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Re: Response to Notice Of Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, Docket No. 100910448-0448-01, RIN: 0660-XA19, Document Number: 2010-24863

Dear Mr. Amari and Mr. Shapiro:

Thank you for the opportunity to comment on issues of innovation and the Internet with particular focus on copyright and creativity. While this Notice addresses creativity and copyright, the *primary* underlying purpose of this Notice, in light of the preceding series of papers and discussions, is to consider how to engage in effective antipiracy efforts globally. While concerns about fair use, scholarly and educational exchange, and the ways that antipiracy efforts can have the unintended consequence of chilling creativity were sparse in the early discussions, it is notable that the Internet Policy Task Force is gaining new insights from these public inquiries. I am greatly relieved to know that the Task Force, and by extension the NTIA with the PTO, is indeed aware of and responding to the concerns of those who want to make reasonable educational or scholarly uses of copyrighted material – but are reticent or unable to do so for any number of reasons related to copyright.

The importance of sharing and collaboration for the library, museum, and archives community globally falls into an often-complex area. University, scholarly and educational uses take increasingly dynamic forms with growing opportunities for learning and knowledge exchange. These kinds of collaborations are *expected* in a democracy based on the principle that educated citizens are fundamental to democratic institutions and behavior. They reflect the comprehensive ecosystem of information and ideas as expressed and embodied in all kinds of cultural collections.

Copyright law today is inflexible and internationally complex. It chills behavior that is *commonly expected* from our cultural and educational institutions, framing it in the peculiar context of copyright infringement. 'Piracy' is an understandably pejorative term – but it is one that loads all discussions about what is and is not infringement and interferes with reasonable discussions about what *should* constitute infringement. That ambiguous zone chills all kinds of exchange and often results in missed opportunities to share in a way that would be likely to lead to innovation – even if no copyright holder would be directly affected. The 'barnacle encrusted' barge of

copyright is crashing on the shoals.¹

The University of Michigan Library sits at the confluence of the categories presented for comment. As a library, we are a rightsholder, an intermediary, and a user. As such, we are constantly presented with the challenges of balancing the rights and responsibilities of those roles. Libraries are among the guardians of culture and intellectual tradition. We share many similar characteristics and values with museums, archives, and educational and cultural institutions generally conceived. In the absence of such memory institutions, human knowledge is vulnerable to irreplaceable loss, inexcusable in a time when technology thoughtfully applied can help mitigate the loss of flood, fire, war, or even simple technical obsolescence.

At the University of Michigan Library, we approach these matters in both practical and visionary ways. We are proud partners in HathiTrust, a partnership of major research institutions and libraries working to ensure that the cultural record is preserved and accessible long into the future. There are more than fifty members in HathiTrust with membership open to institutions worldwide. Libraries could do their work more effectively if there were a clearer path to making lawful uses of materials in their stewardship. HathiTrust is a shared effort to tackle long-term preservation and access to library materials and thus ensure the sustainability of cultural heritage institutions for today and future generations. The mission of HathiTrust is to contribute to the common good by collecting, organizing, preserving, communicating, and sharing the record of human knowledge.

By building a reliable and increasingly comprehensive digital archive of library materials converted from print that is co-owned and managed by a number of academic institutions, the HathiTrust is dramatically improving access to these materials in ways that, first and foremost, meet the needs of the co-owning institutions. As partners, this is a shared effort to help preserve important human records by creating reliable and accessible electronic representations. The HathiTrust works to create and sustain the shared collections of the partner libraries as “public good”. The technical framework is simultaneously responsive to members through the centralized creation of functionality and sufficiently open to the creation of tools and services not created by the central organization. Responsible stewardship of copyright is a key area of attention for this effort. Innovative approaches to relations and sharing among libraries globally would go a long way to ensuring knowledge is preserved and available into the future. But it is only possible with complex and indeterminate copyright analyses.

Good Faith, Fair Use, and the Permissions Problem: New Technology in an Old Legal Framework

Citizen authors, independent filmmakers, librarians and archivists have unprecedented access to the means of creating and distributing creative works. While there has been a huge explosion in individual creativity over the last decade, this boom has been chilled by the current climate of fear of legal reprisal for potential copyright infringement. Fear of infringement and the specter of catastrophic damages has led to a vicious cycle of chilling efforts by legitimate creative institutions for fear of reprisal. This is particularly troubling, as many of the uses that legitimate creators want to undertake are either fair uses or uses for which rightsholders would grant permission. In the absence of clear permission granting mechanisms and in the face of catastrophic damages, many potentially valuable creative projects never get past the planning stage.

A heavy toll on creativity is posed by the current statutory damages regime. This is one of the most worrying elements of our current copyright climate. The boom of blogs, forums, and photo

¹ Jessica Litman, *Real Copyright Reform*, 96 Iowa L. Rev.1, 4 (2010).

sharing websites, as well as the kind of creativity enabled by YouTube permits citizens and small businesses to engage the global community as creators rather than solely as passive consumers. This is an exciting and rich development. Yet, the same citizen creators, operating in a good faith belief that what they are doing is legitimate, may find themselves under threat of catastrophic damages for potential copyright infringement, and many of these creators would be happy to work with rightsholders to ensure that their intellectual property rights are respected.

Having said the above, it seems clear that the current system of statutory damages, compulsory licenses, and permissions processes made a good deal of sense when originally developed in the course of antitrust lawsuits in the 1940s. We no longer live in an age where content – commercial or otherwise -- is *only* created at high expense by large studios with substantial business and legal infrastructures. Because copyright law still treats 'creativity' as something which occurs as the result of an expensive and professional process, it risks alienating a generation of creators who only see copyright law as an impediment to their success rather than a desirable, beneficial embodiment of a social contract.

This leads to another troubling aspect of the current copyright climate: its influence on the next generation of creators. It is deeply troubling to see children with a good working knowledge of copyright law that coexists with a total disregard -- or even contempt for -- those same laws. Yet the law itself and the inability of traditional rightsholders to adapt to the new and fast-changing reality is largely to blame. These children are the creators, entrepreneurs, educators, and visionaries of tomorrow, it is vitally important that they see copyright law as a necessary and beneficial legal protection as opposed to a obsolete hindrance.

In addition to focusing on anti-counterfeiting as a commercial matter, effort should be directed towards finding how to integrate cultural norms and expectations like freedom of speech, inquiry and expression girded by fair use, into productive cultural and economic innovation. Educational and cultural institutions can be vital elements of this effort, as they themselves have had a long history of serving as longstanding, trusted the stewards of knowledge. These organizations, and the people who work in them, excel in making principled, responsible uses that in turn drive innovation and opportunity. In finding ways to help empower creators to understand, use, and respect copyright law, cultural institutions are a meaningful ally.⁵

Although libraries and other cultural institutions can play a vital role in preserving knowledge and working to strengthen creativity and the law, they are not without problems to face. Libraries deal with copyright on a daily basis, and while they carefully navigate the law, they also run into serious questions as they work toward their goals of preserving, creating, and disseminating knowledge. Some examples follow:

Administrative costs of rights clearance – A general problem that affects commercial and noncommercial interests: the cost of doing permission research and obtaining permissions is extreme. That formal search process tends to lead to inconclusive results. Hal Varian's recent paper on the transaction cost of obtaining permissions sums up the point. It can be a very uneven and costly process with no determinative results.⁶

5 For productive ideas on copyright education see Palfrey, John G., Gasser, Urs, Simun, Miriam and Barnes, Rosalie, *Youth, Creativity, and Copyright in the Digital Age*, (2009). Berkman Center Research Publication No. 2009-05. Available at SSRN: <http://ssrn.com/abstract=1552415>

6 See Varian, Hal, *Transaction Costs and Copyright*, Presented at the WIPO Seminar Series on the Economics of IP, September 2010, available at http://www.wipo.int/econ_stat/en/economics/seminars.html. See also, Vuopala, Anna, *Assessment of the Orphan works issue and Costs for Rights Clearance*, European Commission, DG

Slavic photos – a digital copy of photo album of 19th and early 20th century photos from Eastern Europe are made accessible only on site at a single library where the copyright issues are irresolvable. It is highly unlikely that a rightsholder can be identified or will emerge. Meanwhile the promise of broader access for research and discovery either remains inert, or the Library provides digital access to the surrogates possibly risking exposure.

True crime and sci-fi comics – Digital copies of fragile pulp fiction (so called because of the inexpensive paper it was printed on) from the 1920s-1930s are made for preservation purposes. Assume the copyright questions are indeterminable. Can these surrogates only be viewed on site at the source library rather than globally through other libraries or similar cultural institutions? The promise of digital technology to bring access and share ideas and understanding is only partially met.

Social protest collection – published and unpublished material collected over the course of the twentieth century, a collection documenting a wide variety of international social protest movements of the nineteenth and twentieth centuries.

Assume the copyright questions are indeterminable for most of the materials, while permissions could be sought for use of others simple to permit public access to the digital surrogates for noncommercial educational purposes. The administrative cost to do so would be significant. The scholarly value is of great interest worldwide. But access remains limited primarily to onsite visitors reducing the scholarly and educational possibilities.

Student projects - A student dance performance (choreography, dancing & filmed by students) is recorded for a class. The university wants to show the recording on its local cable network, broadcast only to the school community. The musical accompaniment is presumed to be subject to copyright. The producers believe they need copyright permission but have no idea how to obtain it or how much it would cost. There is no expected profit, no anticipated adverse effect on the value of the music. What do the students need and how do they get it? A mechanical right, a performance right? What if they wanted to be entrepreneurial and sell copies of their dance with the music? How do they get the needed rights as a group of students?

It may be beneficial to think about culture and education as part of and akin to a supply chain. Where do these 'goods' fit, how do they flow, what is a 'problem at the border' – and what is not really at issue? For example, libraries and memory institutions sometimes help companies that own copyrights in materials that *no longer physically exist anywhere in the world*. Films in the Library of Congress' Motion Picture, Broadcast, and Recorded Sound division are sometimes the only remaining copy. Copyright holders in those films benefit from the care, storage and preservation paid for through public and philanthropic support -- but public access is quite limited for the term of the copyright.⁷

Misguided International Enforcement

Information Society and Media, Unit E4 Access to Information, May 2010.

7 See Bamberger and Brylawski, "The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age," Council on Library and Information Resources, 2010, available at <http://www.clir.org/pubs/abstract/pub148abst.html>, see also Blue Ribbon Task Force on Sustainable Digital Preservation and Access, "Sustainable Economica for a Digital Planet: Ensuring Long-Term Access to Digital Information," Final Report, February 2010, available at http://brtf.sdsc.edu/biblio/BRTF_Final_Report.pdf.

It bears noting that the due date for this Notice of Inquiry comes a mere few days after the release of the proposed Anti-Counterfeiting Trade Agreement. While there are clearly reasons to work internationally to protect rightsholders, there is also the danger that overzealous enforcement of international copyright law does little to impact the real problem of industrial scale piracy and counterfeiting and has too much of an impact on legitimate independent creativity.

International antipiracy efforts are critically important in a globalized economy, but they occasionally lead to peculiar outcomes. Last summer, the New York Times reported that piñata stores in Mexico were the target of a surge of anti-piracy efforts; Mexican police seized their stocks of piñatas of Marvel characters such as 'Spider-Man'. A traditional feature in children's parties, the seizure of these piñatas caused considerable popular uproar. The most peculiar and perplexing aspect of the episode is that Marvel reported that they had not sought the enforcement measures taken by the Mexican police, as Marvel has not chosen to treat this kind of matter as an enforcement issue.⁸

It is notable that this action by Mexican law enforcement took place *only days* after the release of the Intellectual Property Coordinator's 2010 Joint Strategic Plan on Intellectual Property Enforcement.⁹ That plan mentions a number of law enforcement efforts with Mexico related to intellectual property and anti-counterfeiting efforts. It seems unlikely that there was much societal benefit reaped by the over zealous actions of Mexican law enforcement with regard to the piñatas; Marvel is no better off, and children have been denied their birthday custom. While this was clearly not the intent of the Joint Strategic Plan, it seems possible that the law as enforced may simply have served to further alienate some people from seeing the application of the rule of law as important and reasonable.

In another example of government action just after the release of the June 2010 IPEC Joint Strategic Plan, online libraries in Bulgaria were shut down.¹⁰ While a 2008 Special 301 report on Bulgaria laments the failure of the Bulgarian government to enforce copyright laws – the whole economic and cultural context for sharing music and storytelling seems to be in direct conflict with legal assumptions shaped other legal traditions. I am not excusing a country from failing to meet its obligations as a member of the EU or its treaty commitments, but do wonder how realistic it is to expect behavior to change so radically into norms that are not intuitive. Concepts like public performance rights are not intuitive to anyone – why should we expect shop owners in Varna to know they should pay a fee for what seems free to them?

It is not only a matter of education – intellectual property education and exchange have gone on for years through the ABA-CEELI and numerous other US government trade law reform efforts executed often with private sector interests. Judges and officials at all levels have been exposed to the law and ideas driving copyright for nearly two decades of 'openness' now. What some countries choose (or are able) to enforce – and where they see interest in enforcement –

8 Lacey, Mark, "Spider-Man Is Among the Most Wanted" THE NEW YORK TIMES, June 16, 2010, available at <http://www.nytimes.com/2010/06/17/world/americas/17pinata.html>.

9 2010 Joint Strategic Plan on Intellectual Property Enforcement, available at http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf.

10 Masinick, Mike "If The Public Library Was Invented Today, Would The Gov't Call It Organized Crime And Shut It Down?" TECHDIRT, June 30th, 2010, available at <http://www.techdirt.com/articles/20100630/12152310025.shtml>, see also Gerogiev, Emil, "Do not misappropriate the law, guys." FROM VEGAS TO LEGAL, June 25th, 2010, available at <http://reguligence.biz/2010/06/25/do-not-misappropriate-the-law-guys/>.

fluctuates far more than in the US. Is it realistic to think that social norms would adjust as quickly as the law – where the law is not necessarily a natural reflection of a social norm? This seems rather similar to the concern we have here in the US with ‘criminalizing’ what has become the normal behavior of a generation.¹¹

Many overseas technical assistance programs are patronizing (and therefore harmful to American interests) and ineffective (therefore subject to ridicule as wasteful). The lawyers, judges, and law enforcement officials can readily understand intellectual property rights as well as any of their counterparts in the United States. The fact that copyright educational assistance has continued without interruption for twenty years demonstrates that the designers of the education do not understand the nature of the problem – or implies that the recipients of this education are simply stupid.

It is remarkable to see more of this kind of education presented as a key element of the proposed ACTA. Many of the countries in which copyright infringement is most rampant were, not long ago, rather efficient dictatorships in which the possession of the very content that we seek to protect was criminal in itself and would send the possessor to the gulag. If governments really want to crack down on copyright infringement, they are quite capable of doing so without preaching masquerading as education.

Cultural Institutions as Vanguard of Copyright and Creativity

Cultural exchange among and between universities, libraries and archives is already a norm with a long, worldwide tradition. It would be invaluable if such cultural exchange were better sanctioned in the copyright arena, allowing these trusted institutions to continue in a meaningful way to preserve creative expression and ensure access now and into the future. Cultural institutions represent authenticity, responsible sharing, and a trusted enclave that actually protects copyrighted material from piracy while ensuring the public interest is met. Laws and approaches to enforcement should take these concerns into account.

Sincerely,



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The author wishes to acknowledge the assistance of Bobby Glushko, Copyright Specialist and Associate Librarian in the preparation of this comment.

¹¹ Professor Lessig argues this point eloquently in his essay, “In Defense of Piracy”, THE WALL STREET JOURNAL, available at <http://online.wsj.com/article/SB122367645363324303.html>.