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Before the

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Subcommittee on Courts, Intellectual Property, and the Internet**

Hearing on

“The Rise of Innovative Business Models:
Content Delivery Methods in the Digital Age”

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Statement of David Sohn, Center for Democracy & Technology

On behalf of the Center for Democracy & Technology, thank you for this opportunity to participate in the Subcommittee's ongoing review of U.S. copyright law. CDT is a non-profit, public interest organization that seeks to promote free expression, privacy, individual liberty, and technological innovation on the open, decentralized Internet. With respect to copyright, CDT advocates balanced policies that provide appropriate incentives for creators without curtailing the unique ability of the Internet and digital media to empower users, speakers, and innovators.

My testimony today will first discuss several key trends regarding consumer expectations in the rapidly evolving copyright and media marketplace. It will then offer some thoughts on what those trends and expectations mean for possible congressional action in this area.

I. Trends and Consumer Expectations in Today's Marketplace for Digital Content

Widespread access to the Internet and digital technologies are reshaping consumer options, expectations and behavior concerning entertainment, media, and creative expression. The marketplace is evolving rapidly. Much is in flux, but several trends are evident and appear likely to continue.

A. Consumers expect "on demand" access – the ability to get what they want, when they want it.

Consumers increasingly expect "on demand" access to the entertainment and media content of their choice. They like the convenience and immediacy that electronic delivery can provide. With just a few clicks, the broadband Internet brings content of all kinds directly and immediately to Internet users. Digital delivery is increasing rapidly, as downloads and streaming replace trips across town to the record or video rental store.¹

Consumers increasingly expect extensive and fine-grained choice as well. Rather than choosing a channel to watch based on "what's on" right now, consumers today use digital video recorders, video-on-demand systems, and various Internet-based services to seek out specific, individual programs and watch them at the time of their choice. Rather than buying albums, many consumers prefer to pick and choose individual songs. And consumers expect access to a wide and indeed comprehensive selection. They know that in the online environment, the range of works that can be offered is not limited by shelf space or the logistics of distributing and warehousing physical inventory. They want access not just to current and popular content, but also to what some have termed "the long tail" – the much larger number of works for which demand is scattered and idiosyncratic. As Internet users grow accustomed to having what feels like an unlimited universe of information right at their fingertips, limitations on choice feel anachronistic.

¹ For example, digital distribution accounted for over 55 percent of the US music market in 2012; 162 million Americans watch online video; and nearly one quarter of American adults read e-books. Digital Media Association, *Digital Media: Growth, Innovations & Challenges 2013*, http://www.digmedia.org/images/stories/DiMA_Report_Growth_Innovations_Challenges_2013.pdf, at 7, 9, 10.

Finally, consumers increasingly rely on technology-based tools to discover and locate copyrighted works. Search engines enable users to quickly find information about any work they choose to query, including information about where to get access to it. Social networks keep users apprised of what their friends or acquaintances are reading, listening to, or viewing. Algorithm-based recommendation tools suggest content based on users' prior behavior or purchases. Projects like the HathiTrust Digital Library and Google Books, the latter the subject of a favorable court ruling just last week, enable users to do full-text searches through the contents of entire major research libraries. In short, technology offers rich options for identifying interesting and relevant copyrighted works.

B. Consumers seek mobility and portability.

Consumers also want to be able to access and enjoy copyrighted works on a mobile basis and from multiple devices. Smartphones, tablets, and e-readers let users enjoy access to copyrighted content on the move and wherever they go.² Cloud-based content-streaming services can provide access anywhere a user can get an Internet connection. And as devices with computing power proliferate, consumers generally don't want their content tethered to particular devices; increasingly, they want the convenience of being able to transfer their content seamlessly among a variety of networked devices used by themselves or their household. In short, consumers not only want the content of their choice *whenever* they want it; they want it *wherever* they want it too.

C. Consumers are creators too – not just passive recipients.

Central to any consideration of the current state of copyright law is the massive increase in the amount of creative activity that the public engages in online. Indeed, the term "consumer" is in some ways misleading in this discussion, as it fails to accurately reflect the public's current relationship to copyright and creation. Consumers today are not just passive recipients of copyrighted content created by large commercial media companies. They are creators of content in their own right, and they interact with digital content in much richer ways.

A tremendous amount of copyrighted material is created today on a non-professional or non-commercial basis, as well as by independent artists and creators operating outside the traditional copyright industry ecosystem. People write blogs; they use consumer-grade software to create music and video that not long ago would have required professional equipment; they self-publish books; they post photos and videos to social networks and user-generated content platforms. Over 100 hours of video are uploaded to YouTube every minute; 350 million photos are uploaded to Facebook each day;

² The amount of video watched on mobile phones and tablets reportedly increased by 100 percent in 2012. Graeme McMillan, *Viewers Are Flocking to Streaming Video Content – And So Are Advertisers*, WIRED UNDERWIRE, Mar. 1, 2013, <http://www.wired.com/underwire/2013/03/streaming-video-advertising>.

Tumblr is home to 148 million blogs comprising 67 billion blog posts.³ 54 percent of adult Internet users report post their own original photos or videos online.⁴

Moreover, digital technology facilitates a more participatory, interactive relationship with creative works. Excerpts from one creative work can be adapted and incorporated into new creations, spurring what some have termed a “remix” culture.⁵ Songs purchased on an album can be rearranged and reordered into playlists of a user’s choosing. Digital text can be searched, cut and pasted, or digitally annotated. Digital photos can be tagged or altered. And media of all sorts can be cut and spliced together to create commentary, criticism, and rich new forms of expression. This is not fringe behavior; of Americans who post their own videos online, 40 percent report making videos that creatively remix content.⁶ Of course, some manipulations of creative work can raise issues under copyright law, but there is no question that the flexibility of digital technology facilitates greater involvement and interaction with creative works.

D. A variety of new distribution models and technologies are catering to evolving consumer expectations.

Business models and technologies are evolving in ways that both cater to and fuel the marketplace demands of Internet-age consumers.

Large volumes of commercially produced works are now available online not just for purchase, but also through services that offer access to an entire library of works on either a paid subscription or an advertising-supported basis.⁷ Streaming, whether for Internet radio or movie rentals, has grown in popularity as an alternative to downloading. Internet-based “locker” services enable users to store their content on computer servers in the “cloud” and access it anywhere they have an Internet connection. Social networks and user-generated content platforms enable individual creators and artists to share and distribute their works either with or without a commercial purpose, and are increasingly being used by larger commercial creators as well. Social networks can even play a role in financing content creation: The majority of projects funded by Kickstarter, the crowdsourced financing site, have come from content-creation categories such as film

³ YouTube Statistics, <http://www.youtube.com/yt/press/statistics.html> (accessed Nov. 17, 2013); Joel Kotenko, *Facebook Reveals We Upload a Whopping 350 Million Photos to the Network Daily*, DIGITAL TRENDS, Sept. 18, 2013, <http://www.digitaltrends.com/social-media/according-to-facebook-there-are-350-million-photos-uploaded-on-the-social-network-daily-and-thats-just-crazy/>; About Tumblr, <http://www.tumblr.com/about> (accessed Nov. 17, 2013).

⁴ Maeve Duggan, *Photo and Video Sharing Grow Online*, PEW RESEARCH CENTER, Oct. 28, 2013, <http://pewinternet.org/Reports/2013/Photos-and-videos.aspx>, at 2.

⁵ For a recent and extensive discussion of the role and value of remixing to culture and creativity, see Organization for Transformative Works, Comments to the Dept. of Commerce Internet Policy Task Force, Nov. 13, 2013, <http://transformativeworks.org/sites/default/files/Comments%20of%20OTW%20to%20PTO-NTIA.pdf>.

⁶ Kristen Purcell, *Online Video 2013*, PEW RESEARCH CENTER, Oct. 10, 2013, <http://pewinternet.org/Reports/2013/Online-Video.aspx>, at 14.

⁷ Music subscription services, for example, saw a 44 percent rise in paying customers in 2012. Digital Media Association, *supra* note 1, at 7.

and video, music, and publishing.⁸ New licensing models, especially those developed by Creative Commons, empower creators with non-commercial objectives or non-traditional business strategies to disseminate their works broadly on terms that better suit their goals. Finally, device innovation plays a key role in the content distribution marketplace as well, as devices such as e-book readers, tablets, and digital video recorders give users new options for engaging with copyrighted works.

In short, much has changed in a relatively short time. But today's marketplace is very much a work-in-progress. New business models and technologies will continue to emerge. Some will be more successful than others, and some will pose serious challenges to entrenched legacy business models. As discussed in the next section, copyright law should seek to facilitate this evolution, not to protect specific business models or otherwise forestall innovation and change.

II. What This Means for Copyright Reform Legislation

The trends discussed above carry several implications for Congress's review of copyright law.

A. Congress should focus on ensuring that the legal regime encourages continued innovation in the marketplace.

Responding to the marketplace trends and expectations described above is an ongoing challenge that will require ongoing experimentation and innovation. In reviewing copyright, Congress should focus on how the law can accommodate and encourage robust continued innovation in the marketplace to meet evolving expectations for the distribution and enjoyment of both commercial and noncommercial creative works.

To be clear, the fact that consumers increasingly expect "on demand" access to the copyrighted content of their choice does not mean they are legally entitled to it, any more than they are legally entitled to get it all for free. Copyright holders enjoy the exclusive right to distribute their works and thus are generally entitled to do so on terms of their own choosing. But where the market fails to cater to substantial consumer appetites, that represents a lost opportunity. Everyone is better off if the market can develop new offerings that recognize what consumers want and find ways to provide it.

Having access to a wide variety of legal offerings that meet consumers' diverse and evolving preferences is obviously in the interests of consumers themselves. It is consistent with copyright's fundamental objective of "enriching the general public through access to creative works."⁹ It is also, however, crucial to the broadly shared goal of reducing copyright infringement.

⁸ Derek Slater and Patrick Wruuck, *We Are All Content Creators Now: Measuring Creativity and Innovation in the Digital Economy*, THE GLOBAL INNOVATION INDEX 2012, http://www.wipo.int/export/sites/www/econ_stat/en/economics/gii/pdf/chapter11.pdf, at 165.

⁹ *Fogerty v. Fantasy Inc.*, 510 U.S. 517, 527 (1994).

The success of iTunes – which earlier this year announced its 25 billionth download¹⁰ – has demonstrated conclusively that it *is* possible to “compete with free.” The lesson of this and the rest of the growing online copyright marketplace is that if lawful services are slick, easy to use, and offer comprehensive choice, consumers are happy to use them. But it also remains true that if lawful services fail to give consumers what they want, when they want it, unlawful sources will be out there, waiting to fill the gaps and satisfy the unmet demand. In a world in which information technology has made incredibly powerful tools for copying and disseminating data cheap and ubiquitous, no amount of wishing and no enforcement strategy will be able to fully eliminate unlawful sources of copyrighted material.

As Congress considers copyright reform legislation, therefore, it should keep in mind that a robust and evolving content marketplace providing convenient and attractive options for satisfying consumer demand is the best defense against widespread infringement.¹¹ Encouraging the continued development of innovative business models and technologies is the most productive thing Congress can do.

B. Congress should be careful not to undermine those elements of the current regime that promote marketplace and technology innovation.

Encouraging continued marketplace innovation requires, first, being careful not to undermine those elements of the current legal regime that have proved essential to much of the innovation that has occurred to date. I would highlight three: the safe harbor set forth in DMCA section 512; the so-called “Sony doctrine” concerning products capable of substantial non-infringing uses; and fair use.

The section 512 safe harbor protects online service providers, if they meet certain conditions, from monetary liability for infringements that may occur over their systems. This protection has been nothing short of indispensable to the development of social networking and user-generated content platforms – the platforms that are empowering the explosive expansion of creative activity by individual creators and that are becoming increasingly important channels for commercial content as well. Litigants in several major lawsuits have sought to constrain section 512 in ways that would have rendered it inapplicable to most of today’s online services, but courts have rejected those efforts and confirmed section 512 as a key facilitator of innovation.¹²

¹⁰ Apple, *iTunes Store Sets New Record with 25 Billion Songs Sold*, February 6, 2013, <http://www.apple.com/pr/library/2013/02/06iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html>.

¹¹ Indeed, studies earlier this year regarding Norway and the Netherlands claim that the rise of lawful services such as Spotify and Netflix has caused infringement in those markets to decline. See Sophie Curtis, *Spotify and Netflix curb music and file piracy*, THE TELEGRAPH, Jul. 18, 2013, <http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>; Janko Roettgers, *Charts: How Spotify is killing music piracy*, PAIDCONTENT, Jul. 18, 2013, <http://paidcontent.org/2013/07/18/charts-how-spotify-is-killing-music-piracy/>.

¹² See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011); *Viacom International Inc. v. YouTube Inc.*, 2013 WL 1689071 (S.D.N.Y. April 18, 2013); see also David Sohn, *Court Ruling in YouTube Appeal Is (Mostly) a Win for Internet*, Apr. 5, 2012, <https://www.cdt.org/blogs/david-sohn/0504court-ruling-youtube-appeal-mostly-win-internet>.

The *Sony* doctrine, established in the 1984 Supreme Court case that rejected a copyright challenge to the VCR, states that it is lawful to make a product that may have some infringing uses, so long as the product is capable of substantial non-infringing use.¹³ This principle has been central to the development of multipurpose information technology devices that today play key roles in the marketplace.

Fair use, codified in section 107 of the Copyright Act, is a flexible provision that helps the law accommodate a wide range of beneficial activity and free expression. It facilitates the rise in consumer creation, providing a legal basis for activities such as quoting, remixing, and parody. It facilitates consumer choice and interaction with digital content, such as the “time shifting” functions of VCRs and DVRs. And it enables technology-based tools that help users discover and locate copyrighted works, from search engines themselves to the mass-digitization projects recently upheld in the HathiTrust and Google Books decisions.¹⁴

Continued innovation and development in the online content marketplace would suffer greatly if Congress were to narrow or otherwise undermine any of these three legal principles.

C. Congress should consider reforming Copyright Act’s statutory damages provisions.

The current statutory damages regime can serve as an obstacle both to marketplace innovation and to the public’s increasingly participatory relationship to content and creation. Statutory damages reform should be a priority item for Congress to consider in any review of copyright law.¹⁵

The current statutory damages framework is a massive risk-multiplier for any company or individual trying to navigate the often unsettled contours of copyright law. That can chill innovation, because history shows that innovators and their investors seeking to develop new products and services often have to contend with copyright disputes. Examples of new technologies sued on copyright grounds range from VCRs to mp3 players to search engines for images to video-sharing websites and many more. The statutory damages regime makes each such dispute literally a “bet the company” issue, with damage potential in the hundreds of millions or even billions of dollars. Many would-be innovators would quite rationally shy away.

Statutory damages also create outside risks for the increasingly creative and interactive behavior of consumers. In particular, the high stakes can discourage expressive activity that relies on fair use, since fair use analysis is too fact-specific to provide consumers with certainty regarding what is and is not fair use. Statutory damages are at the heart of

¹³ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁴ See *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003); *Authors Guild, Inc. v. Google Inc.*, 05 Civ. 8136 (S.D.N.Y., 2013); *Authors Guild, Inc. v. HathiTrust*, 11 Civ. 6351 (S.D.N.Y., 2012).

¹⁵ For a longer discussion of the problems associated with the current statutory damages regime, see CDT’s recent comments to the Dept. of Commerce’s Internet Policy Task Force, <https://cdt.org/comments/comments-us-commerce-dept-internet-policy-task-force>. See also Pamela Samuelson and Tara Wheatland, *Statutory damages in copyright law: A remedy in need of reform*, 51 WILLIAM & MARY L. REV. 2, 439 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604.

the “orphan works” problem too, because any use of a work whose author can’t be found carries the risk of exorbitant damage awards if the author later surfaces. As digital technology enables the public to interact with content in new ways, the statutory damages regime threatens the possibility of disproportionate sanctions for behavior that seems far removed from anything one might call “piracy.”

D. Congress should consider providing greater legal certainty for personal, non-commercial uses.

Congress should also consider providing greater legal certainty for functions that cater to consumers’ growing interest in mobility and portability. It may often be fair use for consumers to move their legally acquired content among devices for their own personal uses – but, as noted above, the contours of fair use are uncertain and the consequences of any misstep can be severe. Carving out a more explicit exception for personal, non-commercial uses could benefit consumers.

E. Simplifying the Copyright Act, so that the general public can better navigate it, has an important place in reform efforts.

In light of the explosive growth in non-commercial, consumer-based creation, copyright law can no longer be the sole province of a relative handful of highly specialized companies and lawyers. As the Register of Copyrights observed earlier this year, this means there is a growing need for the nation’s copyright statute to be readable and accessible to non-experts.¹⁶ Much of today’s Copyright Act is nothing short of byzantine and inscrutable. Simplification should have an important place in any discussion of reform.

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CDT appreciates the opportunity to participate in today’s hearing. We look forward to continuing to engage with the Subcommittee as it proceeds with its review of this important topic.

¹⁶ *The Register’s Call for Updates to U.S. Copyright Law – Hearing before the House of Representatives Committee on the Judiciary Subcommittee on Intellectual Property, Competition, and the Internet*, 113th Cong., 1st Session (Mar. 20, 2013) (Statement of Maria Pallante, Register of Copyrights of the United States) (“Because dissemination of content is so pervasive to life in the 21st century, the law also should be less technical and more helpful to those who need to navigate it . . . [I]f one needs an army of lawyers to understand the basic precepts of the law, then it is time for a new law.”).