Submitted by email: ***copyright-noi-2010@ntia.doc.gov***

November 19, 2010

Office of Policy Analysis and Development
NTIA
U.S. Department of Commerce
1401 Constitution Avenue, NW, Room 4725
Washington, DC 20230

Re: Docket No. 100910448–0448–01, RIN 0660–XA19, Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy

Mozilla wishes to thank the Internet Policy Task Force for the opportunity to respond to the above-captioned inquiry. We applaud the Task Force for its efforts to openly gather feedback from all perspectives as it considers new policy recommendations.

Mozilla's interest in this inquiry stems from our identity. We are a global community of people working together since 1998 to build a better Internet. Mozilla and its contributors make technologies for users and developers, including the Firefox web browser used by more than 400 million people worldwide. As a non-profit organization, we are dedicated to promoting openness, innovation, and opportunity online. Thus, we care deeply that the Task Force's efforts to protect copyrighted works on the web not impede the web's essential open platform or the widespread innovation that results from a vast range of creators.

Whether for pleasure, education, or commerce, the web's ability to help fuel innovation has derived from its tapestry of contributions, which are the product of people, communities, and organizations around the world creating, modifying, sharing, and hosting content. In our view, it is imperative that these quintessential

qualities of the Internet be preserved without compromising the rights of content producers, whether big or small, and those that host and distribute such content.

We ask the Task Force to promote legal approaches that value and support the full spectrum of content creators as well as the content hosts. While the NOI calls for comments from "all interested stakeholders—including rights holders, Internet service providers, and consumers," we believe the stakeholders are broader than that and should explicitly include content creators and hosts.

One of the reasons the web is so valuable is that it leverages a participative and truly global platform resulting in worldwide access to a wealth of content on a scale never before seen. Two critical elements of this ecosystem are the vast array of content creators and the web platforms that host their content. The community created, open source, and free online encyclopedia Wikipedia illustrates the power of open and collaborative energy of individual contributors supported by a neutral hosting platform.

We believe innovation on the web will be supported by promoting legal frameworks that:

- Support content creators by valuing all legal forms of content creation and distribution, regardless of the size or financial resources of the creator;
- Better protect content hosts by harmonizing global responsibilities under frameworks like the DMCA;
- Expand immunity and safe harbor frameworks to other causes of action to avoid chilling effects upon content distribution.

1. Support All Legitimate Content Creators

Given the lower costs of content creation and access to users made possible by the web, millions of musicians, authors, artists, and developers can create

awesome content and more easily reach large audiences and/or commercialize their works. But this new path toward innovation and market creation is at risk due to an imbalanced and fragmented legal system that favors large-scale rights holders and burdens content hosts.

Mozilla has received numerous threats of legal action and take-down requests for content hosted on our Add-ons Marketplace, which hosts over 12,000 browser extensions and our Personas gallery, which offers over 230,000 different designs created by individuals, political and non-profit organizations, and large, traditional "rights holders." We have found the current legal structure makes it easy to stifle potentially valid legal works by the ease of issuing overly broad take-down notices, combined with the significant difficulties of any effective response.

Currently, under the DMCA, filing a take-down request requires only a "good faith belief" that the use is not authorized. In contrast, those asking for their work to be reinstated must assert "under penalty of perjury" a good faith believe that the material was removed due to mistake or misidentification AND must agree to personal jurisdiction in U.S. courts (i.e., they can be sued and judgments enforced on them in US courts even if they don't live here or have dealings here). The imbalance between these two standards is immense. It has the effect of making take-down notices extremely easy to issue but difficult to combat, even for content that is legitimate. Additionally, the consequences for those who issue overreaching take-down requests are limited and hard to enforce.

At Mozilla, we have received a number of copyright- and trademark-based take-down requests (targeted to approximately 650 individual pieces of content).

But not once have we received a put-back request, even in instances where the take-down request seemed on its face a mistake and the content creator disagreed with the take down. For example, we recently received a take-down notice from a large Hollywood studio with a list of 170 urls to different personas it wanted taken down for allegedly infringing its trademarks to television shows, including a persona of a local soccer team. The persona's title included the coach's last name, which happens to be the same as the title of one of the TV shows trademarked by the rights holder. While the creator contacted us about the apparent overreach since the design had nothing to do with the TV show, he didn't opt to submit a put-back request, so the content remains blocked from appearing on our sites. These kinds of experiences suggest that the disparate impact of the DMCA process on the "rights holders" and the accused has a chilling effect on the creation and availability of content.

The web would also benefit by legal mechanisms to discourage overreaching take-down notices, including those that target the fair use of copyrighted materials. Fair use of copyrights is an important check on the monopoly rights granted to copyright holders. Some potential approaches include providing that any take-down recipient who defends her/his conduct successfully receive the presumption of a fee award and allowing a put-back request based on an assertion of a good faith belief of fair use. Another possibility is to explore legal tools in use in other jurisdictions such as "threats actions" currently used in the United Kingdom to quickly and efficiently address improper cease-and-desist demands related to registered intellectual property rights, such as registered trademarks.

Given the frequent imbalance of resources between those asserting rights and individual artists, these kinds of changes could help individual artists and other new comers striving to bring their legitimate works to a market but reluctant to take on a costly litigation against a large, well funded corporation. Thus, the current framework unintentionally places the new generation of independent and small producers are at a disadvantage. This threatens the continued explosion of content creation, which is exactly what copyright policy is designed to promote.

2. Harmonize Legal Frameworks relating to Content Hosts

Under the Berne Convention, copyrights are nearly global. But the laws related to liability for those hosting copyrightable works whether in copyright or other content-related areas like defamation, privacy, trademark, or right of publicity can be varied and complex. Clear, harmonized rules would encourage the hosting and distribution of content and other works by simplifying the legal landscape (and hence the attendant risk and/or cost of legal counsel). For example, a consistent standard between nations as to what constitutes a proper take-down request for copyrighted or trademarked material would reduce uncertainty and inefficiencies in the marketplace.

3. Expand Immunity and Safe Harbor Rules for Hosts

Current protective legal frameworks in place for content hosts, including both immunity (as provided under the Communications Decency Act Section 230) and safe-harbor provisions (such as the notice and take down regime under the DMCA), should be strengthened and expanded.

Ex Ante Review is Inefficient. It is massively inefficient to require organizations that host content to review all submitted content in advance and attempt to make legal determinations across the range of potential liability that exists worldwide. Such reviews lead to varying standards and a false sense of propriety because it is virtually impossible for hosts to determine the legality of each piece of content under every legal standard worldwide before it is posted. Legal determinations under areas of law like copyright, defamation, and privacy are very fact specific and intensive. When an *ex ante* review process is required before content can be posted, the requisite fact-finding process and worldwide legal resources introduce inefficiencies that stifle content creation and distribution.

For example, whether or not content is defamatory is a contextual and content-specific inquiry (not to mention subject to standards that vary significantly depending on which jurisdictions' rules govern). Confirming the existence of permissions or consent likewise requires an administratively burdensome process that would be ineffective, costly, and inefficient at the scale required for the web if it must be conducted on each and every piece of content before it is hosted.

In sum, providing a worldwide legal clearinghouse for all content prior to hosting is a monumental and expensive burden. By contrast, when an affected individual or entity feels its rights have been violated, it can identify the specific content and specific claim for the host to respond.

In essence, rights holders and affected entities are best situated to police their rights within the applicable legal frameworks. For instance, Mozilla has found with several large rights holders that upon careful consideration they have decided

not to issue take-down requests because they realize that their rights are strengthened and market increased as a result of content creators modifying and distributing art works incorporating their logos or artwork.

Immunity and Safe Harbors Inconsistently Available. While both Europe's e-Commerce Directive and the U.S.'s CDA Section 230 and DMCA provide protections (through either immunity or safe harbor procedures) for content hosts, the last few years have seen examples of intermediaries exposed to potential liability for content on their sites. (Scott P. v. Craigslist, Inc.,[1] Barnes v. Yahoo!, Inc.,[2] Google Italian privacy case[3]). If immunity and safe harbors are not consistently applied across jurisdictions and claim types, the burdens and inefficiencies discussed above weigh down the web marketplace and the ability of artists and developers to reach markets.

At Mozilla, we have received trademark-related take-down demands related to user-created Personas in which the trademark holder demands Mozilla pay €1 million plus €2,000 per download in addition to the take-down remedy. And these millions of dollars are what the mark holder demanded Mozilla pay solely for its role as a host of the user-generated content. Mozilla asks the Task Force to consider means to harmonize (between states' and federal law as well as between nations) and strengthen immunity so entities can be legally compliant and make content available without facing unreasonable legal liability.

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[1] *Scott P. v. Craigslist, Inc.,* CGC-10-496687 (Cal. Superior Ct., filed Feb. 5, 2010).
[2] *Barnes v. Yahoo!, Inc.,* 2009 WL 1232367 (9th Cir. May 7, 2009).
[3] "Larger Threat Is Seen in Google Case," Rachel Donadio, *New York Times*, Feb. 25, 2010, page A1; available at http://www.nytimes.com/2010/02/25/technology/companies/25google.html.

We submit these recommendations to the Task Force on the belief they will help keep the web open for innovation, creativity, and commerce for all users.

Respectfully Submitted,

Mozilla

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