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**Department of Commerce
United States Patent and Trademark Office
National Telecommunications and Information Administration**

Docket No. 130927852-3852-01

Comments of New Media Rights to the Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy

New Media Rights submits the following comments in response to the Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, published at 78 Fed. Reg. 61337. In its Notice, the Department of Commerce seeks comments on a variety of digital copyright issues that are “critical to economic growth, job creation, and cultural development”.¹

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¹ 78 Fed. Reg. 61337(October 3, 2013)

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I. Commenting Party Language

New Media Rights (NMR) is an independently funded program of California Western School of Law. NMR provides expertise and advocacy on media, communications, and internet law as it applies to independent creators and internet users. NMR offers pro bono legal services to creators including artists, filmmakers, podcasters, citizen journalists, bloggers, open source software projects, as well as non-profit organizations. Further information regarding NMR’s mission and activities can be obtained at <http://www.newmediarights.org>.

II. Introduction

When it comes to domestic copyright legislation for the digital age, things really haven’t changed much since the implementation of the Digital Millennium Copyright Act (“DMCA”) in 1998. While the legislation hasn’t changed, our creative world certainly has. In 1998, how many of us envisioned the world of remixers and independent creators producing content of a quality once reserved for the Hollywood elite? How many of us would have imagined the creation of a license, like Creative Commons, aimed at allowing users to share their work in unprecedented ways? How many of us thought that ordinary people would be using this new technology to

create and share everything from mundane pictures of meals at restaurants to the extraordinary live tweeting of the Arab Spring? The cultural and communications landscape has changed dramatically since 1998. The evolution of our creative culture and the way we communicate deserves a corresponding evolution of copyright law.

This reform need not, and should not, take the form of any radical evisceration of copyright. At the same time, reform should not be used as an opportunity to continue unreasonable expansion of copyright law without concern for the collateral damage it causes to artistic progress, freedom of speech, and the intellectual enrichment of the public. Rather, much like one would tend to a garden, it is time we examine our current copyright law, remove the old weeds of law that no longer serve us, and plant the seeds of new law that will help to foster a new generation of artists and creators.

In these comments, New Media Rights addresses three of the most compelling areas of copyright reform presented in the Greenpaper. First, these comments address five key copyright law problems that need to be solved to help remix creators spend their time creating rather than fighting legal disputes. Second, we discourage the widespread implementation of intermediary licensing modeled off YouTube's Content ID system because it is not, in fact, an intermediary licensing system. We also explain the implementation of such a system could be incredibly detrimental to users' rights largely due to the lack of an effective appeals process and various design challenges in the system. Finally, we address the Department of Commerce's question regarding how best to go about fashioning a multistakeholder process that would create a working set of best practices for the DMCA. We hope that our comments in these three areas will spark discussion and encourage badly needed copyright reform for the digital age.

III. Remixes

At New Media Rights we provide direct legal services to remix creators. Remix creators are creators who reuse copyrighted works for legal purposes. Sometimes, Remix creators take one or more copyrighted works and transform them into something new, creative and original. However, the specific bounds of remix culture are limited only by human imagination. Remix artists often rely on their own creativity and fair use to create their work, although sometimes remix creators do use public domain work or get licenses (including open licenses) to use copyrighted content.

We are constantly impressed by the creativity and innovation of the remix creators we work with on a daily basis at New Media Rights. However, there are several problems that we have observed that not only impede remixes from getting made but also cause remixes to be removed unfairly from the public discourse. Many of these issues affect every member of the public who interacts with copyrighted works, or in other words, absolutely everyone. This comment will address five of those common problems:

- Problem 1: The §17 USC 512(f) provisions fail as a safeguard against overreaching takedown notices and copyright bullying.
- Problem 2: But for some limited exemptions, the Anti-circumvention provisions in 17 USC 1201 are overbroad, making access to copyrighted materials for fair use purposes illegal.
- Problem 3: Lack of digitization of copyright records makes reusing works from created from 1923-1964 that are in the public domain too difficult and expensive.

- Problem 4: The extraordinary duration of copyright needs to be empirically justified or reduced.
- Problem 5: Any Small Claims Copyright Court must contain important safeguards for small-scale parties. .

We hope that by bringing these problems we've observed first hand to the attention of the Department of Commerce and the USPTO; we will help take the first step on the long path to badly needed copyright reform for the digital era.

Copyright reform must reflect the input of all stakeholders, including users and those who reuse works for legal purposes, as well as copyright holders. We must also remember that goal of copyright reform should not be to protect any individual business model, but to encourage the progress of science and the useful arts as mandated in our Constitution.

Problem 1: The 17 USC §512(F) Provisions Fail As A Safeguard Against Overreaching Takedown Notices And Copyright Bullying

At New Media Rights, we provide direct legal services to remix artists responding to content bullies.² Content bullying occurs when an individual takes down another user's content for an improper purpose. But what truly differentiates content bullies from reasonable individuals involved in a copyright dispute is their tenacity for ignoring appeals and insistence on removing and disabling content that doesn't actually violate copyright law.

It's important to remember that the DMCA "safe harbor" provisions provide for a notice and takedown system that allows content to be removed from the internet without ever seeing the

² See e.g., *Jonathan McIntosh, Buffy vs Edward Remix Unfairly Removed by Lionsgate* (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>; *Teens make parody video, but Sony tells them to beat it... just beat it!* New Media Rights (October 15, 2013) http://www.newmediarights.org/teens_make_parody_video_sony_tells_them_beat_it%E2%80%A6_just_beat_it.

inside of a courtroom. The DMCA is a powerful extrajudicial tool, and just one of many approaches content bullies use to remove otherwise lawful content from the internet.

Large-scale copyright holders, often use automated means (for example web crawlers) to find infringing content³ and then mass-produce DMCA take down notices; often not considering legitimate reuses like fair use. Thus many types of otherwise legal⁴ content disappear as collateral damage⁵ in their war on piracy. Similarly, within the context of DMCA takedown notices, copyright holders are sometimes guilty of overlooking fair use considerations when filing take down requests because they intentionally mean to misuse the DMCA to remove legal but objectionable content. In addition to DMCA section 512 notice and takedown related bullying, large-scale copyright holders often use their privileged relationships with content sharing websites like YouTube, including the Content ID system, to remove or monetize reuse of their content which would otherwise be legal.⁶ Other methods of content bullying include cease and desist letters and removals of urls from search engines.

For DMCA notice content bullying, section 512(f) is supposed to be the statutorily crafted tool available to protect users from having their material removed without any means of

³ These automated takedown processes often result in the takedown of non-infringing content. See Mike Masnick, *Microsoft Sends Google DMCA Takedowns For Microsoft's Own Website*, TechDirt(July 30, 2013) <http://www.techdirt.com/articles/20130729/16181423993/microsoft-sends-google-dmca-takedowns-microsofts-own-website.shtml>; Emil Protalinski, *Why automated DMCA takedown requests are asinine: HBO asked Google to censor links to HBO.com*, The Next Web (February 3, 2013) <http://thenextweb.com/media/2013/02/03/why-automated-dmca-takedown-requests-are-asinine-hbo-asked-google-to-censor-links-to-hbo-com>.

⁴ See e.g. Ron, *Microsoft's automated DMCA bot strikes again, sends takedown notice for Open Office*, WinBeta(August 18, 2013) <http://www.winbeta.org/news/microsofts-automated-dmca-bot-strikes-again-sends-takedown-notice-openoffice>.

⁵ See Jonathan McIntosh, "Buffy vs Edward Remix Unfairly Removed by Lionsgate" (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>.

⁶ *Id.*

recourse.⁷ However, section 512(f) is not providing that balance and has ceased to serve the purpose Congress intended.⁸

Unfortunately, the statute and the case law right now simply do not make it clear enough to rightsholders that they should consider fair use before taking down content from the internet. In fact the only case to address the matter, the Lenz case, is in its 7th year and no final decision has been reached in the case, although several lower courts have found that fair use must be considered before sending a takedown notice.⁹ As the law currently stands, because fair use is complex, difficult to predict, and not often respected by content bullies, creators are less likely to develop certain kinds of content especially once they've already experienced content bullying for their other work. The vast majority of cases involving content bullying we see involve content holders taking down remixes of their work, even when those remixes are probably fair use. The sad truth is that even if we strongly believe that a work is fair use there is still a chance that the content will get taken down anyway because it is currently unclear if fair use needs to be taken into account as part of the take down process. This holds true even in textbook cases of fair use.

One textbook example of content bullying, and why section 512(f) needs to be amended to include a consideration of fair use is a takedown we dealt with earlier this year. The takedown involved a remix by remix artist Jonathan McIntosh called “Buffy vs Edward: Twilight Remixed.” This particular remix is used in law school classrooms across the country to teach the concepts of transformativeness and fair use. The Copyright Office even mentioned this remix by name as an example of a transformative noncommercial video work after Mr. McIntosh

⁷ See S. REP. 105-190, 21(512(f) was meant to “balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.”)

⁸ *Id.*

⁹ The Lenz case has strongly suggested that fair use should be considered (*See Lenz v. Universal Music Corp.*, 5:07-CV-03783-JF, 2013 WL 271673 (N.D. Cal. Jan. 24, 2013)(citing *Lenz*, 572 F.Supp.2d at 1154–56.) However, even within this case it is a relatively recent finding (*see Lenz*, 572 F.Supp.2d 1150, 1154). Moreover, if and to what extent fair use should be considered is still a contested issue(*See e.g.*, *Tuteur v. Crosley-Corcoran*, CIV.A. 13-10159-RGS, 2013 WL 4832601 (D. Mass. Sept. 10, 2013))

displayed it at a Copyright Office hearing in Los Angeles regarding DMCA anti-circumvention exemptions in May, 2012.¹⁰ Although fair use can be hard to predict, Jonathan's remix is about as close as one can get to declaring a work fair use without a final court decision. Despite this, Jonathan's video was wrongly monetized twice and then taken down under the DMCA takedown process.¹¹ It took 3 months, including multiple appeals, outreach to the copyright holder, a DMCA counternotice and quite a bit of press¹² to overcome Lionsgate's misuse of both the Content ID system and the takedown system to get the video back up. This type of bullying behavior was exactly the kind of behavior section 512(f) was supposed to protect against. But without explicitly requiring a consideration of fair use, it can't.

For every "textbook" example of fair use, like Jonathan, that we fight and win we talk to other creators at the start of projects that simply abandon their plans out of fear of this type of content bullying; from app and game developers that cease creating because they worry about intimidation from larger copyright holders, to video creators who abandon their parody and criticism projects because of the very real risk of their YouTube accounts being crippled by too many takedowns.

¹⁰Jonathan McIntosh, *Buffy vs Edward Remix Unfairly Removed by Lionsgate* (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>.

¹¹ "The audio/visual content of this video has been reviewed by our team as well as the YouTube content ID system and it has been determined that the video utilizes copyrighted works belonging to Lionsgate. Had our requestes [sic] to monetize this video not been disputed, we would have placed an ad on the cotent [sic] and allowed it to remain online. Unfortunately after appeal, we are left with no other option than to remove the content." representative, Matty Van Schoor, stated in a response email to New Media Rights on December 20, 2012. *Id.*

¹² See Daniel Nye Griffiths, *Copyright In The Twilight Zone: The Strange Case Of 'Buffy Versus Edward'*, Forbes (January 15, 2013) <http://www.forbes.com/sites/danielnyegriffiths/2013/01/15/copyright-in-the-twilight-zone-the-strange-case-of-buffy-versus-edward/>; Jonathan McIntosh, "Buffy vs Edward" remix unfairly removed by Lionsgate: the model "fair use video" used by the US Copyright Office is a casualty of YouTube's Content ID system. *Ars Technica* (January 9, 2013) <http://arstechnica.com/tech-policy/2013/01/buffy-vs-edward-remix-unfairly-removed-by-lionsgate/>; Jonathan McIntosh, *Lionsgate Censors Remix Video That The Copyright Office Itself Used As An Example Of Fair Use*, TechDirt (January 9, 2013) <http://www.techdirt.com/articles/20130110/01515121624/lionsgate-censors-remix-video-that-copyright-office-itself-used-as-example-fair-use.shtml>; Cory Doctorow, *Lionsgate commits copyfraud, has classic "Buffy vs Edward" video censored*, BoingBoing (January 11, 2013) <http://boingboing.net/2013/01/11/lionsgate-commits-copyfraud-h.html>.

Today, there are few consequences, other than bad press¹³ for this type of behavior. At this point in time no court has actually awarded damages in a section 512(f) case. There have been injunctions¹⁴ and one out of court settlement¹⁵, but never an actual award of damages by a court. These penalties have done nothing to stem the tide of rampant abuse of the DMCA takedown process.

In short, section 512(f) is broken. It does not serve as an incentive for copyright owners to avoid causing collateral damage in their efforts to enforce their rights under copyright law. Rather than trying to reinvent fair use, we think there is a much simpler legislative solution to the section 512(f) problem. New Media Rights would like to propose three legislative solutions to help fix section 512(f) and make it an actual working tool to fight content bullying.

Solution 1: Clarifying The Role Of Fair Use In Text Of 17 USC §512(C)(3)(V)

The first solution New Media Rights would like to propose would help to address the lack of clarity regarding if and to what extent fair use must be taken into account before filing a takedown notice under the DMCA. We propose making the following change to 17 USC §512(c)(3)(v), new text is in brackets.

A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law[, including fair use under 17 USC §107.]

¹³ Jonathan McIntosh, *Buffy vs Edward Remix Unfairly Removed by Lionsgate* (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>. See also Patti Mengers *Chalk up another win for Lansdowne kids; audio restored to 'Read It' video*, Daily Times News (October 19, 2013) <http://www.delcotimes.com/general-news/20131010/chalk-up-another-win-for-lansdowne-kids-audio-restored-to-read-it-video> .

¹⁴ *Biosafe-One, Inc. v. Hawks*, 524 F.Supp.2d 452(S.D.N.Y. 2007); *Design Furnishings, Inc. v. Zen Path LLC*, 2010 U.S. Dist. LEXIS 112314(E.D. Cal. 2010).

¹⁵ *Diebold Coughs Up Cash in Copyright Case*, Electronic Frontier Foundation(October 15, 2004)<https://www.eff.org/press/archives/2004/10/15>.

The addition of this half sentence to the statement that the copyright holder must make before they file a DMCA takedown notice makes it clear that fair use must be considered before sending a takedown notice. As a result, content owners would have to consider fair use before taking down a work. This change would also make it clear that that section 512(f) sanctions could be awarded where a content owner failed to take into account fair use before taking down a piece of content. This would help prevent many of the content takedowns that are nothing more than content bullying or collateral damage in the efforts to fight piracy. Yet it would still shield copyright owners that had acted in good faith.

Some content owners have complained that because fair use is so complex and difficult to predict, considering fair use before sending a takedown notice is just too time consuming.¹⁶ However, the standard in place only requires a “good faith belief” that a video is not fair use. Really all that standard requires is that whoever is performing the takedown consider whether the reuse is excused by fair use, not perform a more exhaustive analysis one might expect in a law school exam or motion filed before a court.¹⁷ By applying the good faith belief standard in conjunction with a clarified stance on fair use to 17 USC §512(c)(3)(v), this change will better fulfill the original intention of the Congress that the DMCA safe harbors, “... balance the need for rapid response to potential infringement with the end-users [sic] legitimate interests in not having material removed without recourse.”¹⁸

¹⁶ Brief of Amicus Curiae, Motion Picture Association of America in support of neither party, *Tuteur v. Crosley-Corcoran*, CIV.A. 13-10159-RGS, 2013 WL 1450930, 11-13 (D. Mass. Apr. 10, 2013), <https://www.documentcloud.org/documents/699602-mpaa-on-dmca-512f.html#document/p1>.

¹⁷ This point has been debated quite vigorously in the *Lenz* case however the court has ruled on multiple occasions that fair use must be considered before sending a takedown notice. Our legislative proposal merely codifies that point to hopefully prevent any future litigation on the matter. *See, Lenz v. Universal Music Corp.*, 5:07-CV-03783-JF, 2013 WL 271673 (N.D. Cal. Jan. 24, 2013)(quoting *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1153-54 (N.D. Cal. 2008))

¹⁸ Sen. Rep. No. 105–190 at 21 (1998).

Solution 1: Imposing A Gross Negligence Standard For Section 512(f)

The second solution New Media Rights would like to propose would help to address the problem that it is almost impossible to win a section 512(f) case because of its impossibly high mens rea standard. New Media Rights would like to propose the introduction of a new, attainable standard.

Currently the “knowingly materially misrepresents” standard is absurdly high. So high that only a few cases since the passage of the DMCA have been able to meet that bar.¹⁹ The existence of only a few cases in fifteen years, in the face of millions of content takedowns every year²⁰, exemplifies the failure of section 512(f) to curb abuse of the DMCA notice and takedown system. New Media Rights would like to propose a lower, “gross negligence” standard. This standard will transform section 512(f) into a tool to actually protect remix creators from wrongful takedowns, because, under this new standard more cases will be brought. As more cases are brought there will be fewer wrongful takedowns because content holders will know that there are actual consequences for sending wrongful takedown notices. To ensure the affordability of bringing these actions, in addition to the changes to damages we outline below, we believe the Copyright Small Claims Court recently proposed by the Copyright Office should have jurisdiction over section 512(f) cases.

Solution 3: Clarifying Section 512(F) Damages

¹⁹ See e.g. *Biosafe-One, Inc. v. Hawks*, 524 F.Supp.2d 452(S.D.N.Y. 2007); *Design Furnishings, Inc. v. Zen Path LLC*, 2010 U.S. Dist. LEXIS 112314(E.D. Cal. 2010). *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004)

²⁰ Including DMCA,url and Content ID like takedowns.

As we have already stated, monetary damages have never been awarded by a court for a violation of section 512(f). We would like to propose a damages model that we believe would lead to a modest increase in the amount of section 512(f) cases being brought against egregious content takedowns, and in the long run would reduce content bullying. New Media Rights proposes that section 512(f) be rewritten to clarify what period damages, especially attorney's fees, can be awarded for.

Original Text

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

Proposed Text

shall be liable for damages, costs, and attorneys' fees that are incurred by any of the following parties who is injured by such misrepresentation:

- i. the alleged infringer or,
- ii. any copyright owner or copyright owner's authorized licensee or,
- iii. the service provider.

Damages, costs, and attorneys' fees shall be inclusive of all activities related to the misrepresentation including but not limited to any damages, costs, and attorneys' fees that arise out of any of the following:

- i. the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or
- ii. replacing the removed material or ceasing to disable access to it, or
- iii. pre-litigation work and any resulting litigation.

Nothing in this provision shall restrict the award of other damages under 17 U.S.C. 505.

This language will better clarify what damages can be awarded. In addition, by separating out who can recover damages and what damages can be recovered into their own sub-list the statute is more readable which will hopefully minimize confusion about section 512(f) damages.

The most important clarification we propose is explicitly allowing for recovery of attorneys fees for both pre-litigation and litigation work. Bringing a copyright lawsuit is expensive²¹, but without allowing for the possibility of the recovery of attorneys fees for pre-litigation and litigation work, only the independently wealthy or those lucky enough to find the impossibly rare species of pro-bono public interest copyright attorney with significant financial resources can bring a section 512(f) case. By offering damages for both pre-litigation and litigation work attorneys will be able to afford to take on worthy section 512(f) cases on contingency instead of outright refusing to take even the most worthy section 512(f) case.

²¹ Am. Intellectual Prop. Law Ass'n, Report of the Economic Survey 2011, 35 (2011) (survey showing that the median cost for litigating a copyright infringement lawsuit with less than \$1 million in damages at issue was \$350,000).

As a final point of clarification, because section 512(f) is a part of Title 17, costs and attorneys fees may only be awarded at the courts discretion.²² Thus, these changes are not imposing a new fee shifting statute within copyright law but rather clarifying when fees and costs already awarded by Title 17 may be awarded in 512(f) cases.

Problem 2: But For Some Limited Exemptions, The Anti-Circumvention Provisions In 17 USC 1201 Are Overbroad, Making Access To Copyrighted Materials For Fair Use Purposes Illegal

Every three years, a variety of stakeholders provide comments and gather in L.A. and Washington D.C. to consider limited exemptions to the DMCA's "Anti-Circumvention" provisions. Significant expenditures of time and money are required to ensure some individuals can lawfully access copyrighted works for otherwise lawful purposes such as fair use. Remix artists are particularly impacted by this process because they cannot do much of their creative work without the exemptions currently required by 17 U.S.C. §1201.

Right now, section 1201 of the DMCA prevents creators from breaking any form of Technological Protection Measures ("TPM")²³ to access copyrighted content without a specific exemption. This is true even in cases where the creator lawfully obtained the product and is using it for lawful purposes.

This is problematic for remix largely because of the painstaking specificity required to receive an exemption. To better understand this problem let's look at one of the exemptions New Media Rights successfully supported at the last round of comments and hearings. That

²² "In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs. 17 USC §505. *See also*, "Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

²³ Also known as Digital Rights Management("DRM").

exemption, in its final approved form, allows for the reuse of video content from DVD's and online content for fair use purposes by select individuals including: K-12 educators, all college students, multimedia e-book authors, and professionals who have been commissioned to make videos for nonprofit purposes.²⁴ There are two things that are problematic within this single exemption.

First is the limitation of the media used. By limiting the exemption to specific types of media, the exemption is in a sense restricting creators to using only that specified media for the next three years. Three years is an eternity in technological time so all too often remix creators are barred from using a new technology or forms of media for up to three years because it is impossible to specifically identify technology and media that do not currently exist to craft an exemption around. Indeed, before online content was added in October 2012, remix creators were confined to DVD content under then existing exemptions section 1201.

The second major problem with section 1201 is the specificity that's required for those reusing content for otherwise legal purposes to fit underneath the exemption. When the exemption limits those covered to specific categories, such as "professionals who have been commissioned to make videos for nonprofit purposes," it leaves out critical categories of otherwise legal reuses of content. If a reuse of content is protected by fair use, the access to the work should not be illegal under section 1201.

These two problems create quite a bit of uncertainty in the remix space and all too often projects that reuse content for otherwise legal purposes are abandoned for fear of violating section 1201. Even worse, entire business models can be wiped out because of the failure to renew an exemption. If the law were clarified to allow access to copyrighted works if the use of

²⁴ 37 CFR §201.40(b)(5)(2012)

the work is otherwise legal, those reusing content for legal purposes would be able to spend less time with lawyers and more time innovating and creating.

Solution: Clarifying The Role Of Fair Use In Text Of 17 USC 1201(C)(1)

New Media Rights would like to propose an incredibly simple legislative solution that would negate much of the uncertainty we have described and categorically allow for circumvention of TPM in cases of where the circumvention is used for fair use. New Media Rights would like to submit the following new language for 17 USC §1201(c)(1)(new text appears in brackets).

Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title. [Specifically, nothing in this section shall prohibit access to copyrighted works for otherwise lawful purposes, including fair use. If a person did circumvent a TPM as defined in this act and that person acted with a good faith belief that his or her acts constituted fair use as defined by 17 U.S.C. §107, the court shall not award damages or provide for any other penalties under 17 U.S.C. §1201.]

By explicitly exempting fair use purposes from section 1201, remix creators and anyone simply accessing copyrighted content for fair use purposes will no longer have to fear facing potential civil and criminal penalties under section 1201. This provision would also make the expensive and time consuming exemption process more efficient, conserving valuable government and private resources because fewer exemptions would be required.

Since fair use can be very unpredictable and reasonable copyright attorneys can easily disagree about whether a remixed work is fair use, we have proposed rewriting the statute in such a way that those creators who had a good faith belief that their acts constituted a fair use are still protected even if a court later finds that their work is not fair use. If a court reaches that point, there are already a wide variety of civil copyright damages and remedies available. Adding on the additional civil and criminal penalties of section 1201 for individuals acting in good faith is simply unnecessary.

Problem 3: Lack Of Digitization Of Copyright Records Makes Reusing Works From Created From 1923-1964 That Are In The Public Domain Too Difficult And Expensive

The public domain is supposed to be a commons that society can draw on to create new and innovative works.²⁵ However, the reality is that it is incredibly difficult and expensive for the average person to determine which works are in the public domain. The only simple hard line we have is that currently works published before 1923 are, in the vast majority of cases, in public domain.²⁶ However, works between 1923 and 1964 fall into a grey area; they may or may not be in the public domain depending on if their copyright was renewed 28 years from the date of the original copyright.

Figuring out if a work is renewed can be a tricky business. The only official records of renewal are held by the Copyright Office in Washington D.C.²⁷ However, records before January 1, 1978 are not available online. The only way to gain access to these accurate and official records of copyright renewals is to either:

²⁵ See Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 966 (1990)

²⁶ Rich Stim, *Welcome to the Public Domain*, Stanford University Libraries, <http://fairuse.stanford.edu/overview/public-domain/welcome/>.

²⁷ *Search copyright information*, Copyright Office of the United States, <http://www.copyright.gov/records/>.

- I. Go to the Copyright office in person, in Washington D.C. , and research their records using paper card catalogs ²⁸OR;
- II. Pay the copyright office \$165 an hour to search the copyright records for the original copyright and the renewal notice.

While these resources may be available to large content holders, \$165 an hour is simply too expensive for the average remix creator. This expense is a huge problem. Creativity cannot exist in a vacuum. When creators can't easily determine what works they can safely use and draw inspiration from, creativity is stifled and the critical first amendment right to free speech is chilled.

Certain types of works such as international works or sound recordings can even further complicate matters. Determining whether these types of work are in the public domain can be especially tricky, even for experienced copyright attorneys. For non attorneys it's often impossible.

Recently we had several individuals come to us because their videos were taken down from YouTube. Each video was taken down because it contained the same song from the 1940s. We had no way of figuring out if the song was in the public domain because we did not know if the underlying musical composition or the sound recording was being claimed. Even if we had known that, there would be no easy way for us to verify the works copyright status because the copyright office records for that time period are not online. Even worse, if it was the sound recording it would likely fall under state law and right now there is no easy way to determine which state's law may apply to some of these older sound recordings. At the end of the day *if* we

²⁸ U.S. Copyright Office, Circular 23, *The Copyright Card Catalog and the Online Files of the Copyright Office*, <http://www.copyright.gov/circs/circ23.pdf>.

can get an attorney from one of those major content owners on the phone we have to take them at their word as to the works copyright status.

In 2013, it's frustrating that we have to rely on paper card catalogs and content companies attorneys to help determine if a work is in the public domain. But more to the point, a work really isn't in public domain if it costs \$165 an hour to know that.

Solution: The Digitization Of Copyright Office Records

New Media Rights recognizes the complexity of the problem but we believe there are a few things that could help. First, is the completion of the Copyright Office digitization of records as soon as possible. Once those records online it will be a huge first step in making the public domain more accessible. Second, we would strongly encourage the Copyright Office to release these records in a useable format so NGO's, startups and other technologists can work with that data to provide even better search engines that will help make it easier for the general public to determine if a work is in the public domain.²⁹

Once these steps have been completed and the public domain is once again affordable we believe that more public domain works will be used as they we're intended to be used, as a jumping off point for a new generation of creators. Of course some of the complexities of international copyrights and sound recordings will still exist, but the ability to find the relevant records will be a gigantic step forward in making these parts of the public domain accessible.

²⁹ Some recent examples of innovative search engines created to help make legal data more accessible include: Lex Machina(patent case law analytics) and ravel law(visual search engine aimed at making searching case law more intuitive).

Problem 4: The Extraordinary Duration Of Copyright Needs To Be Empirically Justified Or Reduced

Two pillars of Copyright law are 1) the scope of creative works it covers and 2) how long it covers those works. The scope of works covered by copyright law has expanded from “books, maps, and charts” in the Copyright Act of 1790³⁰, to everything from audiovisual, photographic, and sound recordings today. The length of time works are covered has increased from 14 years to life plus seventy years for works created by individuals, or 95 years for works for hire.

The expansion of the scope of works covered by copyright law can be explained by the fact that advances in technology lead to new ways to create and share creative expression, and the law naturally adapted to accommodate expression in new media.

The length of time copyright protects a work has also expanded remarkably, yet it lacks an empirical justification. Any effort to modernize copyright law must include a thorough review of the effect of length of the copyright term on stimulation of “progress in the arts for the intellectual enrichment of the public.”³¹

While we have addressed some current challenges for Copyright law and remix culture, our firsthand experience indicates that shortening the copyright term would alleviate a number of fundamental problems with copyright law. We acknowledge that the length of copyright is a hotly debated issue. To decide whether the current terms are justified, and to find an optimum term length, we must consider whether current terms actually a) lead to greater availability of works still under copyright leading to greater intellectual enrichment of the public, and b) incentivize more artistic creativity than shorter terms.

³⁰ Copyright Act of 1790, Section 1.

³¹Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990)

There is significant evidence to suggest the extraordinary length of copyright protection is harming the availability of copyrighted works and in turn the exchange of information and ideas. However, there is no empirical evidence that the current life plus seventy years term is providing a greater incentive for artistic creation and progress in the arts than a shorter term would provide.

Longer Terms Do Not Lead To The Greater Availability Of Works Still Under Copyright,
Harming Intellectual Enrichment Of The Public

Longer copyright terms have led to older works slowly sliding into obscurity rather than being exploited in ways that actually benefits the original copyright holder or society as a whole. One of the more common justifications for the increasing length of copyright is that it would encourage owners to ensure that works were available.³² The reasoning of those who ascribe to this belief is that if works enter the public domain, they will become obscure because there will be no economic incentive for the copyright holder to continue to publish the work.³³

Unfortunately this reasoning is the exact opposite of the reality in the digital age. A recent study

³² See e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 207 (2003) (holding that Congress “rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works”), H.R. REP. NO. 105-452, at 4 (1998) (“[T]he 1998 extension would ‘provide copyright owners generally with the incentive to restore older works and further disseminate them to the public.’”)

³³ “[T]here is ample evidence that shows that once a work falls into the public domain it is neither cheaper nor more widely available than most works protected by copyright. One reason quality copies of public domain works are not widely available may be because publishers will not publish a work that is in the public domain for fear that they will not be able to recoup their investment or earn enough profit” Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 104th Cong. 217-18 (1995) (statement of Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks). See also, William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475 (2003) (“an absence of copyright protection for intangible works may lead to inefficiencies because of impaired incentives to invest in maintaining and exploiting these works.”); Timothy B. Lee, *15 years ago, Congress kept Mickey Mouse out of the public domain. Will they do it again?* The Washington Post(October 25, 2013) <http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again/>(“There's no evidence suggesting that a longer term is going to produce any more art, literature,” Sprigman says. “The only reason to extend the term is to give private benefits to companies like Disney or Time Warner that have valuable properties like Mickey Mouse or famous films.”)

indicated that it was far easier to find a book on Amazon.com from the 1890's as opposed to the 1990's.³⁴ Why is this case? The study suggests that there is abundant availability of public domain books because these books do not have to be licensed, and publishers and individuals are far more likely to publish them and make them available.³⁵ In addition, because eBook publishing is extremely low cost, publishers and individuals are especially likely to publish high quality public domain books.³⁶ And it's not just publishers trying to make a few bucks that are eager to make public domain works available; organizations like Project Gutenberg and the Internet Archive strive to make works in the public domain accessible.

New Media Rights has also worked directly with many individuals, educational organizations, and small businesses that enhance, restore, and illustrate public domain books, as well as those who find ways to organize and build upon public domain works including video, photographic, and artistic content. This is productive economic activity that also preserves important intellectual and cultural works for future generations.

Indeed, the progress Article 1, Section 8 of the Constitution seeks to yield must necessarily include use by and enrichment of the public. Without its dissemination to the public, the public benefit of incentivizing creative works disappears. Therefore any discussion of how the length of copyright term incentivizes creation of new works must include the question of how the copyright term affects use by and enrichment of the public.

³⁴ Heald, Paul J., *How Copyright Makes Books and Music Disappear (and How Secondary Liability Rules Help Resurrect Old Songs)* (July 5, 2013). Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-07; Illinois Public Law Research Paper No. 13-54. <http://dx.doi.org/10.2139/ssrn.2290181>. This is not the first study to come to this same conclusion (See Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Copyrighted and Public Domain Fiction Bestsellers*, 92 MINN. L. REV. 1031 (2008) (Study found that works in the public domain were significantly more likely to be in print than works still under copyright. Moreover books in the public domain were often published by multiple publishers).

³⁵ Heald, Paul J., *How Copyright Makes Books and Music Disappear (and How Secondary Liability Rules Help Resurrect Old Songs)* (July 5, 2013). Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-07; Illinois Public Law Research Paper No. 13-54 at 15, <http://dx.doi.org/10.2139/ssrn.2290181>.

³⁶ *Id.*

It Is Unclear If Longer Copyright Terms Lead To Any Additional Incentive To Artistic Creativity

To justify longer copyright terms, proponents need to show an overall incentive effect on artistic creativity when works are covered by copyright law for a longer period of time. At the moment, any such statement is simply that, an opinion not backed up by empirical data. There is very little, if any compelling and sound empirical data on how current, extremely long copyright terms have affected the production of new copyrighted works.

Solution: Independent, Empirical Studies Are Needed To Determine If The Copyright Term Is Economically Justified, And Should Be Shortened

Up until this point too much of the copyright term debate has been focused on profit and ideology. It has failed to take into account, at an empirical level, the greater complexities of the proper length of copyright term. Rather than continued philosophical debate, the time has come for a debate founded on unbiased data. Without unbiased empirical data on this matter, it is hard to justify the current length of copyright. There are some very straightforward economic questions that should be addressed, including:

- Does the term of copyright protection for life plus seventy years incentivize any more creativity than a life plus fifty year term, or a 20 year term?
- Why is a 20 year term appropriate for incentivizing leaps of invention (i.e., patents), but not appropriate for incentivizing creativity?

- Does a longer copyright term merely provide marginal additional profit potential decades in the future without effecting incentives for creativity today, or does it actually incentivize additional artistic creativity?
- How do longer copyright terms affect the availability of works still under copyright over time? How does this affect future generations of creators, the overall progress of the arts, and the intellectual and cultural enrichment of the public?

Data that answers these questions is badly needed to have an informed debate about the current length of our copyright terms. Even once such data is gathered, any discussion of how the length of copyright term incentivizes creation of new works must still include the question of how the copyright term affects use of works by, and enrichment of the public.

Problem 5: Any Small Claims Copyright Court must contain important safeguards for small-scale parties

In the current copyright litigation system there is a significant power imbalance between wealthy, large-scale copyright holders and small-scale defendants. This has created a climate in which large-scale plaintiffs frequently exploit small-scale defendants' lack of sophistication and resources to extract inappropriate settlements from them. The disparity between the amounts of funds available to these two parties has resulted in the "settling culture" that exists today. Small infringement claims, at best, are straightforward affairs involving cooperative parties. At their worst, small copyright claims are exploitative of individuals without the resources or sophistication to properly defend themselves. When a small-scale defendant runs afoul of a large-scale copyright holder, often the only rational economic choice is to settle out of court. Because large-scale copyright holders often have a significant amount of funds to put towards litigating a claim, they are often able to intimidate defendants with fewer resources to settle out

of court, even when a valid defense may exist. These issues are discussed extensively in New Media Rights' January 17th, 2012 Comment on Small Claims response to the Copyright Office's Notice of Inquiry.³⁷

Small-scale defendants face financial obstacles in addition to the misuse and abuse of copyright laws by large copyright holders. Glaring examples of this abuse are seen in sweeping takedown notices issued by large copyright holders.³⁸ These sweeps often fail to distinguish between fair use of a work and infringing activity. Before these takedown notices are issued, there is little if any review of the work, which often times leads to improper takedown notices. These broad sweeps adversely affect all users, but particularly remix artists who rely in part on existing content to create their commentaries, criticisms, or parodies. When large copyright holders abuse the DMCA takedown notice process the artist's work loses value, as the old adage goes: *timing is everything*. As we have seen, disputes with a copyright holder can take months to resolve,³⁹ and then finally when the work is placed back on the site, it is oftentimes too late; the work has lost popularity and monetary value. Even if small-scale defendants want to hold the large copyright holder responsible for their wrongful takedown, the law is not friendly to their claims, and it is difficult for them to muster the resources to pursue these wrongs in court. Instead, the best the small-scale defendant can do is to publicly shame the plaintiff for abusive takedowns.

³⁷ Comments of New Media Rights, in the matter of remedies for small copyright claims, Docket No. 2011-10, at 1, http://www.newmediarights.org/sites/newmediarights.org/files/New_Media_Rights_Small_Claims_Copyright_Comment_final_d.pdf, January 17, 2012.

³⁸ See *Takedown Hall of Shame: Homeland Insecurity Through Bogus Takedowns*, Electronic Frontier Foundation (April 18, 2013), <https://www.eff.org/takedowns/homeland-insecurity-through-bogus-takedowns>; See also Mike Masnick, *HBO's Latest DMCA Abuse: Issues Takedown to Google Over Popular VLC Media Player*, TechDirt (July 15, 2013, 4:18 PM), <http://www.techdirt.com/articles/20130715/11202123803/hbos-latest-dmca-abuse-issues-takedown-to-google-over-popular-vlc-media-player.shtml>.

³⁹ See *Supra* discussion of "Buffy v. Edward" at 6-7.

Because of these concerns New Media Rights is cautiously optimistic about the implementation of the Copyright Small Claims Court recently proposed by the U.S. Copyright Office.⁴⁰

Although this new venue may have the potential to change the inequity small copyright claimants' face inside and outside the court system; we remain concerned that if not carefully constructed, it may also become a new forum for large content holders to intimidate small-scale copyright holders into settlements. To prevent this from occurring New Media Rights believes that certain key provisions must make it into the final version of the law.

Allow for Section 512(f) Claims And Counterclaims

Currently proposed sections 1403(c)(3) allows for claims and counterclaims of section 512(f) in the small claims court.⁴¹ It is critical that these provisions remain in the final version of the legislation because by allowing claimants to raise a section 512(f) claim we can begin to create a forum where parties are held accountable for bad faith claims of infringing activity. If the section 512(f) mens rea standard is lowered to gross negligence, and section 512(f) is actually enforced, as we have outlined above, less content will wrongfully be removed from the internet. Once that occurs creators can spend less time with attorneys and more time creating.

⁴⁰ U.S. Copyright Office, *Copyright Small Claims*, 1-201, 3-4 (September 2013), <http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

⁴¹ *Id.* at 137.

Allow For 17 USC 107 Fair Use As A Defense

As outlined in section 1403(c)(5) of the proposed legislation any legal or equitable defense can be raised to contest a claim of infringement.⁴² We want to stress, how critical it is to preserve the claimants right to assert a fair use defense under this provision. Because so many small claims cases involve fair use claims, not allowing this defense would largely gut the effectiveness of the Copyright Small Claims Court.

Also, although it is implied in section 1401(b)(3) that appointed Copyright Claims Officers will be qualified and experienced enough to evaluate a fair use defense⁴³, we want to reaffirm how crucial it is to appoint Officers who have experience with fair use claims and can be fair in its application. It is one thing to know the factors and read the court opinions applying fair use, but it is another to appreciate the role it plays in supporting our right to freedom of speech and see the value that fair use of copyrighted works brings to our society.

Also, the Attorneys appointed under section 1402(a)(2) to serve as Claims Attorneys should also not only be experienced in fair use but also at explaining it to laypeople.⁴⁴ While any copyright attorney should be able to explain fair use, the ability to explain it to a lay person is a niche skill that even some greatly accomplished copyright attorneys struggle with.

⁴² *Id.*

⁴³ *Id.* at 133.

⁴⁴ *Id.* at 135.

Adopt Sections 1405(D) And (E): Conduct Of Proceedings Access To Representation And Prima Facie Claim

Two key provisions we encourage the task force to adopt are sections 1405(d) and (e)⁴⁵, which promote access to representation and require prima facie evidence before a claim may be adjudicated before the Copyright Small Claims Board.

Although section 1405(d) does not guarantee a litigant representation, this provision still promotes equity in the Copyright Small Claims process by allowing parties to hire representation for help navigating such a complex area of law. And even if parties cannot afford to hire representation section 1402(a)(2) describes the role of Claims Attorneys as one of assisting parties through the Copyright Small Claims process. Both of these provisions should be adopted and enforced because even without representation parties may still benefit from the guidance of Claims Attorneys, which means that small-scale parties may still have a fighting chance to protect their interests against larger scale parties.

We would also encourage the new Copyright Small Claims Court and Copyright Office to try to utilize legal clinics that handle copyright issues throughout the country to provide representation to defendants in these cases. The Copyright Office should create a plan to work with clinics, similar to recent USPTO efforts to get legal clinics to provide services for underserved trademark and patent law clients. Ideally, the Copyright Office should try to provide some kind of funding to support the work of clinics and attorneys willing to represent defendants in these cases, to ensure parties are fairly represented.

The requirement imposed by Section 1405(e)(1), where petitioner must provide *prima facie* evidence of a copyright claim, is supported by both large, and small-scale copyright

⁴⁵*Id.* at 140.

holders.⁴⁶ Adoption of this provision can promote equity and judicial efficiency by preventing frivolous claims from reaching court.

New Media Rights believes that if these five problems are addressed as a part of larger copyright reform, the world will be a better place for not just content creators but those who interact with content.

III. Widespread Implementation Of Intermediary Licensing, Such As YouTube's Content ID System Could Be Incredibly Detrimental To Users' Rights

Widespread implementation of YouTube's Content ID system could be incredibly detrimental to users' rights. There are several issues with Content ID and until a solution is found, New Media Rights cannot recommend widespread adoption of a law or policy based on YouTube's Content ID system. Our preliminary concern is that, despite describing Content ID as an intermediary licensing system in this request for comment⁴⁷, Content ID is not actually a licensing system.

The Content ID system is a tool that content owners can use, outside of the DMCA, to prevent or monetize reproduction of their work on YouTube. This system alerts the original content holder when one of their works is detected on YouTube's site. The original content holder then has three options, they may:

- 1) disable the audio of the video or remove the work altogether;
- 2) track the video and receive statistical information related to the video; or
- 3) monetize the video by requesting that YouTube add advertisements to the video.⁴⁸

⁴⁶*Id.* at 122.

⁴⁷ The Dept. of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy*, 1-112, 29 (July 2013).

⁴⁸ *How Content ID works*, YouTube, <https://support.google.com/youtube/answer/2797370?hl=en>, (last visited Nov. 11, 2013).

None of these options amount to a license between the original content holder and the allegedly infringing user. Specifically these options lack several of the key components necessary for the licensing of content, including a benefit to the licensee and any actual agreement between the content holder and the licensee. Instead of a license, Content ID is simply an agreement between YouTube and content holders to allow content holders broad control over any use of their work on YouTube. Once we dispense with the fact that Content ID is not a license, there are two problems with Content ID that would have to be solved if a similar system were to be implemented elsewhere.

Problem 1: Content ID Does Not Effectively Account For Fair Use

Currently, Content ID has a very difficult time separating out fair use from infringing use of a copyrighted work. Indeed the vast majority of the cases we see at New Media Rights involving the Content ID system involve works that should not have been flagged because their uses of copyrighted works are fair use. In fact, using the Content ID system, content owners can financially benefit from, and exert control over others' creative work that may involve legal uses of their copyrighted content. Forcing works to be monetized is particularly troublesome for artists who are directly criticizing or parodying the underlying work. One such example is Jonathan McIntosh, who has faced numerous documented monetization and takedown efforts of copyright holders whose work he criticizes.

In one episode in late 2012, McIntosh's video *Buffy v Edward*, critical of Lionsgate's *Twilight* series, was repeatedly monetized using Content ID by Lionsgate's agent MovieClips.⁴⁹ After repeated appeals and efforts to get Lionsgate to drop their efforts, Lionsgate confirmed in an email to New Media Rights that they had proceeded to file a DMCA takedown on *Buffy vs*

⁴⁹ *Jonathan McIntosh, Buffy vs Edward Remix Unfairly Removed by Lionsgate* (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>

Edward because Jonathan had disputed their right to monetize the remix.⁵⁰ Lionsgate’s agent stated

“The audio/visual content of this video has been reviewed by our team as well as the YouTube content ID system and it has been determined that the video utilizes copyrighted works belonging to Lionsgate. Had our requestes [sic] to monetize this video not been disputed, we would have placed an ad on the cotent [sic] and allowed it to remain online. Unfortunately after appeal, we are left with no other option than to remove the content.⁵¹ In other words, allow us to monetize the content or we will take the content down.”

That’s not respectful of fair use. That’s compulsory licensing at best and a form of digital sharecropping at worst, where the copyright holder and YouTube benefit monetarily, and the downstream creator gets nothing. Content ID largely imposes a world where the only way to reuse content is to get a license, which is contrary to the balance our copyright law creates.

Problem 2: The Content ID Process Is Currently Too Difficult For The Average User To Navigate

Content ID does have an appeals process, which in theory should mitigate some of these fair use concerns, but it seems both users and content holders do not understand those appeals. A recent case illustrates this problem with the appeals process.

Recently we helped the Lansdowne Teen Advisory Board,⁵² get their parody video “Read It!” un-muted by the Content ID system. This video took Michael Jackson’s iconic music video about gang violence “Beat It,” and turned it into a song that encourages kids to read and come to

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Teens make parody video, but Sony tells them to beat it... just beat it!*, New Media Rights, http://www.newmediarights.org/teens_make_parody_video_sony_tells_them_beat_it%E2%80%A6_just_beat_it, (Oct. 15, 2013).

the library. However, before the Lansdowne Library ever approached us, they approached the song's owner, Sony Music, for help getting the video back up. Sony claimed that even they were incapable of navigating the "YouTube Vortex" to appeal the muting of the video. Although New Media Rights was able to navigate what Sony called the "YouTube vortex" and get the video unmuted, it seems particularly telling that content owners and users alike have difficulty navigating the system.

In many cases, the design of the process is intimidating to users. For example, the simple concept of requiring certain personal information to be entered to appeal a claim intimidates some users from filing an appeal. In addition, the appeals process for fair use asks users to address each of the fair use factors in detail, something that can only really be done by an experienced attorney, and discourages users from appealing wrongful takedowns.

Even when users draft a detailed response based on fair use, there is no guarantee of victory. In Jonathan McIntosh's case, New Media Rights drafted a 1,000 word response citing case law supporting Jonathan's fair use.⁵³ Even when the appeal was granted by YouTube and the video was reinstated without ads, Jonathan soon found his content removed again through a new "visual" Content ID claim rather than the previous "audiovisual" claim.⁵⁴ Indeed, Lionsgate's agents MovieClips caused McIntosh problems for about 3 months, ignoring his fair use arguments and the fact that their claims were not supported by the law.

For these reasons, we cannot recommend that a Content ID like system be implemented on a larger scale at this time.

IV. Development Of DMCA Takedown Best Practices

⁵³ *Jonathan McIntosh, Buffy vs Edward Remix Unfairly Removed by Lionsgate* (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>

⁵⁴ *Id.*

New Media Rights is cautiously optimistic about the ability to solve many of the issues surrounding DMCA notice and takedown system using a multistakeholder dialogue. New Media Rights is particularly well suited to be a part of that dialogue on the following issues proposed by the Department of Commerce: inaccurate takedown requests; misuse of takedown requests; and, the difficulties in using the system for individuals or small and medium-size enterprises. These are all issues we encounter on a daily basis, and our direct experience working with these types of clients will contribute greatly to the dialogue.

The task force can ensure participation by all relevant stakeholders, as well as effective and informed representation of their interests by doing a few things. The first is giving sufficient notice for the hearings or roundtables. For small organizations like New Media Rights, it's very difficult to allocate resources to attend and prepare for hearings without at least three months notice. Along those lines, we strongly recommend that hearings be held on both the east and the west coasts to ensure that attending the hearings or roundtables will not be a financial burden on smaller organizations and stakeholders. Alternatively allowing participation by phone could also help to lessen the financial burden, although in person participation is preferable.

Also, as the multistakeholder process is conducted it would be helpful to apply some of the lessons we've learned from past multistakeholder and policy proceedings. First, an impartial party must decide who is invited to participate in the process. It would be all too easy to entirely skew the process and results by failing to invite remix and independent creators, NGO's, academics, technology companies, everyday internet users, or any other stakeholders to the discussion. In IP policy this happens all too often, most often at the international level,⁵⁵ and it would be unfortunate to let that occur here.

⁵⁵ See e.g., *New Media Rights joins public interest coalition opposing fast-track authority for the Trans-Pacific Partnership*, New Media Rights(October 23, 2013)

Second, the multistakeholder process must be open to public comment and review throughout the process since the DMCA is such an important tool for speech online. All too often, again mostly in the international IP policy space, discussions have been secret and not open to public review.⁵⁶ Secrecy breeds bad policy, and if the process is not open to public comment and review we may walk away with best practices that are entirely self-serving for the stakeholder group with the most money, power and influence.

Third, technologists must play an active role in the multistakeholder process. Last year with the controversy behind SOPA and PIPPA, we saw the effects of creating internet law without technologists.⁵⁷ If technologists are not at the table, it's all too likely that any proposed best practices would be technologically unfeasible, and thus useless to all parties involved.

Fourth and finally, whatever the result of the multistakeholder process it should not take the form of a private contract between parties, like the recent Copyright Alert System. Such contracts are almost impossible to challenge in court and they often lack critical forms of due process for users.⁵⁸

With these things in mind we are cautiously optimistic that a multistakeholder process could be a useful part of the larger copyright reform process.

http://www.newmediarights.org/new_media_rights_joins_public_interest_coalition_opposing_fast_track_authority_trans_pacific.

⁵⁶ *Id.* See also *Anti-Counterfeiting Trade Agreement*, Electronic Frontier Foundation, <https://www.eff.org/issues/acta>.

⁵⁷ Declan McCullagh, *How SOPA would affect you: FAQ*, Cnet (January 18, 2012) http://news.cnet.com/8301-31921_3-57329001-281/how-sopa-would-affect-you-faq/; Allan A. Friedman, *Cybersecurity in the Balance: Weighing the Risks of the PROTECT IP Act and the Stop Online Piracy Act*, Brookings (November 15, 2011) <http://www.brookings.edu/research/papers/2011/11/15-cybersecurity-friedman>.

⁵⁸ See Dan Nosowitz, *Everything You Need To Know About The Piracy-Battling Copyright Alert System*, Popular Science (February 28, 2013) <http://www.popsoci.com/technology/article/2013-02/everything-you-need-know-about-piracy-battling-copyright-alert-system>. For a cautionary tale of how private contract based systems like this backfired abroad, see e.g., Teri Karobonik, *Internet Intermediary Liability in Ireland, Global Censorship Chokepoints*, <https://globalchokepoints.org/internet-intermediary-liability-ireland#!>.

V. Conclusion

New Media Rights offers these changes and comments to spark discussion and encourage badly needed copyright reform for the digital age. Again, we would like to emphasize this reform need not, and should not, take the form of any radical evisceration of copyright. At the same time, reform should not be used as an opportunity to continue unreasonable expansion of copyright law without concern for the collateral damage it causes to artistic progress, freedom of speech, and the intellectual enrichment of the public. Rather, much like one would tend to a garden, it is time we examine our current copyright law, remove the old weeds of law that no longer serve us, and plant the seeds of new law that will help to foster a new generation of artists and creators.

Respectfully Submitted,
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New Media Rights
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