit statutory damages only to cases of direct infringement. Alternatively, Congress could forbid aggregation in secondary liability cases. Thus, a secondary infringer would be liable only for a single award of statutory damages for all works infringed, rather than a potentially infinite number of separate award for each work infringed, as under current law.[59] Congress could also cap statutory awards in cases that do not involve intentional infringement, as many states have chosen to cap punitive awards under their tort law.[60] Of course, if a plaintiff's injury is greater than any statutory cap, the plaintiff may always seek actual damages.

(c) *Require timely election of damages.*

A specific reform that would facilitate certainty is requiring timely election of which damages a plaintiff will seek. Currently, plaintiffs can delay the election between actual and statutory damages until any time before final judgment – after the jury (or court) awards both actual and statutory damages. This allows the plaintiff to "game the system" by waiting to see how they fare with a jury, and then choose the higher of the two awards. So as not to unfairly prejudice defendants, plaintiffs should make this election in a timely manner, before the trial or the filing of a motion for summary judgment.

(d) *Provide courts with guidance for the award of damages.*

As noted above, 17 U.S.C. § 504(c) currently imposes a minimum statutory award of $750 per work infringed, which may be reduced to $200 if the infringer was not aware and had no reason to believe the act constituted infringement. The maximum increases from $30,000 per work up to $150,000 in cases of willful infringement. Courts could benefit from more guidance for calculating damage awards than merely stating, as 17 U.S.C. § 504(c)(1) does, "as the court considers just." This language suggests that the court's award should be designed to 'do justice.' Cases that do not involve willful infringement, including where an intermediary is being penalized for the misconduct of another party, cannot plausibly lead to deterrence. Congress could provide guidance that in cases not involving willful infringement, Section 504(c)(2) could

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[58] *See Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. __ (2014) (Scalia, J., dissenting) ("A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act. William Patry, Copyright § 9:5.50"). From the perspective of innovation and economic policy, it would be dangerous to blur this boundary by holding companies liable as *direct* infringers for the acts of their customers.

[59] Professor Michael Carrier argues even further that statutory damages should not be available at all in secondary liability cases. Michael Carrier, *No Statutory Damages for Secondary Liability*, Disruptive Competition Project, Jan. 30, 2014, *available at* http://www.project-disco.org/intellectual-property/013014-no-statutory-damages-for-secondary-liability.

[60] *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 615 (1996).

direct courts to "attempt to compensate the copyright owner" for the injury resulting from infringement.

More broadly, Congress should take note of the fact that many online services and intermediaries invest substantially in providing robust voluntary rights-protection systems for right-holders. Congress already encourages the use of such systems via Section 512, limiting relief against compliant services. However, some rights-holders are disinclined to use these systems, and instead prefer litigation. In the case of all remedies, Congress could circumscribe which are made available to plaintiffs who do not take advantage of these voluntary systems designed to reduce litigation, and its corresponding burden on the federal judiciary.

IV. Conclusion

Our copyright system is important. Exclusive rights in one's expression are an important tool in the federal government's toolbox for promoting innovation. They are not, however, the only tool in the toolbox, and we should recognize that it is possible to have too much of a good thing. Today, statutory damages have reached that point. A mechanism intended to ensure that individual claims still have weight is now frequently exploited as a vehicle for abuse and even injustice, which undermines the credibility of our intellectual property system. With some recalibration, however, Congress can restore this remedy as an effective tool for promoting progress.

Mr. COBLE. Thank you, Mr. Schruers.
Mr. Siy?

TESTIMONY OF SHERWIN SIY, VICE PRESIDENT, LEGAL AFFAIRS, PUBLIC KNOWLEDGE

Mr. SIY. Thank you, Chairman Coble, Ranking Member Nadler, Members of the Subcommittee, Ranking Member Conyers. Thank you for inviting me to discuss copyright remedies today.

Today, I would like to address the issue of statutory damages and preliminary injunctions. My written testimony briefly touches upon certain issues raised by seizures and forfeitures.

Whenever I introduce copyright law to a new audience, two things tend to shock them: the length of copyright terms and the magnitude of statutory damages.

Statutory damages for copyright infringement are extraordinarily high. Damage awards can quickly reach millions of dollars in cases where the retail value of the infringing copy is less than the cost of a couple of hamburgers. Furthermore, there is no requirement that statutory damages awarded bear any resemblance to the actual harm caused.

Also, the wide range of values available also increase uncertainty and makes the mere risk of litigation a much bigger threat than it should be.

This not only affects large technology companies, it affects individuals going about their daily lives. Uploading a home video to YouTube could expose a user to $150,000 in damages or potentially just $750 at a basic minimum.

A mash-up that used 10 different tracks could thus lead to $1.5 million in exposure, all for creating a new work that is likely but still debatably a fair use.

Such high awards suggest that statutory damages are exceeding their intended purpose. Large damages beyond a certain size don't increase deterrence. An amount I can't afford is still an amount I can't afford, whether it is in the thousands of dollars or millions.

Furthermore, even a low risk of such a large award can chill free speech, the legitimate creation of fair use works, and contribute to the problem of orphan works.

The threat of large-damage awards can also be abused by copyright trolls, who will threaten litigation backed by large awards in order to extract smaller settlement payments from defendants, even those who might have legitimate defenses. Those smaller payments, though, can range from $2,000 to $10,000 apiece.

So reform is necessary in this area, and there are a number of different forms that might take.

First, there are existing reductions in damages available in the statute for certain good faith attempts at fair use. These could be expanded to include other types of users.

Secondly, similar limitations on damages could be applied to noncommercial uses.

Third, Congress could re-examine the criteria used to calculate statutory damages and perhaps place caps in certain instances where the number of works and the number of copies fit particular criteria.

Fourth, some basic evidence of harm could be asked of plaintiffs when they bring suit, with maximum damages being scaled on the statutory side to some multiplier of actual harm.

And finally, Congress could simply add guidelines to the statute for the application of this wide range of values, reducing uncertainty for the parties, but also for judges and juries who are asked to apply them.

One area where I believe the law is headed in the right direction, though, is that of preliminary injunctions. In 2006, the Supreme Court held that courts dealing with intellectual property cases should, as they do with other types of cases, engage in a true balancing of four critical factors before issuing a preliminary injunction. Whereas in the past, a number of courts had basically assumed that preliminary injunctions should issue automatically in copyright case—the 2006 decision of *eBay v. MercExchange* corrected that longstanding error.

Three critical features of eBay and the decisions that followed it produced this shift. First was the recognition that instead of requiring an injunction, many plaintiffs can be made whole through the payment of damages, especially for ordinary commercial uses of commercial works.

Second was the recognition that in balancing the potential harms of issuing or not issuing an injunction, a court must not presume that the defendant's actions are infringing. In other words, the court must balance the potential harms of getting a decision wrong in either direction, balancing the risk of ongoing infringement against the risk of limiting First Amendment legitimate speech.

Third, the public interest in a copyright case is not merely in enforcing copyright law for meritorious plaintiffs, but also meritorious defendants. Even more than that, though, is the important recognition of the public interest in a court case stretches beyond the parties in suit and can affect the public at large by allowing or restricting speech, or affecting the interests of a defendant's good faith clients and consumers.

Some district courts will occasionally site pre-eBay derived precedent in issuing automatic injunctions, but the number of these cases appears to be diminishing. The rebalancing of the preliminary injunction standard highlights just how important due process can be in the application of remedies.

Remedies may seem to belong to the time after a trial, but they affect litigation from its very beginning, or even before that litigation begins.

So I ask you to consider that as you continue your review. Thank you for your time, and I look forward to your questions.

[The prepared statement of Mr. Siy follows:]



Testimony of Sherwin Siy
Vice President, Legal Affairs
Public Knowledge

Before the
House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Hearing On:
"Copyright Remedies"

Washington, DC
July 24, 2014

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Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee,

Thank you for inviting me to testify on the issue of copyright remedies today. Though it may seem natural to consider remedies at the end of a trial, the nature and extent of remedies typically affect the course of a lawsuit from its beginning, or even before. The potential for suits to result in massive, disproportionately large damages, or to begin with a preliminary injunction that halts a party's activity before a decision is ever reached can chill legitimate activities and incentivize frivolous litigation and encourage copyright trolls. Furthermore, the various methods by which items or entities accused of facilitating infringement are seized or forfeited run the risk of swallowing up innocent parties, providing them with little guidance as to how to seek recourse or contest the seizure.

Statutory Damages

Whenever I introduce copyright law to a new audience, two things in particular tend to strike them as shockingly disproportionate to their goals: the length of copyright terms and the magnitude of statutory damages.

Section 504 of Title 17 specifies that plaintiffs can choose between actual damages and statutory damages at any point before final judgment. The statute also specifies that statutory damages will in most cases range from $750 to $30,000 per work infringed, and up to $150,000 per work where the infringement is found to be willful. There are several problems inherent to this formulation that have become clear in the years since its creation.

The first is that the range of values is so wide that it creates tremendous uncertainty as to liability. The second is that the values themselves are disproportionately high in many cases where only a few copies of a few works have been made on a non-commercial scale, or for good-faith uses. A third is that the lack of relationship between statutory and actual damages can raise constitutional due process questions.

First, with a range of values spanning almost three orders of magnitude, juries have issued awards that totaled tens of thousands of time more than the estimated actual

damages caused.[1] An innovator introducing a new technology that might, like the VCR, rely upon fair use to make copies of thousands of works, could face liability exposure in the hundreds of millions of dollars—enough to scare away many potential innovators and investors from the space entirely.

Second, the actual minimums and maximums set by the statute are also very high. This is particularly troubling in the case of individual defendants. Even when using the standard minimum, liability for infringement can add up swiftly; uploading a home video with an infringing song as a background track could cost an individual up to $150,000 for a simple click of the mouse; a mashup that incorporates ten different songs could result in a student being sued for at least thousands of dollars in damages, and potentially $1.5 million.[2] Such damages neither deter bad-faith activity any more than more reasonable damages would, while also chilling legitimate creativity.

Statutory damages also exacerbate the problem of orphan work. Publishers, museums, and others faced with large, uncertain damages will hesitate to provide the public with access to copyrighted works whose authors cannot be found and asked for permission.

Furthermore, the magnitude and uncertainty attached to statutory damages creates an incentive for the copyright laws to be abused in a number of ways by bad actors. Plaintiffs can advance frivolous copyright suits in order to silence criticism; the threat of large damages, even discounted against a slim chance of the suit's success, can encourage legitimate speakers to be silenced. Other plaintiffs may engage in "copyright trolling" in an attempt to game the legal system for profit. By filing suits against thousands of unspecified internet users indiscriminately, these lawyers can subpoena the records of internet subscribers and demand settlement payments from them. Faced with the choice of uncertain litigation and potentially ruinous damages on one hand, and a "settlement" payment in the range of $2,000 to $10,000 on the other, many defendants pay the lower amount to make the suit go away, regardless of its merits or the merits of their defense.[3]

Third, the relationship of statutory damages to actual harm also creates problems. The Supreme Court has suggested that, in the area of punitive damages, awards more than ten times the actual harm caused are likely to violate the Constitution's Due Process Clause by failing to provide potential defendants with fair warning of the consequences

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[1] *See* Pamela Samuelson and Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 Wm. & Mary L. Rev. 439 (2009), available at http://scholarship.law.berkeley.edu/facpubs/1151 (noting that in one file-sharing case, the statutory minimums would have resulted in a 320:1 ratio of statutory to actual damages; the jury initially awarded $1.92 million, against an estimated $50 of actual damages, representing an award: damages ratio of 38,400:1).

[2] For reference, the 2010 album "All Day" by Girl Talk sampled 372 different sound recordings in its 12 tracks.

[3] *See, e.g., Nu Image, Inc. v. Does 1-23,322*, 799 F. Supp. 2d 34 (D.D.C. 2011); *On the Cheap, LLC v. Does 1-5,011*, 280 F.R.D. 500, 502 (N.D. Cal. 2011); *Mick Haig Prods. E.K. v. Does 1-670*, 687 F.3d 649 (5th Cir. 2012).

of a violation.[4] Copyright statutory damage-to-harm ratios can easily reach the tens of thousands, creating exactly the same problems by springing massively disproportionate penalties upon defendants. In one case where the damages award vastly exceeded the harm, the Chief Judge of the District of Minnesota explicitly implored Congress to amend the statute:

> Thomas not only gained no profits from her alleged illegal activities, she sought no profits. Part of the justification for large statutory damages awards in copyright cases is to deter actors by ensuring that the possible penalty for infringing substantially outweighs the potential gain from infringing. In the case of commercial actors, the potential gain in revenues is enormous and enticing to potential infringers. In the case of individuals who infringe by using peer-to-peer networks, the potential gain from infringement is access to free music, not the possibility of hundreds of thousands -- or even millions -- of dollars in profits. This fact means that statutory damages awards of hundreds of thousands of dollars is certainly far greater than necessary to accomplish Congress's goal of deterrence.[5]

While statutory damages have a necessary role to play in enforcing copyrights, the current method of their calculation no longer reflects their proper purpose in a wide variety of situations. The existing method for calculating statutory damages makes less sense in an environment where ordinary users of technology can make copies of hundreds or thousands of works, incidentally or not, in noncommercial settings and with no profit motive. In fact, the current per-work limitation was originally created at the request of broadcasters and the film industry, which feared that an infringement on their part might result in a massive multiplier if a single work was infringed many times.[6] In contrast, the scenarios that typically lead to disproportionate damages today result from a large number of works being reproduced a small number of times—something that would have required a much more deliberate, sustained, and likely profit-motivated effort in past decades.

This suggests the calculation of statutory damages should be altered to reflect today's realities, where many more individuals and institutions face potential copyright liability, where technology makes it more likely that copies of multiple works are not made with malicious or commercial motives, and where secondary liability can increase exposure rapidly.

Some potential solutions include removing statutory damages for good-faith, reasonable efforts to make non-infringing uses. Currently, such an exception applies to nonprofit educational institutions and public broadcasting entities, but expanding it would also allow journalists, artists, and others to rely on fair use without unreasonable fear.

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[4] *BMW of North America v. Gore*, 517 U.S. 559, 580-81 (1996).
[5] *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (2008).
[6] Abraham L. Kaminstein, Register of Copyrights, U.S. Copyright Office, Register's Report on the General Revision of the U.S. Copyright Law 104 (1961).

Congress could also ensure that statutory damages be limited to a reasonable multiplier of actual harm. In cases where harm cannot be precisely assessed, courts could require the presentation of readily available evidence, accessible via subpoena power and other discovery tools.

Congress could also adjust the existing minimum and maximum awards amounts, or set caps on awards. These adjustments could be tied to particular fact patterns, such as cases involving personal, noncommercial uses of works, or scenarios like secondary liability.

Finally, courts and juries seem to suffer from a lack of guidance in awarding statutory damages, Congress could add guidelines to the statute to increase the predictability of awards. Courts could be instructed to consider a number of relevant factors, including the severity of the infringement, the actual harm, the infringer's good faith, and others.

Preliminary Injunctions

Another substantial remedy available in copyright litigation is the preliminary injunction. Preliminary injunctions have the power to stop an entire enterprise in its tracks pending the outcome of litigation. In many cases, a plaintiff getting a preliminary injunction to issue may, for all practical purposes, decide the outcome of the case before the merits stage is even reached.

The courts appear to be in the process of working out these errors in the wake of *eBay* and its progeny, and it seems unlikely that Congress should need to act in this area. Still, this provides a telling example of how a seemingly small change in the approach to an aspect of civil procedure can have a significant effect upon litigation and pre-litigation conduct.

For too long, many courts treated preliminary injunctions for copyright and patent cases under a substantially different standard than other cases—issuing them almost as a matter of course, instead of treating them as the extraordinary remedies that they are.

The Supreme Court, in a series of cases dating back to *eBay, Inc. v. MercExchange, L.L.C.*,[7] has fortunately put a stop to this trend, and a number of circuit courts have explicated and applied its rulings in a number of different copyright

[7] 547 U.S. 388 (2006).

contexts.[8] However, district courts will on occasion still cite back to no-longer-valid precedent in asserting that copyright cases are to be treated differently.[9]

Typically, the mistake comes from a misreading of the required factors for issuing a preliminary injunction. In order for an injunction to issue, a plaintiff must demonstrate: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm in the absence of an injunction; (3) the balance of hardships favors the issuance of an injunction; and (4) that the public interest, including the interests of nonparties, would be served by an injunction.

These factors have in the past been read in a number of ways so as to make the issuance of injunctions nearly automatic in copyright, patent, and trademark cases. Courts have made the automatic presumption that any infringement of a copyright is an irreparable harm, for example, ignoring the fact that in many cases the infringement of commercial works can be compensated for with money damages.

Courts also have presumed that the balance of harms should always tip in a plaintiff's favor, reasoning that the harm suffered by a defendant by not being able to infringe is not cognizable. This reasoning, however, neglects the fact that a court should be measuring the harm to defendant *assuming that an injunction is issued in error*, and that presuming the defendant's liability basically eliminates the point of having the balancing prong of the test in the first place.

As for the fourth factor, a number of courts have assumed that the public interest is always in enforcing copyright law. While it may be true that enforcement of the law is in the public interest, it again presumes the outcome of the case to assume that the law will in fact be enforced by an injunction. After all, enforcing an injunction upon what turns out to be a noninfringer would not be enforcing the law. Furthermore, courts have neglected the effects of injunctions upon non-parties or upon interests apart from those specifically in the copyrighted work. In cases where individual consumers' information maybe stored on a defendant's service, or where First Amendment speech may be curtailed by an injunction, significant interests outside of the parties' will apply.

Seizures and Forfeitures

Finally, I would like to touch briefly on the issue of seizures and forfeitures. A number of different processes exist by which infringing items, or items accused of

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[8] In the Second Circuit, in *Salinger v. Colting*, 607 F.3d 68, 76 (2d Cir. 2010); in the Fourth Circuit, in *Christopher Phelps & Assocs, LLC v. Galloway*, 492 F.3d 532 (4th Cir. 2007) and *Bethesda Softworks, L.L.C. v. Interplay Entertainment Corp.*, 2011 U.S. App LEXIS 21711 (October 26, 2011); in the Ninth Circuit, in *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011) and *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989 (9th Cir. 2011).

[9] *See*, e.g., *Flava Works, Inc. v. Gunter*, 2011 U.S. Dist. LEXIS 82955 (July 27, 2011); *vacated by Flava Works, Inc. v. Gunter*, 689 F.3d 754 (2012); *Atmos Nation, LLC v. Kashat*, 2014 U.S. Dist. LEXIS 81394 (E.D. Mich. June 16, 2014).

facilitating or enabling infringement, can be taken by authorities. In recent years, this has extended beyond physical items to more abstract concepts, like domain names.

A number of problems and concerns surround issues of seizure and forfeiture, both relating to due process for allegedly infringing items and to the possibility of innocent parties being affected by these actions.

The process by which the owner of allegedly infringing material may contest a seizure is not always clear. In 2010, a hip-hop blog, dajaz1, had its domain seized by Immigration and Customs Enforcement ("ICE") in an ex parte proceeding, over what turned out to be links to four tracks hosted on a file-sharing site.[10] ICE seized the domain name despite the fact that the blog complied with an earlier DMCA takedown notice addressed to those tracks. The site remained seized for over a year, subject to a series of extensions filed by the government under seal, before charges were ultimately dropped and the domain returned to its owners. Throughout the process, dajaz1's legal representation was apparently not afforded the opportunity to view or contest the requests for the extensions.[11] The due process problems with civil asset forfeiture are not limited to copyright actions, drawing recent attention in cases where pretextual claims of drug dealing are used to seize innocent parties' assets with little practical recourse.[12] The use and potential abuse of civil forfeiture here, as elsewhere, deserves further scrutiny by Congress.

Procedural problems can be compounded with technological ones, especially when "tools of infringement" include not just specialized equipment, but general-purpose items like servers that may host legitimate sites, storefronts, content of other parties, or even more abstract informational structures such as domain names, which can also be shared between completely different parties (for example, two completely unrelated bloggers might both have a wordpress or a tumblr domain). This can create problems with smaller or lesser-known hosting services that use a shared domain name. Actions taken against allegedly infringing domains have, in the past, also affected innocent parties. In 2011, authorities targeting child pornography that was hosted on subdomains at mooo.com also took down over 84,000 other subdomains, including many personal sites that had no illegal or infringing content on them.[13] Given the interlinked nature of

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[10] Ben Sisario, *Hip-Hop Copyright Case Had Little Explanation*, New York Times, May 7, 2012, http://www.nytimes.com/2012/05/07/business/media/hip-hop-site-dajaz1s-copyright-case-ends-in-confusion.html; Timothy B. Lee, *Waiting on the RIAA, feds held seized Dajaz1 domain for months*, Ars Technica, May 4, 2012, http://arstechnica.com/tech-policy/2012/05/waiting-on-the-riaa-feds-held-seized-dajaz1-domain-for-months/.

[11] Dajaz1, *Our Response to Unsealed Court Documents in Dajaz1 Domain Seizure*, May 7, 2012, http://dajaz1.com/2012/05/07/our-response-to-unsealed-court-documents-in-dajaz1-domain-seizure/.

[12] *See* Sarah Stillman, "Taken," The New Yorker, August 12, 2013, *available at* http://www.newyorker.com/magazine/2013/08/12/taken?currentPage=all; The Daily Show, Highway-Robbing Highway Patrolmen, July 22, 2014, http://thedailyshow.cc.com/videos/pjxlm/highway-robbing-highway-patrolmen.

[13] Andrew McDiarmid, "An Object Lesson in Overblocking," Center for Democracy and Technology, February 17, 2011, https://cdt.org/blog/an-object-lesson-in-overblocking/.

many online services and internet addressing, it is extremely easy for actions targeting one alleged bad actor to affect thousands of innocent users. For example, a recent legal action by Microsoft against an alleged botnet resulted in over 5,000,000 subdomains being inadvertently taken down.[14]

The combined technical and due process issues involved in seizure and forfeiture make it easy for error to occur and for innocent parties to face a difficult and unclear process to make things right. In its continuing review, Congress should ensure that these tools are used responsibly and transparently, and are structured to prevent mistake and abuse.

Conclusion

Remedies are a critical facet of any legal regime, and few would doubt the need for effective remedies for copyright infringement. However, in providing remedies, it is important that due process is available and provided to all concerned. There is a clear need for reform in some areas, such as statutory damages, and there is a distinct need to assess the potential for mistake and abuse in seizures and forfeitures. As we have seen in the example of preliminary injunctions, remedies must take into account not only their effects on a wide variety of types of parties, but also their effects on members of the public at large. Thank you for your time, and I look forward to answering your questions.

[14] Nate Cardozo, "What Were They Thinking? Microsoft Seizes, Returns Majority of No-IP.com's Business" EFF.org, July 10, 2014, https://www.eff.org/deeplinks/2014/07/microsoft-and-noip-what-were-they-thinking.

Mr. COBLE. Thank you, Mr. Siy. Good to have you with us.
Ms. Wolff?

TESTIMONY OF NANCY E. WOLFF, PARTNER, COWAN DEBAETS ABRAHAMS & SHEPPARD

Ms. WOLFF. Good afternoon, Chairman Coble, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, Members of the Subcommittee. I appreciate this opportunity to come here to speak to you today about remedies in your ongoing review of the American copyright system.

I have had over 30 years' experience now representing individual creators, whether they are visual artists, illustrators, graphic designers, trade associations representing the interests of professional creators, as well as organizations such as PLUS that is trying to help both users and creators license images more efficiently and effectively.

I am here today on behalf of five separate organizations, collectively among them they represent the professional imagery that you see every day, whether you are reading your Washington Post, looking at your smart phone, or reading something on a tablet.

These creators and their licensing entities rely on a copyright system where copyright is encouraged and that there is a true ability to enforce rights when rights are not licensed properly.

These are small businesses, whether they are individuals or companies that are involved with aggregating and licensing images, and the lifeblood is copyright and the ability to license.

It is ironic that now that so much is displayed online, that images and visual imagery are used more and more, because everyone wants to have text enhanced with images. It is very boring just to read words.

On the other hand, it seems like less and less of the content is actually licensed from these professionals. It is so easy to right-click, which I call a right-click license, where work is not licensed but, rather, infringed. And the inability to have an affordable and efficient way to actually enforce license fees, which have a relatively low value compared to many of the large cases that are battled out between the big corporations, just makes enforcing copyright in Federal court impractical and impossible. Almost on a daily basis, someone comes to me with a legitimate case of infringement.

Maybe I will take one moment and talk about the word "troll." I think, unfortunately, the word "troll" is often used when someone is legitimately trying to enforce a copyright claim, and I think it should not be used in that context. When you look at the cost of even an index number, which is $400, and that many images can be licensed for online use for blogging and other things for as low as $250 or less, in some instances, you can see how impossible it is to enforce a copyright when it costs more to have the key to the courthouse than you would ever get in recovery.

There has been a lot of mention of statutory damages at this table. Statutory damages are critically important. In many instances, however, the visual artists don't even have the benefit of statutory damages, because they, as a group of creators, create such a volume of work compared to others, such as a musician, a

film writer, a writer, that often the burden and expense of registration is too large of a hurdle.

So most of these creators are faced with only actual damages, because they have not had the benefit of registration before infringement. And when your actual damages can be in hundreds to a few thousand dollars, you really need an alternate system.

Federal court is wonderful. It has very robust rules and a great discovery system. But for these type of cases, it is like giving an artist a sledgehammer when all you really need is a flyswatter.

There really does need to be a way to encourage licensing rather than infringement. It is so easy to make a judgment call when you are a user and assume that you can just use an image because if you are caught, what are the consequences? If someone contacts you, you can just ignore them, which I find is often the case, because it just costs too much to go to court.

These references to extraordinary damages in my years of experience I just have not seen them. Everyone comes to me all excited that they could get up to $150,000 for willful infringement, but the courts don't do that. It is so rare.

What happens when you have statutory damages is it gets you a phone call from the other side. It allows you to come to a reasonable resolution that affords the creator some type of license fee because they realize they can go to court. So it actually encourages settlement.

There are so few cases that end up going to trial because it is so expensive.

So all the organizations I am here speaking for have been responding to inquiries from the Copyright Office, and we really do support the study on small copyright claims that the Copyright Office published in September 2013.

As you rightly said, if you have a right without a remedy, you have no right. And it really does cause a great economic harm to these businesses and individuals who make a living out of legitimately creating works and attempting to earn license fees.

I am very pleased to be here today and answer any further questions you have.

[The prepared statement of Ms. Wolff follows:]

Prepared Statement of Nancy E. Wolff, Partner, Cowan DeBaets Abrahams & Sheppard

Chairman Coble, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss copyright remedies as a part of your ongoing review of the American copyright system.

I. INTRODUCTION AND BACKGROUND

My name is Nancy Wolff and I am a Partner at Cowan DeBaets Abrahams and Sheppard, LLP. In my practice, I represent numerous visual artists, content licensing companies and counsel trade associations, such as PACA/Digital Media Licensing Association and PLUS, an organization aimed to create standardization amongst licensing to make it easier for both creators and users to license images. Clients come to me with potentially infringing matters on almost a daily basis.

These comments are submitted on behalf of myself, as well as a number of visual arts trade associations, including PACA, Digital Media Licensing Association ("PACA"), American Society of Media Photographers ("ASMP"), National Press Photographers Association ("NPPA"), Graphic Artists Guild ("GAG"), North American Nature Photography Association ("NANPA") and Professional Photographers of

America ("PPA") (collectively the "Organizations"). Collectively these organizations represent the creators of most of the visual content that enrich your life every day, as well as the licensing entities that aggregate, distribute and make the content of these professional artists available to the media and others for licensing. This includes illustrators, graphic designers, videographers, photojournalists, press photographers, advertising photographers, portraiture, wedding and event photographers and nature photographers. When you read the Washington Post, your favorite blog on an iPad or other tablet, or keep up with news and events on a smart phone, the content is enhanced with illustrations, photographs and videos created by members of these organizations. Visual images document history, illuminate our world, and give us insights into our world that cannot be adequately expressed by the written word.

These professionals are small business owners throughout America. Their livelihood depends on the ability to license content and receive fair compensation for the works they create. The underpinning of their business is a robust copyright system, including the ability to enforce their rights in the event users choose to use their works without obtaining a license. To have a right, without a remedy is an empty right. In my experience, federal court litigation, the exclusive venue for copyright infringement claims, is simply too expensive given the relatively lower monetary value of many image claims. Online infringement claims, in particular, do not justify the high cost of litigation that can exceed a $100,000. As a consequence, many online uses that should be licensed with payments going to the creator and/or their licensing representatives are used without payment or license, based on the calculated risk that there will be no consequence. While their exists many options for legitimately licensing images for reasonable license fees, too many users simply forgo the license and assume that anything on the internet is available for free.

While infringement of content made available for licensing has always been present, even before digital photography when we lived in a predominantly print world, the frequency and ease with which images now can be redistributed and used without obtaining any license or paying a license fee is causing measurable economic harm to the individual creators and their licensing organizations.

The reality for more than a decade now is that most images displayed on websites are not authorized or licensed. A few years ago, PicScout, a company known for its image recognition technology and ability to search the Internet for the use of images and compile reports, did a study of a sampling of commercial websites to determine whether the images displayed were licensed or not. The study results confirm that approximately 90% of the images on the commercial websites sampled were not properly licensed. The knowledge that most infringements will not be enforced by the copyright owner contributes to such a high rate of infringing uses.

II. CHALLENGES IN THE CURRENT LEGAL SYSTEM

A. Registration

The ability for visual artists to use the federal court system to redress the harm is limited for several reasons, including: the difficulty of effectively registering large volumes of images, the relative smaller value of the claims and the resources and effort involved in bringing a claim in federal court. The first challenge to effective copyright enforcement is copyright registration. Photographers and other visual content creators are among the most prolific of creators, and in sheer numbers create more copyrightable works than musicians, writers, filmmakers and most other authors whose works are protected by copyright. The burden on resources, both financial and human, in registering large collections of works discourages these creators from taking advantage of the voluntary copyright registration system, when faced with the day to day challenges of making a living, and the understanding that under the current Copyright Act a work is protected from the moment of creation. While this is accurate, a U.S. author cannot commence an action unless the work is registered, and if the work is not registered before the infringement or within three months of publication, statutory damages and the ability to seek attorneys' fees are unavailable, leaving the visual artist only with the opportunity to seek actual damages, often a relatively nominal amount. *See* 17 U.S.C. §§ 411,412. Consequently, the great majority of visual content creators do not hold the keys to the courthouse, even if they discover clearly infringing uses. The cost of an expedited copyright registration may often far exceed the value of the licensee fee that could be obtained. While the Copyright Office has worked with the photography community over the years in developing group registration solutions that take into consideration the large number of images that can be uploaded on a daily basis, the process still provides hurdles to most visual artists with the practical result that many works of visual arts are not registered. Reviewing ways in which visual artists can

more effectively register their works and working with the Copyright Office in creating the 21st century registration system that can accommodate the submission of digital files as part of a photographer's daily workflow will certainly improve this challenge.

B. Alternate Tribunal for Smaller Claims

In order to continue to obtain license fees for the use of images on behalf of the copyright owners, there needs to be an efficient, effective and viable means for image creators and licensors to enforce their rights. Otherwise, there is no incentive to license images and visual artists will always be competing against the use of images obtained by infringement for free. The Organizations' members take seriously the responsibilities of enforcing copyright in the imagery they represent and many licensing companies have departments dedicated to copyright compliance in order to resolve infringements and secure licensing fees on behalf of copyright holders. Indeed, visual artists' economic livelihood depends on a robust copyright system. As such, many artists, as well as the Organizations, have had to enter into the business of tracking down infringers to enforce their copyright. While the first step is to resolve claims without resorting to litigation, some claims cannot be resolved, either because the infringer refuses to respond, believes that simply removing the infringing content is sufficient, or refuses to pay adequate licensing fees.

Statutory damages remain an important remedy to visual artists and their representatives. Without statutory damages, it is often difficult to establish actual damages. Frequently however, because many works are not registered for the infringing use, visual artists are only able to seek actual damages as a remedy, often limited to the amount of the license fee. Moreover, they cannot seek attorneys' fees, which can have the effect of encouraging claims to settle early, often without resorting to litigation. If the claim cannot be resolved informally, a decision must be made as to whether an infringement action is warranted. The current system fails when the relief sought is actual damages because standard license fees for many noncommercial uses on the Internet are relatively low, in the hundreds of dollars, and even commercial uses may only be in the thousands of dollars. Using federal court to try to enforce copyright infringement on many of the online abuses is like using a sledgehammer, when a flyswatter is all that is needed. The high cost of filing and prosecuting a copyright claim in federal court often forces copyright owners to greatly increase their demands to cover the cost of litigation and to cover the cost of attorneys' fees. This places undue pressure on all sides of the matter, including the judicial system, causing more funds and energy to be expended than necessary. In most instances, it does not make commercial sense to pursue an action unless there are numerous registered images infringed by a single infringer. As a result, individual artists and smaller companies are at a disadvantage because they do not have the same capabilities and resources that larger corporations possess to prevent their works from being taken advantage of. Unfortunately, the inability to enforce copyrights only encourages infringement and disrespect for copyright in general and, absent a practical remedy, deprives visual artists of their rights.

In addition to the obvious financial deterrents in bringing an action, including attorneys' fees and other costs, such as obtaining a court filing index number (a fee that may itself exceed the license value of an image use), expert fees, document production and deposition costs, it is often difficult to finding attorneys throughout the country who are willing to handle these type of actions, where the economic value, even with the of availability of statutory damages and/or attorneys' fees, may be relatively low. Even if a copyright owner has the benefit of an in-house lawyer or a local lawyer that is willing to work with them, strict jurisdictional requirements may prevent the company from being able to bring a claim in its local federal district. This is an additional deterrent to pursuing claims against a defendant who resides at a distance to the copyright owner, adding additional costs and inconvenience, particularly in the case of the individual who may not be able to afford the costs of, or to take the time off to, travel. In some cases, the inconvenience of litigation is enough to prevent an individual copyright owner from bringing a lawsuit, as it detracts too greatly from the artists' ability to work and create. Further, there is a risk that the copyright owner could lose based on defenses such as fair use, an area of the law for which it is very difficult to predict outcomes. The small copyright owner often cannot take the risk that the defendant might prevail and be faced with the possibility of paying the defendant's attorney's fees.

On almost a daily basis, we counsel clients as to the risk of bringing a copyright action and, in most instances, the client is deterred based on the cost of litigation and the risk of fees.

III. SUPPORT OF THE COPYRIGHT OFFICE REPORT ON SMALL CLAIMS RECOMMENDATIONS

The Organizations collectively favor a system that would enable rights holders to elect to bring a copyright infringement claim using a form of alternate dispute resolution and support the Copyright Office Study on Remedies for Copyright Small Claims. Each of the organizations have provided comments to the United States Copyright Office in connection with their study on remedies for copyright small claims and support the United States Copyright Office Report On Copyright Small Claims published in September 2013. While each of the Organizations submitted individual responses, the issue of effective remedies for copyright infringement is a priority, and the Organizations have met over the years to collectively discuss and respond to questions posed by the Copyright Office. Specifically, the Organizations support an alternate dispute resolution system that would provide:

- The ability to bring a small claim without the need of legal representation;
- A forum and procedures that are cost effective and do not require expensive travel, costs or expert fees;
- The ability to have a claim adjudicated timely by a tribunal that is knowledgeable about copyright;
- A resolution that offers finality and ease of enforcement of any judgment; and
- Incentives to avoid having the defendant's rejecting the forum and demanding that the claim be brought in a federal court of general jurisdiction.

The submissions of the various Organizations to the Copyright Office in response to three separate notices of inquiry regarding copyright small claims and remedies provide greater detail as to the complex issues that arise when considering an alternate system than federal court. Some highlights of submission on behalf of PACA/ the Digital Media Licensing Association may be helpful in framing the issues.

Nature of the Process

We envision the process of submitting a claim under a small copyright claims system as an alternative dispute process with guidance and oversight from the Copyright Office. The adjudicators should have copyright law experience and some training in dispute resolution. The process should be virtual, meaning that claims should be submitted electronically without the need for any party to travel to any location in order to testify or to provide other evidence. The award should be timely, and, absent abuse, should not be entitled to an appeal.

Voluntary Versus Mandatory

We acknowledge that any alternative tribunal to federal court will most likely be voluntary. In order for the system to be successful, participants should be offered a cost effective and streamlined dispute resolution process. There should be incentives to encourage the use of the system, to discourage more well-healed infringers from refusing to participate in the hopes that the claimant would not have the financial means to bring any claim, thereby avoiding any risk of paying damages for infringing activity. Possible incentives could include an increase in the prevailing plaintiff's damages if the defendant rejects the plaintiff's election to proceed in the small copyright claim forum and the plaintiff prevails in the general federal system. In this event, the plaintiff should be entitled to costs and attorneys' fees, regardless of whether attorneys' fees would be available under Section 412 of the Copyright Act.

Permissible Claim Amount

We support the Copyright Office recommendation that the jurisdictional limit for a small copyright claims system be up to $30,000. This amount is consistent with the statutory limit of damages for non-willful infringement under the Copyright Act. In addition, this amount would cover many cases that are not brought because the recovery is too low, such that claimants are not able to find representation and are not able to navigate the federal system without an attorney. The American Bar Association Section of Intellectual Property Law conducted a poll of its members in connection the with the Copyright Office Notice Of Inquiry on Remedies for Small Claims Copyright Claims and only one third of the attorneys polled stated they would accept an uncomplicated case with a likely recovery of less than $30,000.

Representation

In the spirit of an affordable, less formal process, the parties should not be required to retain an attorney. Whether one is entitled to retain an attorney should be at the election of the party, but not prohibited, whether the party is either an

individual or an entity. Rules regarding whether a corporation or business entity may appear without legal counsel should be relaxed for small copyright claims, similar to arbitration proceedings in which a corporate officer or employee may appear and represent the corporation.

Discovery

In order to have a less expensive, streamlined and quicker resolution, discovery and other procedures will necessarily be limited.

Damages

Apart from establishing a jurisdictional limit, the Organizations do not recommend altering existing law and policy on recoverable damages. Both actual damages if proven and statutory damages and attorneys' fee should be allowed, subject to the jurisdictional cap.

Effect of Adjudication

Similar to an arbitration award, the award of the adjudicator in a small copyright claim forum should be final and enforceable. Decisions should not be published or carry any precedential weight and should be limited to the specific activities in question.

Enforceability of Judgment

Congress may want to consider the model for enforcing arbitration awards with respect to awards rendered in a small copyright claim tribunal. If a party is awarded damages, that party should have 30 days to pay. If the party does not pay, the award may be converted into a judgment and any applicable court with jurisdiction will enforce any award if payment has not been made.

Limitations on Relief Offered

Whether damages other than monetary damages should be part of the small copyright claims system should be considered carefully. An injunction to prevent the continued infringement or to enforce the removal of content online may be appropriate if a work is not so incorporated within another creative work that it would cause disproportionate economic harm to the new work. If, however, the infringing work is merely displayed on a website, in addition to damages, it would be appropriate in order to enjoin continued use of the infringing work by the defendant, to avoid multiple claims for the same use by a plaintiff against the same party. This would address a problem that is rampant with notice and takedown under Section 512 of the Copyright Act, where works may be taken down after notice to the service provider, but are then immediately reposted by users, requiring copyright owners to repeatedly send notice and takedown letters for the same infringing content.

IV. CONCLUSION

The Organizations support the efforts of the Copyright Office in its study of a Copyright Small Claims Court. They actively participated in the Office's study by responding to inquiries on this issue. More details regarding the Organizations' recommendations can be found on the Copyright Office's website at: http://www.copyright.gov/docs/smallclaims. We encourage Congress to implement the recommendations summarized here and described in the comments filed by the Organizations. These proposed solutions will create a vastly more suitable venue for small claims for both statutory and actual damages and will benefit users, copyright owners, licensing agencies, and visual artists (especially those who earn a substantial portion of their livelihood from licensing fees) alike. Without an effective remedy, visual artists do not have a right, and infringement will continue in an unconstrained manner.

Thank you for inviting me to testify today. We look forward to assisting the Subcommittee as it continues to consider this issue and the overall process of copyright review.

Mr. COBLE. Good to have you with us, Ms. Wolff.

The entire Subcommittee Members thank you all for being here and for not abusing the 5-minute rule.

We try to comply with the 5-minute rule as well, so, if you will respond tersely, we will appreciate that.

Mr. Bitkower, does the lack of a provision providing for felony infringement of a right of public performances deter law enforcement

from bringing actions for illegal streaming? And who needs this provision to protect their works?

Mr. BITKOWER. Thank you, Chairman Coble. The short answer to your question is yes. We have seen over the preceding years a trend toward streaming and away from simple downloads as the preferred method of infringing many types of online content. And it has already been said, by both you and Ranking Member Nadler, the streaming of digital content, because it most clearly implicates the public performance right, is currently clearly prosecuted only as a misdemeanor.

Misdemeanor penalties are real, but when you look at the massive profits that infringing Web sites can make from streaming media, misdemeanor penalties are simply not sufficient to deter those large-scale infringers. So we do think it would be very helpful to have a felony penalty for streaming.

Mr. COBLE. Thank you, sir.

Mr. Tepp, in contrast to the early days of the Internet, in your opinion, how many Americans today believe that anything they find on the Internet is available to use for free and that they should not be held accountable for situations in which fair use does not apply?

Mr. TEPP. Sir, I fear that too many don't give copyright the respect that it deserves.

Mr. COBLE. I would concur with that.

Mr. TEPP. And I fear that too many think that they either won't get caught, or if they do get caught, the remedies will be too small.

That is, I might add, the precise rationale that this Committee applied when it passed the NET Act, the No Electronic Theft Act, in 1997. I think the remedies have improved with that enactment, but we still have a significant challenge in front of us, in terms of piracy in the modern age.

Mr. COBLE. I thank you, sir.

I would like to hear from each one of you, and I will start with you, Mr. Tepp. What are your views on the Copyright Office recommendation for a small copyright claims system?

Mr. Tepp, if you will start us off?

Mr. TEPP. Sure. I think the Copyright Office did a very nice job analyzing those issues. I think it is important to have a small claims process for precisely the reasons that Ms. Wolff has mentioned. It really is financially difficult for individual creators to proceed.

There are two things that I think are important to have in that process. One, it should be entirely voluntary for both parties to participate. And two, it should be based on the size of the claim, not on the size of the claimant.

Mr. COBLE. Thank you, Mr. Tepp.

Mr. Schruers?

Mr. SCHRUERS. So a few observations on the small claims issue. I think, first, it shows that current statutory damages aren't working. The motivation for statutory damages, the $750 up to $150,000, was precisely intended to empower individual artists to bring cases and, as well, to provide a deterrent. But the idea that providing a floor would ensure that people could come to court was something that, certainly, motivates the statutory minimum. And

notwithstanding the fact that we are also hearing that the system doesn't work. So I think we can learn from that.

Additionally, with respect to that approach, there are also small defendants. While I don't represent them, I do see that many individuals are the subject of these troll actions. And I find myself wondering why smaller plaintiffs should be entitled to recourse in a lower-cost system that smaller defendants should not.

So I think the structure of a small claims system is something worthy to consider. It is likely to have a lot of cascading implications across the act, and so I think its ultimate efficacy would depend a lot on how it is designed.

Mr. COBLE. Thank you, sir.

Mr. Siy?

Mr. SIY. Thank you, Mr. Chairman. I think that a small claims court can be an excellent idea. I think as many people have pointed out, litigation is expensive, both for the plaintiff and for the defendant. I think a careful balancing needs to occur in terms of providing a more efficient, more streamlined process versus making sure that the rights of all the parties involved are protected.

Mr. COBLE. Thank you, Mr. Siy.

Ms. Wolff?

Ms. WOLFF. Yes, I am very grateful for the Copyright Office for putting such a detailed report together. I think it addresses a lot of the concerns that the smaller copyright owners have. I think it would benefit defendants as well as plaintiffs, because there would be a forum that would cost less for both sides, and there would be a cap on the amount of damages, which would solve a lot of the problems that were presented at this table.

But there are many legitimate claims that just can never reach the system the way it is designed now. I think for it to work, though, being voluntary, there would have to be teeth, that if a defendant simply refused to participate, thinking that it would cost more to try to enforce any type of smaller claim amount, that there would have to be some kind of incentive and additional damages that could be awarded to a plaintiff, if they are forced to have the expense of going the Federal copyright route.

Mr. COBLE. Thank you, ma'am.

Mr. Bitkower?

Mr. BITKOWER. Thank you, sir. The department does not have a formal position on small claims court for civil enforcement.

Mr. COBLE. I see my time has expired. Thank you all again.

The gentleman from New York?

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Tepp, could you please explain why statutory damages for civil copyright infringement are structured the way they are, and also explain the per infringed work framework applicable to all copyrightable works?

Mr. TEPP. Certainly, sir.

Congress has very carefully and repeatedly over time reviewed and considered whether statutory damages need to be recalibrated or adjusted.

In 1790, as you alluded, the statutory damages were per infringing copy, so if you make 20 infringing copies, you pay 20 times the statutory amount. Back then, it was $.50, half of which went to the

copyright owner, half of which was available to the government. So even then, there was both a compensation and deterrence element.

Those numbers were adjusted over time for inflation. Additional numbers were put in for different types of works, reflecting the different value for different works.

There was also eventually an added minimum and maximum cap for statutory damages. I believe it was in 1897.

In 1976, in the general revision of the Copyright Act, it was changed to a per infringed work standard. So you make one infringing copy of a work, make 100 infringing copies of a work, you still pay one time the statutory damages range.

Of course, in so doing, Congress provided a wide range, so that it could accommodate different types of facts. One infringing copy is less likely to generate a large number within the range, and vice versa. Large numbers of infringements, more harmful infringements, willful infringements, are likely to bring a court to award a higher number within the statutory range.

Mr. NADLER. Now, your written testimony illustrates that after adjustments for inflation, statutory damages are actually lower now than at any point in the last century, and also that Congress saw the need to increase statutory damages in 1999 in response to the increased threat of digital piracy.

So even though we increased damages in 1999, they are still at their lowest level they have been at in a century.

Mr. TEPP. That is correct, sir.

Mr. NADLER. Do you think they are at a proper level, or should we raise it at this point?

Mr. TEPP. I am not asking for this Subcommittee to consider raising it at this point. I think the system is working reasonably well.

We can always imagine scenarios where it would be hard-pressed—for example, the infringement of a pre-release high-profile, large-budget, copyrightable work. That is a single work infringement. The maximum statutory damages would be $150,000. That work might have generated millions, but for that infringement.

So in spite of that, though, I think the current range of damages is basically getting the job done.

Mr. NADLER. Now, I understand that the current copyright structure has led to numerous tech innovations and, we have all seen this, legitimate services, whereby consumers can access movies and music on multiple legal sites, whether it be iTunes, Pandora, Netflix, HBO GO, or whatever. Now if it were not for the statutory damages and enforcement by the Department of Justice, is it possible that these services might be more threatened by illegal downloading and streaming sites like Napster and illegal movie sites?

Mr. TEPP. Thank you very much for that question. I think the argument about chilling effects really misses the point: At the macro level, innovation and copyright protection are complementary. They produce and develop works and markets that they each benefit from.

And the online services that are licensed and legitimate have the most to lose from online services that are undercutting them, be-

cause they are getting their copyrighted works that attract so many people without paying for them.

Mr. NADLER. Thank you.

Mr. Bitkower, you recommend the creation of legislation to establish a felony charge for infringement for unauthorized public performances conducted for commercial advantage or private financial gain. Did you not recommend that?

Mr. BITKOWER. We do recommend the creation of felony penalties. We have not endorsed particular text at this point, but that is, certainly, one option.

Mr. NADLER. Okay. Now, why is it the case that in most cases infringing streaming can be prosecuted only as a misdemeanor, even when sites are willfully streaming pirated content to a large number of users and turning huge profits through advertising revenue and subscriptions? That is a situation where you are recommending a felony. Why is the law only a misdemeanor now?

Mr. BITKOWER. Thank you, Ranking Member. The reason that the current law only clearly provides for misdemeanor penalties is because the way courts and treatises and experts have approached the streaming question——

Mr. NADLER. Say that again? I just didn't catch it. Say that again?

Mr. BITKOWER. The reason that the current law only is read to provide most clearly misdemeanor penalties is because the way the courts and treatises have approached the streaming problem is more as one of public performance than of reproduction or distribution.

Because it does not invoke those rights that have felony penalties attached to them, the only current way to approach those through criminal law most clearly is as a misdemeanor.

There are ways that we could address that in different fashions, in terms of creating a felony penalty. One might be to address more narrowly streaming. One might more broadly address public performances in general.

Mr. NADLER. Thank you.

Ms. Wolff, the last question, how does the current remedies regime impact individual creators? And do you think that a small claims system with a reduced range of statutory damages would benefit individual creators?

Ms. WOLFF. I think it would benefit them very much because many of these individual creators haven't taken advantage of registration because it is very expensive for them to do that. And even when they do, to have one work infringed, it is a range from $750 to $30,000, and courts generally don't hand out large awards. So it is very difficult to go to court and have to pay attorney's fees.

But I think having effective enforcement actually encourages licensing and will encourage the legitimate online licensing offerings that frankly offer very reasonable license fees to use images in many of the situations where they are being used without permission.

So I think having an enforcement scheme will benefit the individual authors and also increase licensing of these images rather than encourage right-click and stealing.

Mr. NADLER. And could we make it cheaper to register?

Ms. WOLFF. I think that would be helpful and also easier if it was done within the flow and process of creation.

Mr. NADLER. Thank you very much.

My time is expired, so I yield back.

Mr. COBLE. I thank the gentleman.

The gentleman from Pennsylvania?

Mr. MARINO. Thank you, Chairman.

Mr. Bitkower, could you please tell me what, if any, prosecutions are taking place with China, with Russia, that doesn't involve China's or Russia's intellectual property, more so what involves our intellectual property, because I have the feeling—we were just talking about this a moment ago—that the Olympics, as long as it wasn't a Chinese infringement, then nothing was done about it.

Mr. BITKOWER. Thank you, sir.

And the question very accurately gets to the point that we have a very serious concern with intellectual property infringement from China, and that is across-the-board, not just in copyright but also in counterfeit goods—intellectual property, trade secret theft, et cetera.

And in fact, I think the number is over 90 percent of seizures by Customs and Border Protection for counterfeit goods are goods coming from China. So we do have a multipronged approach to that problem. We are not going to prosecute our way out of it, certainly. So we rely on public and private pressure.

We also rely on bilateral cooperation with China. That cooperation has varying levels of success, depending on the type of intellectual property you are talking about. We have had better success in areas that involve health and safety products like counterfeit airbags, for example, than we have with copyrighted goods.

But we do take a variety of approaches, and that includes prosecution. And I do highlight in my testimony one example where we did prosecute an individual who was pirating millions of dollars, $100 million worth of software, from China, who was arrested and prosecuted after coming to the United States to make an undercover sale.

Mr. MARINO. So that was done here in the United States. He was apprehended here in the U.S.

Mr. BITKOWER. That is correct. He was based in China, but he did step foot here to engage in a sale and was arrested upon making that sale.

Mr. MARINO. Did China have any response or any comment on that?

Mr. BITKOWER. I am not aware of any official response China has had, sir.

Mr. MARINO. Okay.

Ms. Wolff, you have represented artists and individuals across the board. Can you tell me on how many occasions, roughly, what percentage of your cases do end up in trial? And I am sure you petition the court for attorney's fees. What is the success rate there?

Ms. WOLFF. I would say, in a copyright infringement case, I have had no case go to trial. When you are in Federal court, the first thing the judge will try to do is try to get the case off the docket, and when you are in Federal court with RICO, tax invaders and everything else, and you are complaining someone has been using

my photograph and not paying for it, you are going to be put in a room with a magistrate, and you are going to try to get to some resolution. Or they will try to get summary judgment to at least narrow the issue, so a case can resolve more effectively.

So the issue of petitioning for attorney's fees doesn't occur because you don't usually get to do that until you go all the way through trial.

Mr. MARINO. Thank you.

Mr. Bitkower, again, I like the department's position on increasing the penalty from a misdemeanor to a felony. What impact, if any, do you think that is going to have on pirating?

Mr. BITKOWER. I think it will have an impact, sir. I think it will have an impact today, because there are streaming sites that are not, I think, being adequately deterred by the available penalties now. And I think when you look at the trends that we are seeing in online infringement, there will be an even greater shift toward streaming and away from downloading.

And in that case, it will be more important in the future than it is even today.

Mr. MARINO. Anyone on the panel, particularly the three gentlemen that I have not asked a question, give me your comments on when a case gets to trial, there is an award, if it is a jury, there is an award by jury, tell me your pros and cons on the amount of awards. Do you think that courts are just allowing juries to award unbelievable amounts for injury or not enough?

Mr. Tepp?

Mr. TEPP. The statute is designed to give the courts wide discretion. We trust the courts to get it right. I think, by and large, they do.

There are a couple cases that people like to cite because they seem like big numbers. Complaints about a particular jury verdict within the wide discretion don't prove there is anything wrong with the system. They prove that people don't like that particular jury verdict.

For the two cases you hear most often, when you actually look under the hood, those defendants were found to have willfully infringed by four separate juries of their peers. In fact, one of them even destroyed evidence and lied about it on the stand, so they weren't particularly sympathetic.

Mr. MARINO. Thank you.

I see my time has expired. I yield back.

Mr. COBLE. I thank the gentleman.

The gentleman from Michigan?

Mr. CONYERS. Thank you, sir.

Mr. Assistant Attorney General, what else can we do besides addressing the felony streaming issue? It seems to me like there is an under-prosecution. Normally, I come to the Committee complaining about overcriminalization. And now I find myself in the awkward position of saying let's make a felony of some of these misdemeanors.

Can you give me some comfort in some way?

Mr. BITKOWER. Thank you, Ranking Member Conyers.

I certainly would prefer to be on a Committee where you are recommending increases than the contrary.

I think I can give you comfort, because I think there are a number of ways that we can craft a felony penalty for streaming that is narrowly tailored to address the problem that we are seeing without sweeping too broadly into activities that should not be criminally prosecuted, and are best addressed in other ways.

One of those ways might be to craft a penalty that does not criminalize any new conduct that is not already currently criminal, and merely makes felony penalties for conduct that is already illegal and can be criminally prosecuted as a misdemeanor.

In other words, we would simply be increasing the maximum penalty that a judge could impose after hearing all of the facts upon conviction.

So that is one way we can certainly keep it narrow, and there are other ways that we could do that as well.

Mr. CONYERS. Now that I found out where you stand on overcriminalization, are there other things that we might be thinking about? Do all of you here think that we are making this a little too easy for plaintiffs to jump on the litigation bandwagon, and that we have to find some ways to make it more difficult?

Ms. WOLFF. I don't think anything is easy for plaintiffs to jump on the litigation bandwagon. I think statutory damages are very critical to the individual creators, because it empowers them to actually enforce the copyright and go to court. But what that empowers them also to do is to make a reasonable settlement.

But I think that for the individual, there are way too many hurdles, and it isn't simple enough.

Mr. CONYERS. We need to give the plaintiffs more assurance, small claims plaintiffs.

Ms. WOLFF. For the claims of relatively smaller value, there needs to be a more streamlined, efficient, less cost consuming way to go to court. You can't spend up to $1 million, if you go to trial, or hundreds of thousands of dollars just getting through discovery and summary judgment, when you are trying to collect $10,000, $20,000, or even $5,000.

And attorney's fees aren't automatic, either, so there is never a guarantee you will get that.

Mr. SIY. Mr. Ranking Member?

Mr. CONYERS. Mr. Siy?

Mr. SIY. I think when we talk about what is or isn't easy for plaintiffs, it is a mistake to lump all plaintiffs into the same boat, just as it is a mistake to lump all defendants into the same boat. There are plaintiffs for whom the current system makes the incentive to litigation a little too tempting to advance nonmeritorious claims.

I don't think that we are advocating eliminating statutory damages, but simply that the system adopts a one-size-fits-all approach to all sorts of different types of plaintiffs and defendants.

Mr. CONYERS. Mr. Bitkower, how do you think the Department of Justice is doing in keeping pace with these various technological advances and the international scale of copyright infringement? Most of it is international.

Mr. BITKOWER. That is absolutely correct, sir. And that is a result both of changes to the way we do business on the legitimate

side, as well as the increasing Internet basis of copyright piracy. We are doing the best we can, certainly.

There are narrow areas where we would like to see some additional tools. And as I have also highlighted in the testimony, there are areas where additional resources could help us make better use of the tools we already have. I am referring there particularly to the value of placing additional prosecutors overseas in high-impact areas.

Mr. CONYERS. Thank you, Chairman Coble.

Mr. COBLE. I thank the gentleman from Michigan.

We have a vote on, but the gentlelady from California has a unanimous consent request, and is recognized therefore.

Ms. LOFGREN. I appreciate that Mr. Chairman. I would like to ask unanimous consent to place in the record a statement on this topic from the Electronic Frontier Foundation.

Mr. COBLE. Without objection.

[The information referred to follows:]

Collateral Damages:

Why Congress Needs To Fix Copyright Law's Civil Penalties



July 2014

Introduction

Imagine that you run a business, and one day you ask your lawyer whether selling one of your products could lead to a lawsuit. She tells you that the product is well-designed and responsibly marketed, but there's still a chance that someone might get injured, and sue you. But then your lawyer says something crazy: she has no idea what you might have to pay if you lose. It could be $100, and it could be $10 million. And crazier still, the damages could have no relationship to the harm you caused; a person whose injuries cost $100 to fix could still get $10 million.

What are the consequences of this scenario? Any lawsuit becomes a game of chance, and losing could mean the end of your business. You might well decide you can't risk selling your product at all. When the penalties are harsh and unpredictable, a legal threat becomes a powerful weapon. Rational people will avoid even lawful, important activities for fear of massive penalties if they've miscalculated and a court rules against them.

In most areas of the law, we try to avoid this kind of unfairness and uncertainty by making sure that we tie penalties to the harm caused, with additional penalties where someone seems to have caused harm deliberately. But that's not what we do when it comes to copyright infringement. The U.S. allows copyright holders to ask for "statutory damages" of $750 to $150,000 per copyrighted work, with no guidelines and few controls over where in that huge range a given case will fall. The result is capricious, unpredictable, and often excessive penalties.

This whitepaper explains U.S. copyright law's civil penalty regime. It describes the two major problems with this regime: excessive penalties and unpredictability. It discusses the harms that flow from this broken law. Finally, it suggests some measured changes Congress can make to fix these problems.

The Law

U.S. law lets copyright holders ask for "statutory damages" in an infringement lawsuit. If a copyright holder proves its case, and asks for statutory damages, a jury decides how much the defendant must pay – anywhere from $750 to $30,000 per copyrighted work.[1] If the court finds that the infringement was "willful," the maximum per work jumps to $150,000.[2] In order to get statutory damages, the copyright holder has to register their work with the Copyright Office before the infringement happens, or within three months of the work's first publication.[3]

A copyright holder who asks for statutory damages *doesn't have to show any evidence of harm, or that the defendant made any profit from the infringement.* A copyright holder can, if she chooses, simply ask the jury to come up with a number.

Copyright holders can choose between statutory damages and actual damages right up until the court issues a final judgment.[4] That means a plaintiff can try to convince

a jury that it suffered *more* than $150,000 in actual harm per work, and still choose the automatic award behind "door number 2" if the jury doesn't buy it.

The Copyright Act doesn't give judges and juries any guidance on how to choose a number within the $750-$150,000 range. It only says that the amount should be "as the court considers just."[5]

And it's not only people who copy or use creative works that can be hit with these penalties: copyright cases are often brought against distributors, owners of technology platforms, builders of digital tools and devices, and even investors. People only indirectly involved in any actual copyright infringement can be made to pay statutory damages, often multiplied by the hundreds or thousands when their products touch many different copyrighted works.

The penalties in a copyright suit are very different from almost all other kinds of civil lawsuits. In most personal injury, breach of contract, and patent or trademark infringement cases, a plaintiff can only recover enough money to compensate her for the actual harm, and no more. In egregious personal injury cases, a jury can award "punitive damages" over and above the cost of the injury, but punitive damages are normally limited to about ten times the actual injury, at most. Even in complex federal civil suits like antitrust and racketeering, damages are limited to three times the actual injury. In all of these cases, the injury must be proved with evidence. Copyright has none of these limitations.

U.S. copyright law's massive civil penalties are also out of line with all other countries, including countries with thriving film, music, TV, and literary industries. Worldwide, only 28 countries have statutory damages for copyright. Of those, 19 are emerging or developing economies and only 4, besides the U.S., are advanced economies.[6] Only two European Union members, Bulgaria and Lithuania, have statutory damages.[7] And of the countries that have statutory damages, *every one except the U.S.* imposes limits or safeguards that avoid some of the problems described below.[8]

Supporters of the current system usually offer three justifications for it. One is that statutory damages give courts a way to compensate copyright holders in cases where it is hard to prove the harm from infringement. The second is that they can be used to punish copyright infringers who acted deliberately or maliciously. And the third is that they deter people from infringing copyrights. Let's see if these purported benefits outweigh the costs.

I. Excessive Penalties

Because statutory damages can be awarded in such a broad range, without firm guidelines or evidence requirements, penalties can be shockingly large. The pioneering digital music company MP3.com was ordered to pay over $118 million in statutory damages for creating a database of music in order to give online access for those who already owned the songs on CD. The company was forced to shut down.[9] Free Republic, a nonprofit conservative commentary website, was penalized $1 million for posting

copies of several *Washington Post* and *Los Angeles Times* articles in an effort to illustrate bias in the media.[10] And a firm sued for making copies of 240 financial news articles for internal use was ordered to pay $19.7 million, or $82,000 per infringed article.[11] The actual harm suffered by the news service in that case was probably about $60,000 *in total*.[12]

Individuals who infringe can also be on the hook, even if they have no commercial purpose. Most famously, Jammie Thomas-Rasset, a home Internet subscriber and mother of four, was assessed $222,000 in statutory damages for sharing 24 copyrighted songs using the peer-to-peer software Kazaa – $9,250 per song.[13] And a jury found Boston University undergraduate Joel Tenenbaum liable for $675,000 for sharing 30 songs.[14] Several commentators observed that whatever one's views on peer-to-peer file-sharing and infringement, these awards against noncommercial users seemed excessive. Indeed, judges in both cases found the awards excessive and unfair, and tried to reduce them.[15] One even implored Congress to reconsider copyright's penalties.[16]

Businesses connected to products or services that enable customers to interact with digital content are especially at risk of massive penalties that bear no connection to reality, because statutory damages are multiplied by the number of copyrighted works involved. For example, four major record labels sued XM Satellite Radio in 2006 over the design of a portable radio receiver with recording functions. They asked for maximum statutory damages. Given that XM broadcasted about 160,000 songs per month, a conservative estimate of the number of alleged infringements yielded a potential penalty of $37 *billion*, nearly three times the revenues of the entire recording industry.[17] The case was settled in 2007, with the threat of bankrupting damages undoubtedly playing a role.

In these and many other cases, statutory damages can reach jaw-dropping amounts that are out of proportion to any actual harm caused by infringement, and far beyond the multipliers commonly used in other areas of the law to punish and deter wrongdoing.

Notably, statutory damages are paid not to the government (as with a criminal fine) but to the copyright holder who brought the lawsuit. When statutory damages are many times the cost of the harm that the copyright holder actually suffered, the copyright holder comes out far ahead at the end of the lawsuit.

And while it's true that higher penalties will deter more people from infringing copyright – to a certain point – it's hard to see how the possibility of a $675,000 penalty will deter an individual more than a $50,000 one if either amount will cause bankruptcy. Increasing penalties beyond all reason doesn't increase deterrence.

II. Penalties Are Unpredictable

Damage awards vary widely from one copyright case to the next. With no guidelines in the Copyright Act and no requirement for plaintiffs to prove actual harm, each case becomes a roll of the dice. Anyone whose business and daily activities touch

creative works – an entrepreneur, investor, artist, or technology user – faces incredible uncertainty.

For example, a record label challenging three companies that used its recordings under similar circumstances received $10,000 per work in one case, $30,000 per work in another, and $50,000 per work in a third.[18] One photocopying service that reproduced book chapters and articles for use in student coursepacks was ordered to pay $5,000 per infringed work, while another was assessed $50,000 per work for the same conduct.[19]

It's also hard to predict when a court will label an infringement "willful," and eligible for the enhanced damages range of $30,000 to $150,000 per work. Sometimes, even a person or business that uses their best efforts *not* to infringe or encourage infringement, relying on fair use and other limitations on copyright law, is still declared a "willful infringer" and hit with massive penalties. This happened in the MP3.com case, even though MP3.com made online digital music available only to people who could prove they already owned the music on CD.

For a person who uses ten copyrighted works, being found liable for $7,500 in damages is very different from being penalized at $1,000,000. Yet both are possible – and there's little or no way to tell beforehand what a court will do. Sometimes courts hand down a massive penalty regardless of the user's motivations or attempts to comply with the law in good faith.[20]

III. Excessive and Unpredictable Penalties Undermine Copyright's Purpose

A. Copyright's Penalties Are a Roadblock for Entrepreneurship

Legal risk is often a normal part of doing business. The way most companies manage that risk is by trying to abide by the law.

But if your technology could touch copyrighted works (as many do these days), it's not always clear how the law applies. And that means companies can't figure out where and how to invest. Because massive statutory damages can be awarded even if your product has little or no impact on the market for the copyrighted works, and a good faith attempt to comply with the law (such as by adhering to copyright's fair use doctrine) might not prevent a business-killing award, innovators who don't start out in a favored relationship with major copyright holders effectively have no way to mitigate their risk at the outset – except to direct their creative energies away from many forms of information technology. And with no way to mitigate the risk of crippling damages in a lawsuit, innovators struggle to attract early investment.

The result is that today's copyright system unnecessarily restricts innovation in digital technology. In many cases, it gives major entertainment conglomerates who control thousands of copyrights a veto power over independently developed technologies that might challenge established players and create new markets for creative work.

Although there's no way to know what products and services were never brought to market because of the potential for massive statutory damages, the risks to innovation are not speculative. Innovators in digital audiotape,[21] the VCR,[22] the portable music player,[23] and digital video distribution[24] were all threatened with statutory damages. Discussing the demise of the original Napster service after a copyright suit in 2000, venture capitalists explained that investment in digital music "became a wasteland" for a decade, in part because of lawsuit risks.[25]

Rational, predictable civil damages in copyright cases would allow entrepreneurs and investors to evaluate and manage their risks up front so that innovation can flow.

B. Copyright's Penalties Chill Free Speech

Building upon the work of others is an indispensable part of art and culture. Quotation and satire are tools of political participation as well as cultural life. These activities are protected by copyright's built-in limitations, including the fair use doctrine and the ban on copyright in ideas. The Supreme Court has said that these limitations are what keep copyright law from violating the freedom of speech guaranteed by the First Amendment to the Constitution.[26] But the boundaries of fair use, and the distinction between ideas and expression, are sometimes unclear. When the consequence of crossing these sometimes fuzzy boundaries is thousands or millions of dollars in automatic damages, many people will stay away entirely.

Fair use allows a production like Comedy Central's Daily Show to compile clips of cable news broadcasts into biting commentaries on politics and the media without asking permission to use each clip. The Daily Show can rely on the vast resources and commercial relationships of a large corporate parent to mitigate the risk of statutory damages. An independent satirist lacking those resources must face the possibility of ruinous lawsuits and bankruptcy to create and share Daily Show-style video commentaries.

The same risk impedes documentary filmmakers, amateur video creators, musicians, and writers. By discouraging artists from exercising the rights that copyright reserves to them, the broken civil penalty regime chills free speech.

C. Copyright's Penalties Fuel Lawsuit Abuse

The potential for six-figure recoveries with no proof of harm attracts those who would use the legal system itself as a money-making scheme. Lawyers representing pornography producers, filmmakers, and photo agencies have filed thousands of lawsuits against Internet users across the U.S. These cases are rarely if ever tested in court. Instead, lawyers use the courts' subpoena power to identify home Internet subscribers and website owners. Then they threaten and harass their targets into paying cash "settlements" of $2,000 to $10,000.[27]

The threat of six-figure statutory damages is one of the most effective clubs wielded by these "copyright trolls" to coerce settlements. For a typical Internet user, a

threat of ruinous damages such as those awarded in the *Tenenbaum* and *Thomas-Rasset* cases is reason enough to settle a case for several thousand dollars, even when he or she did not infringe any copyrights. In these cases, statutory damages effectively nullify the procedural safeguards for defendants that Congress and the courts have created. By providing hefty, automatic monetary awards even where there is little or no financial harm, they allow unscrupulous lawyers to reap windfall profits from campaigns of lawsuit threats.

Copyright trolling is a widespread problem. Although one notorious outfit known as Prenda Law ceased its lawsuit campaign in January 2013 and was later sanctioned for fraud, copyright troll suits (identified in one study as copyright suits against multiple John Doe defendants) were nearly one-third of *all* the copyright suits filed in the U.S. in 2013. In Illinois, Indiana, and Wisconsin, these suits were over *half* of the copyright suits filed in that year.[28]

D. Copyright's Penalties Stop the Courts From Doing Their Job

Copyright's irrational and unpredictable civil penalties mean that close cases that could benefit from a court's thoughtful consideration are often settled without creating a lasting precedent. With statutory damages raising the stakes of litigation to an impossible level, the courts cannot do their job of interpreting and clarifying the law.

This is especially harmful in fair use cases. Fair use is a vitally important part of copyright. By allowing some uses of copyrighted work without permission for purposes like scholarship, criticism, commentary, journalism, and the creation of new works, fair use promotes creativity and keeps copyright in line with the First Amendment's guarantee of free speech. But fair use is a flexible doctrine developed through court cases. When the threat of statutory damages keeps potential fair users from risking a court challenge, courts are unable to develop a body of decisions to guide other would-be fair users.

Because they keep even close cases from going to court, out-of-control statutory damages also make it much harder for the courts to help fix other problems in copyright law, including the "orphan works" problem (works for which an owner can't be located to give permission) and refining fair use for the digital age. Cases that could help resolve these issues through precedent often don't get brought.

IV. Rational Remedies: What A Fix Might Look Like

One or more small changes to copyright law could go a long way towards fixing these problems.

First, Congress could remove the threat of statutory damages for people who believe, and have reasonable grounds for believing, that their use of copyrighted works is legal. This would allow artists and journalists who rely on fair use, and digital

entrepreneurs who take care not to encourage infringement by their users, to create and do business while keeping their risk manageable.

Second, Congress could require that copyright holders who bring lawsuits must present evidence of harm whenever possible. In most cases, subpoenas and other "discovery" tools of modern litigation give copyright holders the ability to gather evidence of their actual harm. In the rare cases where it's actually very difficult or impossible to prove harm, the courts could waive this requirement.

Third, Congress could reduce the maximum and minimum amounts for statutory damages in cases that involve personal, noncommercial uses of copyrighted works. A lower limit for damages in these cases could deter infringement while removing the profit motive for abusive copyright trolling.

Finally, Congress can also amend the Copyright Act to add some guidelines for judges and juries in awarding statutory damages. These guidelines would reduce uncertainty and keep penalties more predictable. For example, Israel's copyright act tells judges to look at the duration of the infringement, the severity of the infringement, the actual harm, and the infringer's good faith, among other factors.

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[1] 17 U.S.C. § 504(c)(1).
[2] § 504(c)(2).
[3] § 412.
[4] § 504(c)(1).
[5] *Id.*
[6] Pamela Samuelson, Phil Hill, and Tara Wheatland, "Statutory Damages: A Rarity in Copyright Laws Internationally, But For How Long?" 5-6, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240569.
[7] *Id.*
[8] *Id.* at 13-26.
[9] *UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00 Civ. 472 (JSR), 2000 WL 1262568, at *1, *6 (S.D.N.Y. Sept. 6, 2000).
[10] *Los Angeles Times, Inc. v. Free Republic*, 99. No. CV 98-7840 MMM (AJWx), 2000 WL 565200, at *1 (C.D. Cal. Apr. 4, 2000).
[11] *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455 (D. Md. 2004).
[12] Blaine Evanson, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL'Y 601, 632 n.203 (2005).
[13] *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012).
[14] *Sony BMG Music Entm't. v. Tenenbaum*, 660 F.3d 487, 490, 515 (2011).
[15] *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 117 (D. Mass. 2010) *vacated in part*, 660 F.3d 487 (1st Cir. 2011); *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1011 (D. Minn. 2011) *vacated*, 692 F.3d 899 (8th Cir. 2012);
[16] *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) ("The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases

. . . it would be a farce to say that a single mother's acts of using Kazaa are the equivalent, for example, to the acts of global financial firms illegally infringing on copyrights in order to profit in the securities market.").

[17] *See* https://www.eff.org/deeplinks/2006/05/record-labels-sue-xm-radio.

[18] *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560 (S.D.N.Y. 1995); *Peer Int'l Corp. v. Max Music & Entm't, Inc.*, No. 03 Civ. 0996KMWDF, 2004 WL 1542253 (S.D.N.Y. July 9, 2004); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332 (9th Cir. 1990).

[19] Compare *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1543-45 (S.D.N.Y. 1991) with *Princeton Univ. Press v. Mich. Document Servs.*, 855 F. Supp. 905, 913 (E.D. Mich. 1994) (*Rev'd*, Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1392 (6th Cir. 1996)).

[20] *Los Angeles Times, Inc. v. Free Republic*, *supra* note 10.

[21] Jube Shriver, Jr., *Battle Over Digital Audiotape: Lawsuit: Songwriter Sammy Cahn and Four Others File a Class-Action Suit Seeking to Block U.S. Sales of the Machines. They Claim Sony is Infringing On Copyrights*, L.A. TIMES (Jul. 10, 1990), *available at* http://articles.latimes.com/1990-07-10/business/fi-172_1_songwriter-sammy-cahn; *see also* CBS Songs v. Amstrad Consumer Electronics Plc, [1987] 2 WLR 1191 (House of Lords 1988) (similar suit against maker of analog audiotape recorders).

[22] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[23] *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

[24] *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

[25] Michael Carrier, "Copyright and Innovation: The Untold Story" 22, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2099876.

[26] *Eldred v. Ashcroft*, 537 U.S. 186, 219-221 (2003).

[27] *See, e.g.*, *Nu Image, Inc. v. Does* 1-23,322, 799 F. Supp. 2d 34 (D.D.C. 2011); *On The Cheap, LLC v. Does 1-5,011*, 280 F.R.D. 500, 502 (N.D. Cal. 2011); *Mick Haig Prods. E.K. v. Does 1-670*, 687 F.3d 649 (5th Cir. 2012); *Ingenuity 13 LLC v. John Doe, No. 2:12-cv-8333-ODW*, 107 U.S.P.Q.2d 1241, 2013 WL 1898633 (C.D. Cal. May 6, 2013); *Malibu Media, LLC v. John Does 1, 6, 13, 14, and Bryan White*, No. 12–2078, 2013 WL 3038025 (E.D. Pa. Jun. 18, 2013); *reFX Audio Software Inc. v. Does 1-97*, No. 13-cv-0409, 2013 WL 3766571 (E.D. Mo. Jul. 16, 2013); *Purzel Video GMBH v. Does 1-67*, No. 4:13-CV-450 SNLJ, 2013 WL 3941383 (E.D. Mo. July 31, 2013); Sean B. Karunaratne, *The Case Against Combating BitTorrent Piracy through Mass John Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283, 293 (2012); Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723 (2013).

[28] Matthew Sag, "Copyright Trolling: An Empirical Study" 24, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404950.

Mr. COBLE. Folks, we have a vote. If you all will stand easy, I hope to be back within approximately 45 minutes to 1 hour.

[Recess.]

Mr. COBLE. Pardon the delay, folks. We had a vote, as I told you earlier. Hopefully, we will finish before additional interruptions.

The Chair recognizes the gentlelady from California, Ms. Chu.

Ms. CHU. Thank you, Mr. Chairman.

As the cochair of the Creative Rights Caucus, I am very supportive of creating a small claims court, as a way for smaller and independent artists to have access to a real and affordable copyright enforcement remedy for when their works are stolen online, which often happens repeatedly, like a death by a thousand cuts.

This would especially help creators like photographers and songwriters, who are often the smallest of business owners.

The most important thing to keep in mind is that although we use the term "small claims," often, really, these claims are not small to the individual creator whose livelihood is being threatened by the theft of their work and property. That is why creating such a remedy is so important and necessary. And I look forward to working with Ranking Member Nadler on this.

Let me start off with a question to Mr. Bitkower. In your testimony, you state that DOJ works in close coordination with enforcement partners and especially with Intellectual Property Enforcement Coordinator, IPEC, in the Office of the President to develop policy and legislative proposals that preserve your ability to enforce IP rights through criminal law.

So not only does this position play an intricate role in overseeing volunteer agreements amongst stakeholders in the digital ecosystem, it also plays an important role in ensuring copyright enforcement is actually effective.

As of next month, the position will have been vacant for an entire year. What kind of accomplishments have you seen this office make? And how important is it to DOJ that this position get filled as quickly as possible? Has your enforcement coordination with IPEC been impacted by this vacancy?

Mr. BITKOWER. Thank you, Congresswoman.

Our coordination with the IP Enforcement Coordinator has been a very good one, since the position was created by statute. And as you have remarked, we do coordinate closely on issues of policy and legislation.

There has, of course, been an acting coordinator since Ms. Espinel left the position. So we have continued to work closely with them.

But certainly, the attention that it has brought to copyright issues, and, in particular, the 2011 white paper with legislative recommendations have been helpful to us.

Ms. CHU. Okay, thank you for that.

I would like to ask a question to both Mr. Schruers and Mr. Tepp. It is pertaining to the idea that statutory damages chill innovation.

Mr. Schruers, you state that under existing law, there is no situation in which a copyright holder can be undercompensated, and that the threat of high statutory damages chill the creation of innovative services.

Under our current copyright regime, however, we do see new innovative models like Netflix, which has been very successful in their businesses. And also under the current copyright regime, venture capital invested in media and entertainment sectors grew by over 50 percent. Investment in online music companies alone topped over $1 billion in 2011 and 2012.

Also, by the time that statutory damages are considered in the legal process, the court would have determined that infringement did occur. So if you are a business that plays by the rules and did not infringe on someone's property, you wouldn't have to worry about the calculation of statutory damages.

So what evidence do you have in making the argument that statutory damages chill innovation?

First Mr. Schruers, and then Mr. Tepp.

Mr. SCHRUERS. Sure. So, it is always difficult when your lawyer tells you if you are not doing anything wrong, you don't have anything to worry about. In an environment where we have very vague boundaries, abstractions inherent in the copyright system create a lot of uncertainties both around existing safe harbors in the statue, limitations and exceptions. We see cases litigated for a very long time, such as Veoh, which I mentioned earlier, where ultimately the parties were exonerated, but not before bankruptcy.

So there are a number of other examples in my testimony that identify cases, interviews with investors and entrepreneurs, who very clearly indicate that there is a lack of willingness to either invest or pursue projects that touch content because of the exposure.

It is true that we have innovation occurring today, that there are new and interesting services out there. The fact that they exist does not mean that we would not have more if these concerns did not prevail in the industry.

Ms. CHU. Mr. Tepp?

Mr. TEPP. Thank you very much. Empirically, we, certainly, do have no obvious shortage of new and innovative services. I think it is interesting to hear that the issue raised is about the substantive aspects of copyright law, and there are parts that are not 100 percent clear and fair use is one of them. I know that is something that some of the people at this table think is a very important part of fair use, probably all of the people at this table do.

But that is not what statutory damages is. So I would suggest that the answer to questions of substantive copyright law ought not dictate a lowering of the remedies for when copyright has been found to infringe.

Ms. CHU. And on the question of chilling innovation?

Mr. TEPP. On that question, from a practical standpoint, I think it is a question of who bears the risk. If a service starts up making use of copyrighted works without a license, maybe with a touch and go fair use claim, and maybe they do or don't get the safe harbor protection under Section 512, if they win, the copyright owner gets nothing. That is the way the law works.

If they lose, and they didn't have a license and it is not fair use and they are not protected by the safe harbors, then it doesn't seem to me it is fair to shave the copyright owner's compensation because of that.

Ms. CHU. Thank you. I yield back.

Mr. COBLE. I thank the gentlelady.

The gentleman from Texas, Mr. Farenthold.

Mr. FARENTHOLD. Thank you very much. I kind of want to follow up on that same line of questioning.

Historically, to infringe on a copyright, it has taken expensive equipment. You had to have a Betamax or you had to invent a Betamax, or you had to have a printing press or a copier, which back when a lot of these laws were written, it made copyright infringement on any large scale by an individual user virtually impossible. So we set high damages to deter people with resources from infringing.

Today, pretty much every home in the United States has a computer capable of making a perfect copy of a digital image. And we are seeing cases now with statutory damages, as we are seeing some of the cases from the RIAA work their way up, a $1.5 million damage award for 24 songs on Kazaa.

I mean, at the time, there were all these excesses, I think, where grandmothers were getting sued for what school-age children were doing on the computer without their knowledge.

So I guess my question is, if we were to go to some form of lower statutory damages with a small claims court, if you will, for copyright, don't you think that tens of thousands of dollars or hundreds of thousands of dollars in damage is more appropriate than millions of dollars in damages against a noncorporate or individual infringer? And I will just open that up to anybody on the panel.

Mr. SCHRUERS. If I may, I think that is very true, that the extraordinarily large judgments we see often appear inappropriate. And as I said, I think that undermines the perceived legitimacy of the IP rights system.

A way where the damages seemed more proportional to the injury that is being caused would help not only ensure the perceived legitimacy of copyright, but remove the potential due process concerns that are sometimes associated with this.

It is true that as technology is widely available and the statutory damages in the colonies were initially set, the only people who were likely to violate those were printers who owned printing presses. Now that technology is accessible to all of us.

It is necessary to tune our system appropriately.

Mr. SIY. One of the things that I thought was really interesting about the history of statutory damages is the movement from a per copy penalty to a per work penalty. Apparently, that was at the request of broadcasters in the film industry because as technology changed, it became easier for them to be found liable for these sorts of multiplying statutory damages, even if it was an inadvertent infringement. The idea being that you wouldn't have that sort of unjust multiplication, as technology had changed in the intervening years.

I think that points us in a direction that we do want to take into account the fact that whereas before it was much easier to have multiple copies of a single work being made, these days, it is actually incredibly easy for individuals to have single copies of multiple works, inadvertently or in good faith.

Mr. FARENTHOLD. Ms. Wolff?

Ms. WOLFF. I think we are almost in a way conflating two things, the need for small claims court and the amount of statutory damages now. I think statutory damages are still very relevant, and the ability to seek statutory damages for individual creators is important because there are oftentimes when it is very difficult to establish actual damages.

Mr. FARENTHOLD. Let me get to Mr. Tepp, and maybe I will have time for one more question.

Mr. TEPP. I agree with what Ms. Wolff just said. Certainly, small claims court is an appropriate avenue for qualifying claims. Some claims are larger and deserve the full availability of the range of statutory damages.

The cases you cited, we had four juries that determined, the two cases combined, that the defendants had infringed willfully. In fact, one of them lied on the stand about destroying evidence.

To the extent that anyone thinks those individual jury verdicts were not appropriate, they could have been lower under statute. They could have been higher under the statute. I think what is important for this Committee to keep in mind is that the range in the statute is not the issue, if the complaint is about where the jury fell in that range.

Mr. FARENTHOLD. I see you have successfully exhausted my time. Thank you very much.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from New York, Mr. Jeffries, is recognized.

Mr. JEFFRIES. Thank you, Mr. Chair.

And let me thank the witnesses for your presence and for your testimony here today.

Let me start with Mr. Bitkower. I wanted to re-explore the issue of streaming and the applicable penalty in some greater detail. I know it has been covered to some degree in the hearing today.

Now, under current law, unlawful reproduction and distribution we know to be a felony. And is that punishable between 3 and 10 years imprisonment?

Mr. BITKOWER. That is correct, sir.

Mr. JEFFRIES. Okay. Now, streaming, of course, under copyright——

Mr. BITKOWER. I am sorry. I didn't mean to interrupt, but it is between zero and 10 years, depending on various other factors.

Mr. JEFFRIES. Zero and 10 years.

Mr. BITKOWER. Yes.

Mr. JEFFRIES. Okay. In your experience, what is the average penalty to the extent those prosecutions took place or are continuing to take place?

Mr. BITKOWER. Sir, it is very hard to estimate an average penalty over, obviously, a broad array of cases. Certainly, within the zero- to 5-year range is the vast bulk of them. There could certainly be cases that fall above that where there is large-scale harm.

Mr. JEFFRIES. But there are instances where individuals who are found guilty, or plead guilty, are subject to a term of imprisonment and actually serve time in prison?

Mr. BITKOWER. Yes, sir.

Mr. JEFFRIES. Okay.

Now, streaming under copyright law constitutes a public performance. You pointed that out earlier, correct?

Mr. BITKOWER. Yes, probably.

Mr. JEFFRIES. At least it has been interpreted in that way, by courts and treatises, as you have indicated.

Mr. BITKOWER. Yes, and, of course, depending on the facts of any given case.

Mr. JEFFRIES. Okay. Under Section 506(a)(1) of the Copyright Act, DOJ has jurisdiction to pursue unlawful public performances that occur, correct?

Mr. BITKOWER. That is correct.

Mr. JEFFRIES. Now, if someone is convicted of illegal streaming and unlawful public performance, they are subjected to no greater than a misdemeanor penalty. That is right?

Mr. BITKOWER. That is correct.

Mr. JEFFRIES. Okay. And what is the maximum time punishable under law connected to illegal streaming?

Mr. BITKOWER. The maximum penalty of imprisonment for the misdemeanor offense under 506 is 1 year in prison.

Mr. JEFFRIES. Okay. And have there been instances where DOJ has pursued prosecution for illegal streaming, notwithstanding the fact that the maximum penalty is only a misdemeanor?

Mr. BITKOWER. There have been a few cases where we have brought charges related to illegal streaming. One of them was resolved as a misdemeanor offense.

Mr. JEFFRIES. And what was the outcome, in terms of either a fine or a term of imprisonment connected to that particular case you reference?

Mr. BITKOWER. I don't remember particularly what the sentence in that case was.

Mr. JEFFRIES. Okay. Now, does the Justice Department have any recommendations as it relates to the penalty range, to the extent that Congress determines, as I support, that illegal streaming should be punishable as a felony? Does the Justice Department have any recommendation as to what the sentencing range should be in order to ensure maximum deterrence?

Mr. BITKOWER. At this time, we don't have a particular text with particular numbers in it. We would be happy to work with the Subcommittee on that question. And I certainly think it is something that would be commensurate with the other penalties that we have in the statute.

Mr. JEFFRIES. Because it seems to me that the objective, to the extent that you would make that determination that this type of unlawful conduct should be subjected to the higher felony category, which I believe is in fact the case, that obviously the punishment that is on the books should be designed to deter the conduct from occurring, and then appropriately punish the actor thereafter.

Mr. BITKOWER. I think that is exactly right. I think the key point of our proposal is that streaming or infringement by streaming can be just as serious and, in fact, potentially even more serious than an equivalent case involving infringement by downloading, and the penalty should reflect that.

Mr. JEFFRIES. Where do things stand with the Mega Conspiracy prosecution at this point?

Mr. BITKOWER. Currently, the defendants have been indicted, as you know. Four of them are pending extradition from New Zealand.

Mr. JEFFRIES. Okay. What should this Committee consider in the context of the growing international nature of content piracy that is taking place? We have the technological challenge, that it is not as frequent as illegal reproduction and distribution. It is streaming. But we also have sort of the geographic challenge, that it is increasingly international in nature.

What should we be considering to deal with that second aspect of what we face as piracy challenges in the present day?

Mr. BITKOWER. I really appreciate the question, Congressman.

I think when it comes to the international challenge, as distinguished from the technological challenge, and, of course, those two are wrapped up together, but one of the most effective things we have found in that context is putting boots on the ground. Putting prosecutors in the high-impact regions to work with their local counterparts, either to bring local prosecutions where we can't act, to help us with our own cases, or simply to create a local capacity to deal with copyright and other intellectual property violations in those countries. I think that has been our greatest point of leverage, and we would like to see that expanded.

Mr. MARINO [presiding]. The gentleman's time has expired.

Mr. JEFFRIES. Thank you.

Mr. MARINO. The Chair now recognizes Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Before I ask the question, I have been listening and, Mr. Schruers, one of the things you just said a moment ago, it was in the midst of damages, and the amount of damages and awards. You made a comment, and I would like to get a little clarification, because I do believe that strong copyright protection is not a hindrance to innovation, but actually an encouragement to innovation. You made a statement that really, I want to make sure that we are perceiving this right.

You said it affects the perceived legitimacy of copyright. There is no "perceived legitimacy." Copyright is legitimate. And I don't think that a damage award should take away—or putting it in those terms, that seems to go away from the very fact that copyright exists. There is no "perceived." There is no "legitimacy." Copyright exists.

So I want to make sure that when we use these terms, we are not taking remedy or damage to try to sort of backdoor imply that copyright is any less powerful or needed simply because there may have been judgments that seem to be out of place.

Is that a fair statement of what you are meaning to say or what came out?

Mr. SCHRUERS. Forgive me for not entirely understanding the restatement of what I had said. If I could repeat what I said perhaps more clearly, my comment was that the perception among the public of how legitimate IP rights are will be affected by whether or not the individual judgments that issue under the system seems subjectively just.

Mr. COLLINS. We are not going to have enough time in the 5 minutes, but to actually make the public agree that there is a copyright is part of the very problem we are in right now.

And I think to say, well, because there are bad judgments, that is about like saying all tort law is bad because you have juries in Arkansas or anywhere else that give outrageous tort judgments.

I am going to leave it there for just a moment, because I do want to go back to something that has been talked about a lot, and that is the small claims process, and more specifically, a voluntary test program. I understand that probably the Department of Justice won't have an issue here, but the copyright, especially with a small claims issue, would be supporting a move—I would support a move forward potentially starting out with a pilot program for this and looking at it before fully implementing a small claims process. I do believe there are two separate issues here, the remedy and small claims.

In order for such a pilot to work, it seems the proper structure and incentives would need to be in place. I want you to give me your thoughts on specific elements that would need to be addressed.

First, do you think a voluntary pilot program is a good idea? Good idea, bad idea, sort of quickly, because I want to move to some other questions as well.

Ms. Wolff?

Ms. WOLFF. I agree it is good idea. And some of our associations recommended that we do try this. I know the U.K. has already implemented a copyright small claims, and I believe it has been successful, so I do agree.

Mr. COLLINS. Mr. Siy?

Mr. SIY. Yes, I think a voluntary pilot program would be a good idea.

Mr. SCHRUERS. I don't think CCIA has a position on it.

Mr. COLLINS. Okay.

Mr. TEPP. As long as the funding is there to stand it up, absolutely.

Mr. COLLINS. I would agree.

What about limiting the pilot program to, say, a subset of copyright infringement claims, sort of narrowing it a little bit, say to music? If we limited in that way to music, what about something like that? So again, we can get at least a look at it from maybe a subset instead of saying to everything at one time?

I will start at this end this time.

I know DOJ says, thank goodness I don't have to answer.

Mr. TEPP. There are, I think, a wide range of creators who might make use of a claims system, visual arts, photography.

Mr. COLLINS. But from a pilot program perspective, because we may or may not be able to get the whole thing, so I am wondering, would it be beneficial that we could see things in maybe a smaller form and then ramp up to a larger kind of process?

Mr. TEPP. Ideally, it would be nice to have copyright owners across the spectrum be able to use it and see if there is a difference in different categories of works in terms of its use.

Mr. COLLINS. Okay.

Mr. SCHRUERS. Acknowledging that there is no position on this, that we have no position, I would just say, when you say music, that does open a lot of questions, such as are we talking about compositions or sound recordings, and so on.

Mr. COLLINS. And that could be narrowed as the focus goes. Thank you.

Mr. SIY. Limiting it could help in sort of framing it as an experiment. On the other hand, I would want to ensure that characteristics that are specific to one particular type of copyrights aren't assumed to be overgeneralizable to the entire spectrum.

Ms. WOLFF. Well, I know the visual arts community is desperately seeking a way to try to enforce rights, if you would want to include them in a pilot.

But again, the sampling may be different. If it could be open to all individual copyright authors, I think that would be helpful, whether they are authors, musicians, visual artists.

Mr. COLLINS. Just in closing, and I think going back to where I originally started this, is one of the things that we have to, whether it is legitimacy or illegitimacy, whatever, is that when we get back to understand the copyright, no matter the art form, visual art, movie, music, whatever, when we get back to actually seeing that as thought streams and ideas, and we stop putting it in these categories of sort of music stream, download, then we can have an honest discussion that there is value to the copyright. And that is something we need.

Mr. Chairman, I yield back.

Mr. MARINO. Thank you.

Seeing no other Congressmen or Congresswomen here on the panel to ask questions, this concludes today's hearing.

Thanks to all of our witnesses for attending. Thanks to the public for being here.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional material for the record.

Mr. MARINO. This hearing is adjourned.

[Whereupon, at 4:20 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

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Association of American Publishers
Statement Submitted for the Hearing Record
House Judiciary Committee
Subcommittee on Courts, Intellectual Property, and the Internet
July 31, 2014

Hearing on "Copyright Remedies"
July 24, 2014

Introduction

On behalf of its members, the Association of American Publishers ("AAP")[1] appreciates this opportunity to place its views in the hearing record of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet ("IP Subcommittee") regarding whether current remedies provided in Title 17 are sufficient to protect the creative endeavors of copyright owners and to ensure fair compensation and deterrence when such creative works are infringed.

The hearing covered a wide array of remedies issues, from small claims to statutory damages as well as contrasting views on strengthening criminal penalties for unauthorized streaming, on one hand, and scaling-back civil statutory damages awards, on the other. AAP has previously commented on small claims, statutory damages and the concept of "copyright trolls" in separate proceedings conducted by the Copyright Office and the Department of Commerce (see links below).[2] Brief summaries of our submissions, including their relation to the Copyright

[1] The Association of American Publishers (AAP) represents over 400 publishers, ranging from major commercial book and journal publishers to small non-profit, university, and scholarly presses.
[2] *See* AAP Comments re: Copyright Office, Notice of Inquiry: Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758 (Oct. 27, 2011), submitted Jan. 17, 2012, http://www.publishers.org/_attachments/docs/copyright_policy/aapsmallclaimsc11712.pdf; AAP Additional Comments re: Copyright Office, Notice of Inquiry: Remedies for Small Copyright Claims: Additional Comments, 77 Fed. Reg. 51,068 (Aug. 23, 2012), submitted Oct. 19, 2012, http://www.publishers.org/_attachments/docs/copyright_policy/aapsmallclaimsreplyc101912.pdf (hereinafter "AAP Additional Small Claims Comments"); AAP Further Comments re: Copyright Office, Notice of Inquiry: Remedies

Office's small claims recommendations, are provided below for the convenience of the IP Subcommittee.

Small Claims

As noted at the hearing, the Copyright Office published a report in September 2013 recommending the establishment of a voluntary, yet legally binding, alternative to federal court for adjudicating copyright infringement claims of "small" economic value (*i.e.* a "small claims tribunal").[3]

AAP actively participated in the three rounds of public Comments and one of the public roundtables held by the Copyright Office on this important issue. Given the diversity of AAP's membership, from international corporations to independent presses (reflecting the fact that the majority of U.S. publishers are considered "small businesses"[4]), our Comments focused on achieving a pragmatic solution that would: (1) address our smaller members' need for effective enforcement against copyright infringements; and (2) avoid creating a new forum for the proliferation of frivolous, low-cost, legal actions that would stymie the creative industries. Throughout our Comments, AAP stressed that "devising an alternative method for adjudicating a subset of copyright claims having small economic value deserves careful consideration to ensure that *the net result strengthens copyright protections and incentives to create new works*."[5]

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for Small Copyright Claims: AAP Third Comments, 77 Fed. Reg. 13,094 (Feb. 26, 2013), submitted Apr. 12, 2013, http://www.publishers.org/_attachments/docs/copyright_policy/aapsmallclaimstrfc41213.pdf (hereinafter "AAP Third Small Claims Comments"); AAP Comments re: Department of Commerce, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Internet Economy, 78 Fed. Reg. 61,337 (Oct. 3, 2013), submitted Nov. 13, 2013, http://www.publishers.org/_attachments/docs/copyright_policy/aapgreenpaperc111313.pdf (hereinafter "AAP Green Paper Comments"); AAP Reply Comments re: Department of Commerce, Request for Comment on Green Paper, Copyright Policy, Creativity, and Innovation in the Internet Economy, 78 Fed. Reg. 61,337 (Oct. 3, 2013), submitted Jan. 17, 2014, http://www.publishers.org/_attachments/docs/copyright_policy/aapgreenpaperreplyc11714.pdf (hereinafter "AAP Green Paper Reply Comments").

[3] *See generally* Copyright Office, *Copyright Small Claims Report*, (Sept. 2013) http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf (hereinafter "Small Claims Report").

[4] The Small Business Administration determines specific size standards based on the "number of employees or average annual receipts" to set "the largest size that a business (including its subsidiaries and affiliates) may be to remain classified as a small business for SBA and federal contracting programs." U.S. Small Business Administration, *Small Business Size Standards* (last visited Jul. 31, 2014) http://www.sba.gov/content/small-business-size-standards. For a "Book Publisher" (as defined by the North American Industry Classification System code 51113) to qualify as a "small business," the SBA requires that the publisher (including its subsidiaries and affiliates) have fewer than 500 employees. U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* at 28 (effective as of Jul. 14, 2014) http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf. Under the most recent data provided by the U.S. Census Bureau, over 90% of "Book Publisher" establishments in the U.S. are small businesses and over 80% have fewer than 20 employees. *See* 2012 County Business Patterns (NAICS), U.S. Census Bureau (Mar. 2012) http://censtats.census.gov/cgi-bin/cbpnaic/cbpcomp.pl.

[5] AAP Third Small Claims Comments at 2 (emphasis added).

To be clear, AAP has not endorsed a yet-to-be determined small claims process. Below, however, we highlight many of the Copyright Office's recommendations that our previous Comments support, and a few that we cautioned against, for Congress to bear in mind should it decide to authorize the creation of a small claims process that would "enable all copyright owners to more fully realize the promise of exclusive rights enshrined in our Constitution."[6]

Copyright Office Small Claims Recommendations Supported by AAP Comments

- The tribunal should be a voluntary alternative to federal court.[7]
    - To ensure that the process is truly voluntary, Congress should only consider authorizing the creation of a small claims tribunal that adopts the "Opt-In Alternative" as opposed to the "Opt-Out Alternative" described in the Copyright Office report.[8] The "Opt-In Alternative" requires "affirmative written consent" to activate the small claims proceeding and no default judgment can be entered without such initial acceptance of the forum.

- To initiate a claim, the claimant must: (1) have already registered or applied for registration of the work(s) at issue;[9] (2) submit a statement of facts in support of the claim;[10] (3) certify the truthful and accurate nature of the submission;[11] and (4) pay a filing fee of no less than $100.[12]

- There should be no determination of willfulness[13] and total damages available should be capped at no more than $30,000 for timely registered works ($15,000 for late-registrations).[14]
    - Removing statutory damages or significantly limiting damages, as proposed by the Copyright Office, may provide a powerful incentive for potential defendants to opt-in to a voluntary small claims process.[15]

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[6] *See* Letter from Hon. Lamar Smith, Chairman of the U.S. House of Representatives Judiciary Committee, to Hon. Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office (Oct. 11, 2011).
[7] Small Claims Report at 4.
[8] *See id.* at 157-160 (explaining both the Opt-In and Opt-Out Alternative. The "Opt-In Alternative" provides that "if the respondent does not file an opt-in notice with the Board within 60 days of receiving service of process, the proceeding is dismissed without prejudice.").
[9] *Id.* at 157, proposed section 1404 "Registration Requirement;" *see also* AAP Additional Small Claims Comments at 5 (explaining that eliminating a registration "requirement within an accelerated small claims forum would likely lead to an unmanageable surge in cases.").
[10] *Id.* at 140, proposed section 1405(e) "Commencement of Proceedings."
[11] *Id.* (referencing proposed section 1405(x)(1) which states that the "Register of Copyrights shall adopt regulations concerning certification of the accuracy and truthfulness of statements made by participants in proceedings before the Copyright Claims Board."); *see also* AAP Additional Small Claims Comments at 5 (suggesting that the Copyright Office require "verification measures for paper filings.").
[12] Small Claims Report at 140, proposed section 1405(c)(3); *see also* AAP Additional Small Claims Comments at 5 (noting that "a reasonable filing fee would be a useful tool to help strike a balance between the system's appeal to claimants and the risk of spawning frivolous suits.").
[13] Small Claims Report at 138, proposed section 1403(d)(1)(A)(ii)(III).
[14] *Id.* at proposed Section 1403(d)(1)(A)(ii)(I-II).

- There should be no preliminary injunctive relief, although the tribunal "can include in its [final] determination a requirement for an infringer to cease or mitigate infringing conduct *if the infringer has agreed to do so.*"[16]

- Determinations should "be binding only with respect to the parties and claims at issue and [should] have no precedential effect."[17] Additionally, parties should be precluded from relitigating any claims or counterclaims asserted and determined by the tribunal before any other court or tribunal.[18]

- The tribunal should have "limited discovery," no formal motion practice, accept electronic document submissions, and conduct hearings through teleconference.[19]

- The Copyright Office should have authority to adopt regulations to implement the tribunal and should, after three years of operation (*i.e.* a pilot period), "issue a study regarding the use and efficacy of the [tribunal] and whether any adjustments are needed."[20]

Copyright Office Small Claims Recommendations Not Supported by AAP Comments

- Parties should be able to adjudicate a broad scope of potential claims, counter-claims and defenses, including DMCA-related claims as well as the fair use defense.[21]
    - AAP recommended against allowing the fair use defense as its fact-specific nature runs counter to the limited discovery envisioned for this process.[22]
    - Without question, rights holders need better tools to secure effective copyright enforcement online. Whether the small claims forum is the appropriate place to create such new tools is a question for further discussion.[23]

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[15] *See* AAP Additional Small Claims Comments at 3-5.
[16] *See* Small Claims Report at 138, proposed section 1403(d)(2) (emphasis added). In our Comments, we stressed that the small claims forum should not be allowed to award any type of preliminary injunctive relief due to: (1) its tendency to undermine the limits of a damages cap; and (2) the structural limitations of the forum, *i.e.*, expedited proceedings, extremely limited discovery, *pro se* claimants and defendants, the equitable nature of the remedy which is the province of the federal courts, etc. *See* AAP Third Small Claims Comments at 3.
[17] Small Claims Report at 4 (emphasis added) (explaining the general effect of proposed section 1406).
[18] *Id.* at 159, proposed section 1406(a).
[19] *Id.* at 157-158 (emphasis added)(explaining the conduct of proceedings provided for in proposed section 1405).
[20] *Id.* at 161 (emphasis added) (explaining proposed section 1409) (emphasis added); *see also* AAP Additional Small Claims Comments at 10 (suggesting a "3 year time-frame for [a] pilot version of the small claims tribunal, followed by the Copyright Office's review and request for public comment on its functioning and further refinement or, potentially, discontinuation.").
[21] Small Claims Report at 137-138, proposed section 1403(c).
[22] AAP Additional Small Claims Comments at 4-5.
[23] AAP Third Small Claims Comments at 4.

- "The Opt-Out Alternative," provides that "if the respondent does not opt out within 60 days of service, the proceeding is deemed an active proceeding and the respondent will be bound by the result."[24]
    - Publishers acknowledge the challenge of obtaining voluntary affirmative consent from an alleged infringer, however, the best approach will likely be to provide meaningful incentives (e.g. a low total damages cap) and, potentially, penalties to encourage good faith participation in the forum.[25]

- The tribunal could issue default determinations as well as determinations based upon failure to prosecute.[26]
    - It is unclear whether default judgments issued under an opt-out system would be constitutionally valid.

In general, the Copyright Office report offers a number of sound recommendations to create a streamlined and cost-effective alternative for pursuing small claims with measures to prevent opening the floodgates to frivolous claims. Should Congress decide that the small claims issue merits Congressional action, AAP's remaining concerns could potentially be addressed by authorizing a narrow, opt-in, pilot program, focused on the simplest claims.[27] Limiting the *scope* of permissible *claims*, as opposed to potential *claimants*, as recommended by the witnesses at the hearing,[28] would allow the Copyright Office to assess the efficacy and practicability of the program for different types of creators and address particular shortcomings before implementing a full-scale program. This approach seems preferable to limiting the pilot to a single type of creator—for instance, musicians—which could lead to inaccurate predictions about the efficacy of a broader program for all creators.

Statutory Damages

In AAP's November 2013 Comments submitted to the Department of Commerce in response to its *Green Paper*,[29] we supported the Department's position that "in the online

[24] Small Claims Report 157-158 (emphasis added).
[25] AAP Additional Small Claims Comments at 3.
[26] Small Claims Report at 147-149, proposed section 1405(t)-(u).
[27] *See* AAP Additional Small Claims Comments at 4-5 (suggesting potential threshold requirements to ensure that only relatively "simple" claims are reviewed by the tribunal and noting that the expedited adjudications of the small claims tribunal should be limited to copyright claims that "are severable from related contract, licensing and trademark claims."); AAP Third Small Claims Comments at 2-3 (noting that "contract and licensing arrangements should be admissible evidence to defend against allegations of infringement, for instance where a contract precludes a party from asserting a copyright claim or where the particular conduct at issue is within the scope of a license.").
[28] *See Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) http://www.ustream.tv/recorded/50477847 (Oral Statements of Nancy Wolf and Steven Tepp noting the potential unintended consequences of narrowing the type of claimants that have access to the pilot program, advocating instead for broader access in response to Rep. Doug Collins' question: "What about limiting the pilot program to say a subset of copyright claims—say, music?").
[29] AAP Green Paper Comments at 9-10.

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."[30] However, the difficulty of proving actual damages is not the only reason Congress provided for statutory damages as an appropriate remedy for copyright infringement.

Congress also intended statutory damages to serve as a deterrent, or as the Supreme Court put it, "a punishment for the violation of a public law, [the amount of which] the Legislature may adjust…to the public wrong rather than the private injury."[31] Furthermore, while publishers recognize that "there are…arguments about…the need for a proportionate level of deterrence,"[32] the Supreme Court in *St. Louis IM & S. Ry. Co. v. Williams* confirmed that nothing requires that statutory damages "be confined or proportioned to [the aggrieved party's] loss or damages."[33]

To be sure, in *two* cases, unbiased juries decided to award copyright holders statutory damages that were characterized by the defendants as "unconstitutionally large."[34] The appellate courts in both cases, however, rejected such Due Process claims, and the Supreme Court has found no reason to question these decisions.[35] Importantly, both appellate decisions noted that one of the reasons Congress raised the statutory damages limits in 1998, was to create a "more effective deterrent in response to widespread copyright infringement on the Internet."[36]

If anything is clear from the Department of Commerce's *Green Paper*, it is that, since 1998, technology has only become more efficient and effective at distributing copyrighted content, with or without authorization, and that such technology has become far more commonly and widely used.[37] Therefore, Congress's original rationale for providing statutory damages, along with its rationale for raising the limits of such damages, has been strengthened rather than diminished.

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[30] 78 Fed. Reg. 61,337, 61,339.
[31] *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919); *see generally, Sony BMG Music Entertainment v. Tenenbaum*, No. 12-2146 (1st Cir. 2013); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012).
[32] 78 Fed. Reg. 61,339 (citing Green Paper at 52).
[33] *Williams*, 251 U.S. at 66.
[34] *See generally*, Pam Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53 (2009), http://pennumbra.com/debates/pdfs/CopyrightDamages.pdf.
[35] *See generally, Sony BMG Music Entertainment v. Tenenbaum*, 660 F3d 487, 508 (1st Cir. 2011), *cert denied*, 132 S Ct 2431 (2012); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012), *cert. denied* (Mar. 18, 2013).
[36] *See Sony BMG Music Entertainment v. Tenenbaum*, 660 F.3d 487, 500 (1st Cir. 2011) (stating that "Congress increased the minimum and maximum statutory awards under the Copyright Act because of new technologies that would allow Internet users to steal copyrighted works); *see also Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012).
[37] *See e.g.*, Department of Commerce, Internet Policy Task Force, "Copyright Policy, Creativity, and Innovation in the Digital Economy" at 1, July 31, 2013 http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf (stating that "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.").

In this context, AAP believes that recalibrating statutory damages to correspond to some pre-determined notions of proportionate deterrence, with respect to individual file sharers or online services, would be an imprecise and, ultimately, arbitrary task that would undermine the intentions of Congress to entrust the courts and juries with discretion to award statutory damages, as appropriate, taking into consideration the specific facts of each case. Furthermore, it is AAP's position that the current range of statutory damages provided under the Copyright Act is broad enough to apply fairly to individual file sharers and online services and does not require amendment.[38] Lastly, to the extent that any jury awards may be "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable,"[39] the safeguards of *remittitur* and appeal will continue to provide appropriate checks available to defendants and the courts to ensure the constitutionality of such awards.

"Copyright Trolls"

In AAP's January 2014 Reply Comments on the *Green Paper*, publishers rejected "the notion that the current availability of statutory damages has "spawned a litigation business model" to pursue baseless legal claims.[40] Although witnesses at the IP Subcommittee hearing argued that the *Righthaven* case illustrates a serious problem in need of Congressional attention,[41] AAP explained why this and the Prenda Law cases actually illustrate that judges are using existing judicial authority to sanction such behavior.[42]

In *Righthaven v. Hoehn*,[43] the Ninth Circuit affirmed the district court's finding that an assignment merely granting plaintiffs the bare right to sue for copyright infringement of a number of newspaper articles was invalid – setting a clear precedent against this type of "litigation business model." Also in 2013, judges in Minnesota, California and Illinois sanctioned attorneys affiliated with the firm Prenda Law[44] for filing baseless copyright

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[38] The Copyright Act provides for statutory damages between $200 and $150,000 for each violation, taking into account whether the infringer acted willfully or in good faith and even allows a judge to remit such damages in certain cases involving employees of nonprofit educational institutions, libraries, archives and public broadcasters where the infringer believes and had reasonable grounds to believe the use was fair use. 17 U.S.C. § 504.
[39] *Williams*, 251 U.S. at 66-67.
[40] *See* AAP Green Paper Reply Comments at 14-15 (citing the INTERNET ASSOCIATION, Green Paper Request for Comments at 4 (Nov. 13, 2013) http://www.ntia.doc.gov/files/ntia/internet_association_comments.pdf).
[41] *See e.g. Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) http://judiciary.house.gov/_cache/files/3b3d6a5e-7304-4f9a-8821-7018b79e096f/schruers-ccia-remedies-testimony.pdf (Written Testimony of Matt Schruers at 3-4).
[42] *Id.* (citing Federal Rule of Civil Procedure 11 which allows a court to "impose an appropriate sanction [i.e., one that will "deter repetition of the conduct or comparable conduct by others similarly situated"] on any attorney, law firm, or party" that pursues a frivolous or improper case or makes false statements to the court.).
[43] *Righthaven, LLC v. Hoehn*, No. 11-16751, slip op. at 12, 13 (9th Cir. Feb. 5, 2013); *Righthaven, LLC v. Wolf*, Case No. 11-cv-00830-JLK, (D. Colo. September 27, 2011).
[44] Prenda Law generated revenue by "suing thousands of Internet users over allegations of illegal porn downloads." *See* Joe Mullin, *Unhappy Thanksgiving for Prenda Law Ordered to Pay 261K to Defendants*, ARS TECHNICA (Nov. 29, 2013) http://arstechnica.com/tech-policy/2013/11/unhappy-thanksgiving-for-prenda-law-ordered-to-pay-261k-to-defendants/.

infringement and secondary liability claims or, as one judge put it, "[using] copyright laws to 'plunder the citizenry'"[45] and show "serious and studied disregard for the orderly process of justice."[46] Sanctions from these three courts included making the plaintiffs personally liable for repaying various defendants' attorneys' fees (totaling over $261,000) and "being referred to state and federal bars, the United States Attorney in at least two districts, one state Attorney General, and the Internal Revenue Service."[47] These decisions indicate that the judicial system within which copyright litigation operates already provides strong deterrents against any perceived development of a copyright-based "'litigation business model."

Judges across the nation thus appear to be using available measures to sanction counsel that pursue baseless claims, which are certainly not limited to copyright cases. Furthermore, as highlighted by the Copyright Office recommendation to create a small claims process, federal copyright litigation is usually an expensive and time-consuming process. Coupled with its uncertain results and common disruptive effect on business, it seems illogical for legitimate businesses to pursue baseless litigation. Thus, AAP sees no reason to amend the Copyright Act to combat a "litigation business model" that is, if it exists at all, being pursued only by a small handful of miscreants and effectively addressed by the federal courts through the application of existing federal statutes and rules authorizing judicial sanctions.

Conclusion

AAP thanks the IP Subcommittee for holding this hearing on copyright infringement remedies. We look forward to continued engagement with the IP Subcommittee as it undertakes future hearings on other copyright issues.

Sincerely,

Allan Adler

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[45] *Ingenuity 13 LLC v. John Doe*, Case No. 12-cv-8333-ODW, 2013 WL 1898633, at 1-2*, *5 (C.D. Cal. May 6, 2013).
[46] *AF Holdings, LLC v. John Doe(s)*, Case No. 12-cv-1445-JNE-FLN, (D. Minn. November 6, 2013), ECF No. 67; *Lightspeed Media Corp. v. Smith*, Case No.12-cv-00889-GPM-SCW, (S.D. Ill. November 27, 2013).
[47] *Lightspeed Media Corp. v. Smith*, Case No.12-cv-00889-GPM-SCW, (S.D. Ill. November 27, 2013) (internal citations omitted); *see also*, Mullin, *supra* note 63.



Statement For The Record of Sandra Aistars,
Chief Executive Officer, Copyright Alliance

Before The House Judiciary Committee
Subcommittee On Courts, Intellectual Property And The Internet

Copyright Remedies

July 24, 2014

The Copyright Alliance is a nonprofit, nonpartisan membership organization dedicated to promoting the ability of creative professionals to earn a living from their creativity. We represent the interests of creators and copyright owners across the spectrum of creative disciplines.

Copyright is the foundation for a market of cultural, educational, and scientific works, one that in 2012 contributed over one trillion dollars to the U.S. economy and directly employed 5.4 million workers.[1] It is an economic asset, sometimes the only asset a creator has in negotiating with a distributor of their works – whether that distributor is an internet company or a traditional media company. If copyright is weakened or if it becomes harder for the creator to obtain or maintain its protections, both the creator's negotiating position and the value proposition for the distributor are diminished.

Copyright protection promotes freedom of expression and individual autonomy. The Supreme Court has said, "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[2] Internationally, the right

[1] STEPHEN SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2013 REPORT 5, 10-11 (IIPA 2013).
[2] Harper & Row, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985).

of creators "to benefit from the protection of the material and moral interests resulting from any scientific, literary or artistic production" is recognized as a human right.[3] Copyright empowers creators to choose how and when to release their work to the public, according respect for individual voices while also allowing flexibility to construct a range of business models that meet consumer interests. Empowered creators benefit the public at large by making more and better quality contributions to our society's cultural life.

A right which cannot be adequately enforced is illusory. Unfortunately, it has become increasingly difficult to enforce copyright, particularly for individual creators and small businesses. Two areas concerning copyright remedies which are of particular interest to members of the Copyright Alliance are (1) better options for addressing copyright claims of relatively small economic value; and (2) ensuring continued availability of statutory damages to provide meaningful remedies for copyright owners where actual damages would be inadequate as a remedy or hard to prove.

Addressing Copyright Claims of Small Economic Value

It is particularly difficult for copyright owners to enforce claims against infringers who make unauthorized online displays and reproductions of works where such uses, if licensed, may be of relatively small economic value. For example, works of visual art such as photographs and literary works such as articles are often used without permission in their entirety on web sites. The creators of those works may have little practical recourse against such infringers because cease-and-desist letters are routinely ignored and DMCA notices have little effect.

Because copyright is a federal act and all claims must be brought in federal court, where claims of relatively small economic value are at issue, it is rarely economically viable to hire an attorney to navigate the federal system, pay the federal court filing fees, and proceed with litigation that may involve lengthy and burdensome discovery, motions practice and a jury trial. These costs almost invariably exceed the expected licensing

[3] International Covenant on Economic, Social and Cultural Rights art. 15, Oct. 5, 1977, 993 U.N.T.S. 3 (signed but not ratified by the U.S.).

revenues and damages due to these authors. In many instances, works created by individuals or small businesses will not have been registered until the infringement is found, eliminating any statutory damages or attorney's fees. If there are no profits associated with the infringer's use, the copyright owner may be entitled only to licensing fees. The licensing fees associated with the online use of such a work will, in most instances, never justify the costs, time, and human resources that are required in a federal action, which can exceed hundreds of thousands of dollars and take a number of years to conclude. As a result, many legitimate claims are not pursued and respect for the rights of creators continues to be eroded.

We welcome the recommendations of the Copyright Office in its Small Claims Study, and suggest that in implementing any such recommendations, the Subcommittee strive to meet at least the following goals:

- Appropriately limit the scope and nature of claims
- Encourage the creation of new copyrighted works and authorized derivative works
- Provide effective remedies to plaintiffs, and incentivize participation by defendants
- Deter copyright infringements, and encourage licensing of copyrighted works
- Be cost-effective and efficient for all parties
- Discourage frivolous or "nuisance" claims

The Importance of Statutory Damages to Individuals and Small Businesses

Statutory damages are most important to individual creators, a group that is typically overlooked in discussions about remedies. The availability of statutory damages is often a threshold question for an individual creator deciding whether or not to pursue an infringement claim in federal court, given the extremely high costs involved. Eliminating or limiting this recourse deprives these creators of effective remedies for infringement of their works.

Statutory damages are a positive feature of copyright law, enabling meaningful remedies for creators and affording courts flexibility in a variety of situations. Particularly in copyright infringement cases, actual damages are very difficult to prove. Moreover, even when actual damages can be proven, they are often less than the cost of detecting and investigating infringements. The current statutory damages regime is appropriate, necessary, and need not be recalibrated.[4]

History and Role of Statutory Damages

The availability of damages set by statute has been a feature of U.S. copyright since before the first federal Copyright Act. Five of the twelve original colonies that passed copyright statutes before the Constitutional Convention had pre-established damages provisions.[5] The 1790 Copyright Act provided for such damages, as did every revision since. In the Copyright Act of 1895, Congress for the first time departed from the traditional manner of calculating damages per infringing *copy* to adopt the per infringed *work* standard that is still used today. When adjusted for inflation, the current range of statutory

[4] In the context of the Department of Commerce "Green Paper" roundtables, the Stanford Center for Internet & Society and the Electronic Frontier Foundation have proposed that "plaintiffs seeking statutory damages should be required to produce evidence of their actual harm, or the infringer's profits, to the extent such evidence is reasonably available. If a plaintiff does not produce such evidence, or in the alternative, demonstrate to the court's satisfaction that such evidence cannot reasonably be obtained, statutory damages should be limited to the minimum amounts."[4] Such a proposal would further put effective remedies for infringement out of reach of individuals and small businesses by imposing on them a requirement to assume legal expenses for an extensive damages phase of litigation. In other contexts, damages phase litigation can be as lengthy and exhaustive as the merits phase of a case. Casting such an onerous burden on creators and the courts will thwart the availability of appropriate legal recourse in meritorious cases. As a side note, commenters are incorrect when they say "this was the rule that applied under the U.S. Copyright Act as it existed before 1978." The U.S. Copyright Office noted in its 1956 revision study on damages, "There are several conflicting decisions on the question whether statutory damages may be awarded when actual damages or profits can be assessed."[4] Later decisions suggest they may: "if either profits or actual damages or both can be ascertained, the trial court has discretion to award statutory damages."[4] More importantly, as stated above, the very purpose of setting damages available by statute is to provide relief precisely when actual damages cannot be easily established or proven. Courts currently retain the ability to consider actual damages involved when awarding statutory damages; no further legislative fixes are needed.

[5] William S. Strauss, U.S. Copyright Office, *Studies on Copyright Law Revision Prepared for the Sen. Subcomm. on Patents, Trademarks, and Copyrights: The Damage Provisions of the Copyright Law (Study No. 22)* 1 (1956) [hereinafter *Study No. 22*] (stating that as a result of a 1783 Congressional resolution recommending states the adoption of copyright statutes, Massachusetts, New Hampshire, Rhode Island had statutorily provided minimum and maximum damages for copyright infringement; while Maryland and South Carolina had a fixed sum to be paid for each infringing sheet).

damages is in line with, or in some cases lower than, statutory damages under the 1909 and 1976 acts.[6]

Statutory damages are intended as a substitute for actual damages, primarily serving a compensatory and deterrent role, rather than punishment on top of ordinary damages. A report by the Register of Copyrights during the revision effort that led to the Copyright Act of 1976 details the principles underlying statutory damages: assuring adequate compensation to a copyright owner for her injury and deterring infringement.[7] As the report says, it is difficult to establish the value of a copyright and the loss caused by infringement. Many times the only direct loss that can be proven is the amount of a license. If awards were limited to this amount, it would invite infringement because the risk of loss to the infringer would be negligible. Just as inadequate would be an award solely of an infringer's profits, which may be impossible to compute or not an accurate measure of the copyright owner's injury.[8]

Statutory damages are also legally and constitutionally sanctioned. There is little question that legislatures can set the amount of civil damages by statute. The Supreme Court has long held that such damages need not correspond to actual damages, particularly where the damages involve a public wrong rather than a private injury.[9] "The protection of copyright," as the Eighth Circuit has said, "is a vindication of the public interest."[10] Both appellate courts that have considered the constitutionality of copyright's statutory

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[6] Thomas Sydnor & Debbie Rose, *Capitalist Copyrights: A Republican Reply to "Three Myths about Copyright*, COPYRIGHT ALLIANCE (Dec. 5, 2012), https://copyrightalliance.org/2012/12/capitalist_copyrights_republican_reply_three_myths_about_copyright?page=show#.UrzuXvRDu3Y.

[7] *See Study No. 22, supra* note 46.

[8] *See* Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952) ("... a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.").

[9] St. Louis IM & S. Ry. Co. v. Williams, 251 U.S. 63, 66 (1919).

[10] Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 909-10 (8th Cir. 2012).

damages for individual file sharers have held that such awards are consistent with the Due Process Clause.[11]

Statutory Damages Are Appropriate In Cases Involving Individual Infringers As Well As Intermediaries

The current range of statutory damages remains vital to providing meaningful protection, especially in the online environment. Education about legal options for accessing content and cross-industry voluntary initiatives, like the Copyright Alert System, are other important methods used to direct individuals away from infringement. Nevertheless, there is no compelling reason to recalibrate statutory damages in cases of individual file sharers.

The current range of statutory damages is flexible enough to tailor remedies for individual file sharers in light of factors that the fact-finder finds appropriate. The Eighth Circuit has remarked,

> By its terms... the statute plainly encompasses infringers who act without a profit motive, and the statute already provides for a broad range of damages that allows courts and juries to calibrate the award based on the nature of the violation. For those who favor resort to legislative history, the record also suggests that Congress was well aware of the threat of noncommercial copyright infringement when it established the lower end of the range. Congressional amendments to the criminal provisions of the Copyright Act in 1997 also reflect an awareness that the statute would apply to noncommercial infringement.[12]

Moreover, courts are not without guidance when awarding damages. In *Sony BMG Music Entertainment v. Tenenbaum*, one of only two record label individual file sharing lawsuits to reach trial, the jury awarded $22,500 per infringed work for thirty works after finding the defendant's violations were willful (an award that is only 15% of the statutory maximum).[13] The jury was instructed to consider the following factors from a non-exhaustive list given by the court: "the nature of the infringement; the defendant's purpose

[11] *See* Sony BMG Music Entertainment v. Tenenbaum, 719 F.3d 67, 71-72 (1st Cir. 2013); Thomas-Rasset, 692 F.3d 899, 907-10.
[12] Capitol Records, Inc. v. Thomas-Rasset, 692 F. 3d 899, 908-09 (8th Cir. 2012).
[13] 719 F. 3d 67, 68 (1st Cir. 2013).

and intent; the profit that the defendant reaped, if any, or the expense that the defendant saved; the revenue lost by the plaintiff as a result of the infringement; the value of the copyright; the duration of the infringement; the defendant's continuation of infringement after notice or knowledge of copyright claims; and the need to deter this defendant and other potential infringers." The award reflected, among other things, the defendant's own admission during trial that he had distributed thousands of recordings beyond the thirty at issue and the fact that the defendant was not simply downloading but also uploading and making the songs publicly accessible online. Hence it is unnecessary to add any required "guidelines" for fact-finders to apply when awarding statutory damages. Doing so would decrease flexibility without resulting in more just results than juries have so far provided.

The current statutory damage provisions are also appropriate for dealing with secondary liability by intermediaries. The availability of statutory damages in this context may well be more important than ever. Copyright Alliance members partner with innovative startups to provide users with new, exciting ways to disseminate works. However, a small minority of businesses adopt an aggressive "it's better to ask forgiveness than permission" posture when it comes to creating platforms that exploit creative works—and then claim that copyright and statutory damages are chilling innovation when copyright owners take reasonable steps to protect their work. Statutory damages against indirect infringers protect legitimate services that partner with creators to provide sustainable and convenient platforms for consumers to access the creative works they love. The availability of damages deters unfair competition that would otherwise undermine the ability of legitimate services to succeed.

The sheer number of online services from the U.S. that have flourished online suggests that the potential availability of statutory damages is not hindering the development of new, legitimate services. At the same time, online infringement continues to increase at a significant rate,[14] meaning the deterrent effect of statutory damages

[14] DAVID PRICE, NETNAMES, SIZING THE PIRACY UNIVERSE 2 (2013).

remains necessary. For every infringing site like IsoHunt[15] and Hotfile[16] that goes offline, there are hundreds, thousands even, of illegitimate services that continue to operate—Google alone reports dozens of domains that receive over 100,000 takedown notices each month.[17] Statutory damages work effectively to the extent that they deter the development of services that exploit creators' works outside the bounds of copyright law.

Warnings about the "chilling effect" of statutory damages on new services should be taken with a grain of salt. The National Venture Capital Association (NVCA) warned in 2005 that a Supreme Court decision holding P2P file sharing service Grokster liable for inducing massive amounts of copyright infringement would have a chilling effect on investment in digital services.[18] The Supreme Court ultimately did hold Grokster liable,[19] but contrary to the NVCA's prediction, venture capital investment in the media and entertainment sector grew by over 50%; investment in online music companies alone topped over $1 billion in 2011 and 2012.[20] Put simply, there is no evidence to suggest similar predictions today are any more accurate. To the contrary, the growth of both online services and employment in the creative industries indicates that innovation is not being stifled.

Finally, while copyright owners who depend on the availability of statutory damages to defend their legitimate rights are concerned that a small number of unscrupulous entities are pursuing actions against individual file sharers for the purpose of extracting quick settlements rather than vindicating their rights, these appear to be nothing more than isolated instances of overly aggressive litigators, and there is no evidence that they are a result of copyright law in general or the current statutory damages regime in particular. Moreover, courts are already employing sanctions against such bad actors. For instance, in

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[15] Simon Pulman, *Columbia Pictures Industries v. Fung: IsoHunt Found Liable for Contributory Infringement*, CDAS IP, ENTERTAINMENT, AND MEDIA LAW BLOG (Apr. 9, 2013), http://cdas.com/columbia-pictures-industries-v-fung-isohunt-found-liable-for-contributory-infringement-2/.

[16] Todd Spangler, *Hotfile Shuts Down After $80 Mil MPAA Piracy Settlement*, VARIETY (Dec. 4, 2013, 10:18 AM), http://variety.com/2013/digital/news/hotfile-shuts-down-after-80-mil-mpaa-piracy-settlement-1200918378/.

[17] *See* GOOGLE, TRANSPARENCY REPORT: REQUESTS TO REMOVE CONTENT DUE TO COPYRIGHT (last visited JUL. 23, 2014), http://www.google.com/transparencyreport/removals/copyright/?hl=en.

[18] *See* Brief of the Nat'l Venture Capital Ass'n as Amicus Curiae for Respondents at 6, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

[19] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 941 (2005).

[20] Steven M. Marks, *Debunking the "Stifling Innovation" Myth: The Music Business's Successful Transition to Digital*, 2013 WIS. L. REV. 21 (2013).

Ingenuity 13 LLC v. Doe,[21] the District Court for the Central District of California relied on Federal Civil Procedure Rule 11 to rule against a group of abusive litigants. The court awarded attorney fees and punitive damages to the defendants based on "plaintiffs' brazen misconduct and relentless fraud" to the court. The court also referred plaintiffs to their respective state and federal bars, the District Standing Committee on Discipline, the U.S. Attorney for the Central District of California, the Criminal Investigation Division of the Internal Revenue Service, and notified all judges before whom the plaintiffs had pending cases. Copyright owners as a whole should not be punished for the short-lived, ill-advised litigation tactics employed by a small number of individuals, since judicial safeguards against these sort of actions are already readily available and used by courts when appropriate.

[21] No. 2:12-cv-8333-ODW(JCx), slip. op. at 10, 11 (C.D. Cal. May 6, 2013).



BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

HEARING ON COPYRIGHT REMEDIES

STATEMENT OF THE LIBRARY COPYRIGHT ALLIANCE

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than 2 billion times each year. This statement proposes amendments to the provision of Title 17 relating to statutory damages to make them less onerous on libraries.

As LCA indicated in the context of the hearing on preservation and reuse, the courts have self-corrected one of the serious problems relating to copyright remedies: the granting of an automatic injunction on the finding of infringement. Following the Supreme Court's decision in *eBay v. MercExchange*, 547 U.S. 388 (2006), courts in copyright cases now consider the four factors traditionally employed to determine whether to enjoin conduct, including whether the injury was irreparable and whether money damages were inadequate to compensate for that injury.[1] Nonetheless, another controversial feature of the copyright remedies system, statutory damages, remains.

[1] *See, e.g, Salinger v. Colting*, 607 F.3d 68 (2nd Cir. 2010).

With potential liability of $150,000 per work infringed, the threat of enormous damages exacerbates other flaws of the copyright system, such as long copyright terms and orphan works. Legal scholars have identified numerous problems with the statutory damages framework that necessitate comprehensive reform.[2] The risk of high statutory damages has been shown to deter investment in new technologies.[3] Further, the possibility of windfall profits from statutory damages incentivizes "copyright trolls."[4] Rather than address all the issues relating to statutory damages, this statement focuses on the inadequacy of the existing limitation on statutory damages against libraries and archives.

When Congress enacted the statutory damages framework in 17 U.S.C. §504(c)(2), it recognized "the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part," where the threat of statutory damages could deter lawful activities that involve the use of

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[2] *See, e.g.*, Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009); J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004).

[3] See Michael Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 944 (2012); Matthew Le Merle et al., Booz Allen & Co., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (2011), *available at* http://www.booz.com/media/file/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf.

[4] *See Brownmark Films v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012). While the Copyright Act provides potentially onerous statutory damages for infringement that might far exceed actual damages, it does not provide remedies for knowing misrepresentations of claims of infringement (except in the section 512 context). This imbalance in current law and the chilling effects it creates require redress. To initiate and inform that process, the subcommittee should hold a hearing on copyright trolls, misrepresentation, and other forms of copyright misuse as part of its ongoing copyright review.

copyrighted works.[5] Accordingly, Congress required a court to remit statutory damages when a library, archives, educational institution, or public broadcasting entity believed and had reasonable grounds for believing that its use of a copyrighted work was a fair use. The plaintiff bears the burden of proving that such entities did not act in good faith.[6]

However, this safe harbor applies to libraries, archives, and educational institutions only with respect to their infringement of the reproduction right.[7] This means that the safe harbor does *not* apply to a library's infringement of the performance, display, distribution, or derivative work rights. As a result, the safe harbor provides little benefit, particularly for Internet uses that involve the performance or display of a work on a website.

The safe harbor needs to be updated to reflect the digital era. It should apply whenever the entity had a reasonable belief that *any* type of use of *any* type of work was non-infringing. It also should be expanded to include museums. For these entities to perform their critical public service missions in the 21st Century, the safe harbor must be amended to apply to innocent infringement by these entities of all exclusive rights with respect to all kinds of works.

July 23, 2014

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[5] H.R. Rep. No. 1476, 94th Cong. 2d Sess. 163 (1976).
[6] *Id.*
[7] The limitation applies even more narrowly to public broadcasters; they are shielded only with respect to performances of published nondramatic literary works or reproductions of a transmission program embodying a performance of such a work.



July 31, 2014

The Honorable Howard Coble
Chairman
House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet
Washington, D.C. 20515

Dear Mr. Chairman:

Minor League Baseball™ (MiLB) is the governing body for affiliated professional baseball. It is comprised of 205 teams in 17 leagues that play in the United States, Canada and Mexico at the AAA, AA, A and rookie levels, and consists of more than 5,700 active players. MiLB is pleased to submit these comments with respect to the hearing on copyright remedies held last week by the Subcommittee on Courts, Intellectual Property and the Internet. We respectfully request that this statement be made part of the Subcommittee's formal hearing record.

MiLB is writing in support of an amendment to federal law that makes illegal streaming of copyrighted works a felony under appropriate circumstances—a subject that was mentioned at several points during last week's hearing. MiLB's endorsement of such an amendment stems from its (1) aggressive adoption of, and investment in, streaming technology; and (2) concern that without appropriate congressional intervention, large-scale, unauthorized commercial streaming will dampen, if not eviscerate, their incentive to continue to invest in providing online access to their games.

Digital streaming technologies are reshaping consumer viewing habits, and evidence is mounting that the ability to watch live sports programming online is the driving force in this viewing revolution.[1] As the streaming of this year's Sochi Olympics, the NCAA basketball tournament, the World Cup, Major League Baseball's ("MLB") All Star Game and other sporting events demonstrates, streaming of live sporting events is growing exponentially, particularly via mobile devices.[2] Minor League Baseball is no exception.

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[1] According to the recent Adobe Digital Index Benchmark Report analyzing digital video trends in 2012 and 2013, "sports viewing is the engine behind digital video growth … ." Adobe also reported that sports events accounted for 37 percent of all streams, compared to 32 percent for news programs and 28 percent for TV shows, sports video streams increased 640 percent, year-over-year--compared to an overall growth of 440 percent for all types of content--and one quarter of all sports digital viewing now happens on mobile devices, a 73 percent year-over-year increase. *See* "Kapustka Adobe research finds mobile sports viewing driving huge growth in digital video," Mobile Sports Report (2/4/14) available at http://www.mobilesportsreport.com/2014/02/adobe-research-finds-mobile-sports-viewing-driving-huge-growth-in-digital-video/.

[2] NBC offered 539 hours of television coverage and more than 1,000 hours of live streamed online coverage of the Sochi Olympics—indicating that large numbers of viewers prefer watching live streams of the games on their computers, smart phones and tablets, than viewing tape delayed programming during prime time. http://ajr.org/2014/02/19/sochi-streaming-viewers-watching-live/. Moreover, as reported in MultiChannel News, "NCAA March Madness Live … garnered 21 million live streams across computers, tablets and smart phones from March 18-20. That marked a 42% advance over the comparable stage of last year's tourney, *which marked the first time pay-TV subscribers had to authenticate in order to check out live-streaming simulcasts for the contests on TBS, TNT*



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www.MiLB.com



Video streaming of Minor League Baseball games has become an integral part of making baseball available to fans everywhere. Six years ago, MiLB began video streaming roughly 1,000 games to 5,000 subscribers. Today, MiLB's investment in streaming technology has enabled it to stream more games annually than any other professional sports league, including the NFL, MLB, NHL and NBA. This upcoming season, approximately 30,000 subscribers will have digital access to more than 4,500 live minor league games on multiple platforms, including personal computers and a growing number of mobile devices. Subscribers to MiLB's streaming service also gain on-demand, video access to every MiLB game that was streamed earlier in the season. A subscription for all streamed MiLB games this season is $49.99 for the season or $12.99 per month, and early half of MiLB's more than 160 teams currently stream their games. Each year 10 to 15 additional teams are expected to make this service available to their fans.[3]

The revenue generated by its video streaming service helps MiLB teams to provide wholesome, family entertainment at affordable prices. In 2013, the average cost for a family of four to attend a MiLB game was $62.53 which covers two adult tickets, two children's tickets, four hot dogs, two sodas, two beers, a program or score card, and parking—this is a fraction of the cost of leagues such as the NBA ($300) and NFL ($443). MiLB's revenues come not just from ticket sales, but also from the licensing of its intangible rights, which helps to offer a complete professional sports experience at family-friendly levels.

The revenues from streaming are shared throughout MiLB: all minor league teams share in these digitally-based revenues—irrespective of whether they are currently streaming their games. The prospect of widespread illegal streaming therefore poses threats to minor league baseball on several levels. First, illegal streaming deprives MiLB of both subscription fees and revenues attributable to advertising and the sale of merchandise through its website. Second, the revenue obtained through the licensing of digital rights can be critical in keeping struggling teams in smaller venues afloat.

MiLB's members are gravely concerned that unless checked by appropriate congressional action, illicit commercial streaming will become further entrenched as the dominant and most problematic means of infringing copyrighted works online.[4]

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and truTV." (emphasis supplied) http://www.multichannel.com/content/march-madness-live-streaming-sets-records-over-tourneys-first-three-days/149016. It is reported that the US-Portugal World Cup game was the most widely viewed soccer game in US history and that about 490,000 individuals viewed the game on their mobile devices via ESPN's app. http://www.theguardian.com/football/2014/jun/23/usa-v-portugal-most-viewed-soccer-match-ever-us. In addition to the All Star game, Fox Sports Go, which offers live streaming video for Fox's sports programming, will also provide live streams for the first time of the National League Division Series, the National League Championship Series and the World Series. http://www.tvtechnology.com/article/fox-sports-go-to-live-stream-mlb-all-star-game-/271238.

[3] Moreover,, last year MiLB signed a multi-year deal that allows fans to listen to free, live streamed *audio* broadcasts of many MiLB games on more than 200 devices including personal computers, cell phones, smart televisions, tablets and autos.

[4] For example, during the recent World Cup, the number of individuals viewing a game from unauthorized sources reached approximately 471,000 during the Belgium vs. Russia contest. https://torrentfreak.com/millions-watch-world-cup-through-pirated-live-streams-140701/. For a detailed, yet readable, discussion of the gravity of the illegal streaming challenges facing sports leagues in the United States, *see*



As the Department of Justice testified last week, the current Copyright Act does not treat the illegal, large-scale streaming of copyrighted works in a manner consonant with the harm caused by that activity. Specifically, current law treats only the "reproduction" and "distribution" of a prescribed number of copyrighted works above a threshold value as a felony. Because streaming is generally understood to implicate the public performance right and not reproduction or distribution, unauthorized streaming of protected works is subject to only misdemeanor liability, "even when the pirate sites are willfully streaming pirated content to large numbers of users, and turning huge profits through advertising revenues and subscriptions."[5]

MiLB therefore agrees with the Department of Justice that Congress should update the Copyright Act and create a felony penalty for illicit streaming—a recommendation echoed by the Department of Commerce and the Copyright Office. Criminal penalties have been part of the copyright law since 1897, and their modernization is a routine part of Congressional revision. The suggested action is consistent with past amendments to the copyright law where Congress determined that then-existing law failed to take into account new technologies, including when Congress added felony provisions in certain situations to combat large-scale video and audio piracy, imposed criminal liability in certain circumstances even where there is no monetary profit or commercial benefit from the infringement, criminalized the unauthorized use of a camcorder to record a film in a movie theater, and made illegal the willful distribution of pre-release movies, software and music being prepared for commercial distribution. Adoption of a felony/streaming amendment is entirely consistent with that tradition.

Moreover, although all creative works face risks from such activity, we believe the case for felony liability is especially strong with respect to sporting events because of their short shelf life: once an MiLB game is over, the public's interest in watching the game diminishes significantly. Therefore it is incumbent upon Congress to enact targeted legislation that exposes commercial enterprises that engage in egregious and willful streaming activities to the possibility of felony convictions. We stand ready to work with the Subcommittee to achieve this goal.

Thank you for your consideration of our views.

Sincerely,

Pat O'Conner

Pat O'Conner
President and Chief Operating Officer
Minor League Baseball

Piracy: Sports Leagues' Biggest Problem? http://www.utsandiego.com/news/2013/Dec/30/nfl-mlb-world-cup-chargers-congress-ncaa-nhl/9/?#article-copy.

[5] Copyright Remedies: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property and the Internet, 7, 113 Cong. (2014) (Statement of David Bitkower, Acting Deputy Assistant Attorney General in the Criminal Division, U.S. Department of Justice.)



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