

**Written Submission of Re:Create in Response To Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement**

**November 13, 2018**

Thank you for the opportunity for a written submission in response to the request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement. These comments are submitted to the Office of the U.S. Intellectual Property Enforcement Coordinator, Executive Office of the President, Office of Management and Budget.

Re:Create is a coalition founded in 2015 to educate policymakers on the positive impact the Internet has had on creativity and innovation over the last 25 years. Collectively, the members of Re:Create operate over 100,000 libraries visited by the public 1.5 billion times per year; fight censorship by repressive regimes globally; provide platforms that enable music and video content to reach a global audience; create new and interesting works of art, literature and video enjoyed by wide audiences; invest in new startups and entrepreneurs; and generate billions of dollars in revenue for the motion picture, recording, publishing and other content industries. While our individual organizations maintain diverse views on specific issues, we are united in our overarching respect for copyright and concern for its future.

Our members are the American Association of Law Libraries, American Library Association, Association of Research Libraries, Center for Democracy & Technology, Computer and Communications Industry Association, Consumer Technology Association, Engine, Electronic Frontier Foundation, FreedomWorks, Harry Potter Alliance, New America's Open Technology Institute, Organization for Transformative Works, Medical Library Association, Public Knowledge and R Street Institute. Many of them are individually or jointly filing comments in this docket, and we refer you to all of their comments. We are also filing these comments on behalf of the coalition as a whole.

## Engaging on a Workable Copyright System

Under President Trump, the United States has undertaken an active role in working on renegotiated trade agreements and new multilateral agreements. New and updated provisions around copyright have played an important part in this effort. As part of these efforts, it is important that the Administration look at the full spectrum of U.S. copyright law and the workable system that we have set up in the U.S. This includes provisions in U.S. law around enforcement of copyrights as well as other provisions in U.S. law like safe harbors under DMCA Section 512 and fair use, as codified in Section 107 of the Copyright Act. While safe harbors are included in USMCA, the fair use language is left out. As you look at both the future of the copyright system within the U.S. as well as it being a model for international agreements, it is important that both fair use and safe harbors are seen as key parts of our workable copyright system.

Fair use plays a growing and important role in the broader U.S. economy. A 2017 [study](#) we released found that nearly 15 million independent, American creators representing all 50 states earned a baseline of almost \$6 billion in revenues from posting their music, videos, art, crafts and other works online in 2016.<sup>1</sup> The research is only a tiny snapshot of the entire New Creative Economy and how individual Americans are making money on fair use-based platforms. Another 2017 [report](#) focused on the economic contribution of fair use industries revealed that these industries account for 16 percent of the U.S. economy and generate \$5.6 trillion in annual revenue.<sup>2</sup> They have increased U.S. exports by 21 percent over four years to \$368 billion and employ 18 million U.S. workers. Without fair use, [10.4 million internet-dependent](#) jobs would be jeopardized.<sup>3</sup> Fair use-based industries include some of the most important and growing parts of the U.S. economy. Internet platforms, software development, artificial

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<sup>1</sup> Shapiro, Robert with Aneja, Siddhartha. "Unlocking the Gates: America's New Creative Economy." 2017.

<https://www.recreatecoalition.org/wp-content/uploads/2018/02/ReCreate-New-Creative-Economy-Study-Report-508.pdf>.

<sup>2</sup> "Fair Use in the U.S. Economy," Computer and Communications Industry Association, 2017.

<http://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

<sup>3</sup> Deighton, John, Kornfeld, Leora and Gerra, Marlon. "Economic Value of the Advertising-Supporter Internet Ecosystem." Jan. 2017.

<https://www.iab.com/wp-content/uploads/2017/03/Economic-Value-Study-FINAL-2017.pdf>.

intelligence, and cybersecurity all depend on the ability to use existing code, written materials, and other copyrightable works without asking for previous permission. They do so at no detriment to those works, as minimally as possible, and in ways that actually benefit copyright holders. If machine learning platforms had to get prior permission, they could not exist. If cybersecurity patches required prior permission, it would allow vulnerabilities to last longer. Almost all software code is based on previous code.

Much like fair use, safe harbors are a key part of U.S. law. They have played an essential role in the development of the Internet - without them, sites like YouTube, Facebook, Instagram, Reddit, and so many others would simply never have developed. It is not hyperbole to say that the entire Internet economy depends on safe harbors from liability for user actions for its existence. The 15 million new creators and \$6 billion in revenues<sup>4</sup> they are making are not just dependent on fair use - they are also dependent on platforms that would not allow them to post their content without safe harbors. According to one study, weakened intermediary liability protections would cost the U.S. 425,000 jobs and decrease GDP by \$44 billion annually.<sup>5</sup>

There are many arguments that we have seen made against safe harbors over the last few years that are not accurate. One such false argument is that their original intent was to limit platforms as passive, neutral intermediaries and not platforms that are optimizing or promoting content. This is simply not the case. The language of Section 512 as it was actually written makes this clear. In fact, in terms of original intent, DMCA 512 was designed not to limit the growth of internet services but instead to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”<sup>6</sup>

Another false argument is that safe harbors have hurt the music industry, leading to a wholesale theft of creative property and a devaluation of creative content. Actually,

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<sup>4</sup> Shapiro, Robert with Aneja, Siddhartha. “Unlocking the Gates: America’s New Creative Economy. 2017. <https://www.recreatecoalition.org/wp-content/uploads/2018/02/ReCreate-New-Creative-Economy-Study-Report-508.pdf>.

<sup>5</sup> “[Economic Value of Internet Intermediaries and the Role of Liability Protections](#)” by Christian M. Dippon, PhD, June 5, 2017.

<sup>6</sup> S. Rep. No.105-190, at 1-2 (1998).

U.S. wholesale revenues from music (which RIAA's Vice President has said is the best metric for measuring value) grew by 9.3% in 2016 and 12.6% in 2017, the fifth year of consistent revenue growth for the music industry.<sup>7</sup> The decrease in levels of infringement over the last several years is largely due to increase in availability of online streaming services. The rise of Pandora and Spotify has coincided with a drop in piracy. According to Ernst & Young, piracy rates fell 8% from 2016 to 2017.<sup>8</sup> The percentage of internet users who engage in piracy has been falling, while spending on legal content is rising in nearly all countries and content categories studied.<sup>9</sup> While legitimate sites are thriving and piracy is down, rogue sites have found no shelter in the DMCA's safe harbors. Instead, this activity has successfully been driven out of the U.S. The vast majority of the remaining rogue sites have moved offshore to places beyond the reach and scale of U.S. law enforcement efforts.

Another argument against safe harbors is that they shelter the most powerful internet companies, rather than startups. Safe harbors are far *more* critical to growth of startups than large internet companies. Startups lack the legal and technical resources to adapt to more aggressive monitoring requirements. This is why venture capital investors consistently highlight the existence of safe harbors as a prerequisite to investing in startups. 81% of venture capital investors said they would be more likely to invest in a digital content platform under a weak economy *with* safe harbor rules than in a strong economy that lacked limitations on intermediary liability. In other words, safe harbors have a stronger impact than economic conditions on whether venture capitalists decide to invest in startups.<sup>10</sup>

By all means, the safe harbor system is not perfect. Enforcement efforts under the notice and takedown regime set up under Section 512 of the Copyright Act are

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<sup>7</sup> Fridlander, Joshua P. "News and Notes on 2017 RIAA Revenue Statistics," 2017.

<https://www.riaa.com/wp-content/uploads/2018/03/RIAA-Year-End-2017-News-and-Notes.pdf>.

<sup>8</sup><https://www.ey.com/fr/fr/newsroom/news-releases/communique-de-presse-ey-piratage-de-contenus-audiovisuels-en-france> (in French).

<sup>9</sup> Poort, Joost, van Eijk, Nico and Quintais, Joao Pedro., "Global Online Piracy Study," July 31, 2018. <https://www.ivir.nl/projects/global-online-piracy-study/>.

<sup>10</sup> "[The Impact of U.S. Internet Copyright Regulations on Early Stage Investment. A Quantitative Study.](#)" by Matthew Le Merle et. al., Booz&Co., 2011.

flawed. There is growing abuse and mistakes by copyright holders, who are sending notices of infringement in many cases where the use is not a copyright infringement or is a clear fair use. In many cases, the notices are being sent for reasons other than copyright infringement. This includes anti-competitive purposes, to harass a platform or consumer, or to try and chill speech that the rightsholder does not like. According to a study of takedown requests, one in twenty-five were flawed because they targeted content that did not match the identified work and nearly a third had aspects that raised questions about their validity.<sup>11</sup> Part of this is due to the rise of automated processes that search popular online platforms and send notices that do not verify basic criteria such as whether the material was authorized to be posted by a rightsholder. Automated processes have very limited abilities to make necessary fair use determinations before issuing a takedown notice. And given the potential liability for a consumer fighting back, the risks associated with filing a counter notice often are too great. As you look at potentially broadening enforcements efforts, please note that at least a third of current attempts to police content online are suspect.

Some commenters are likely to suggest that the Section 512 notice and takedown regime be replaced with a type of content filtering they call “notice and staydown”. Such a system would replace the current process with a far more injurious provision to force online platforms to proactively filter content on the web. This is something that Congress squarely rejected.<sup>12</sup> Notice and staydown presupposes ubiquitous monitoring of all users and content on an online service and would be burdensome, disproportionate, and invasive of the privacy interests of legitimate users.

Additionally, the content filtering proposed by advocates of a “notice and staydown” system would impose an undue burden on platforms of all types and would severely limit new and emerging forms of creativity. Not only would it require a platform to monitor and automatically remove all future instances of the identified work, but it would also require the platform to single-handedly determine each time whether a use is infringing, licensed, or protected under the exceptions and limitations in copyright law. It

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<sup>11</sup> Urban, Jennifer M. et. al., “[Notice and Takedown in Everyday Practice](#)” March 29, 2016, p. 11.

<sup>12</sup> Section 512(m) says there is no obligation to monitor.

is clear that this type of system would chill perfectly legal speech and creativity on the web. It would ask platforms to act as the judge, jury and executioner at the risk of expensive lawsuits that could easily seek millions of dollars and chill financial investment, due to presence of statutory damages, absent the protections of the safe harbor. This is an ability they simply do not have.

Such a fundamental change to a bedrock principle of American jurisprudence would also have absurd consequences. Imagine a world where just the mere allegation of infringement would permanently keep that content down. This would have huge implications for everyone when it comes to sharing a video on Facebook or quoting song lyrics. That's because social media networks would be forced to suppress user generated content, as they would not know if it was licensed or not. Parents can forget posting videos of their kids dancing to music, and candidates would not be able to post campaign speeches because of the music that plays in the background. Remix culture and fan fiction would likely disappear from our creative discourse. Live video streaming sites would cease to exist. Notice and staydown might seem innocuous, but in reality it is content filtering without due process.

### Engagement with the Private Sector

As part of our filing, we would like to encourage increased engagement with the private and nonprofit sectors, especially those communities impacted by copyright that are not from the traditional rightsholder community. As the Internet has grown, the impact that copyright has and the frequency with which it intersects with our daily lives have increased. There are key stakeholders in copyright that often are not included in key conversations. These stakeholders include not just rights holders and Internet companies and platforms, but also consumer groups, digital rights groups, fandom communities, independent software developers and cybersecurity researchers, libraries, librarians, and their users, the 15 million independent creators using internet platforms and others. It is very easy to try and portray issues around copyright as just corporate

issues - but they are not. Leaving out these key stakeholders leads to the development of bad policy that doesn't take into account the whole ecosystem.

As part of this, we want to recommend some roundtables that we think would help you as you develop this strategic plan and other future efforts. They include:

- Artificial Intelligence, Machine Learning and Creations and Copyright: Machines are going to start creating things. Machines need to copy things to learn. As new technologies, artificial intelligence and machine learning create unique challenges for our current copyright system that should be examined.
- The Fair Use Economy: Much of the focus on the economy and copyright has focused on the value of copyrights to the economy. As outlined in this paper, there is also the value of fair use to the economy.
- 2019 - The Year of the Public Domain: Because of a string of copyright extensions passed in the 1970s and 1990s, it has been over 40 years since many works have entered the public domain. Works entering the public domain can unleash a flurry of new creative and economic activity. This deserves a bigger look as 2019 becomes the year of the public domain.

There are other topics that would make for strong roundtables as well. We are ready to work with you on these issues as you move forward on the strategic plan.