Internet Association

April 29, 2015

The Honorable Bob Goodlatte
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

The Internet Association respectfully requests that this letter be submitted to the record for the committee's hearing entitled "The Register's Perspective on Copyright Review." Our association represents the interests of leading global Internet companies.[1] We are dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.

The purpose of this letter is to discuss our association's position on key domestic issues discussed during Chairman Goodlatte's comprehensive review of the U.S copyright system. As such, our association urges your committee to take these positions into careful consideration.

## I. The Internet Association's Assessment of the House Judiciary Committee Comprehensive Copyright Review

During the 113th Congress, Chairman Goodlatte launched a comprehensive review of the U.S. copyright regime. To a large extent, the Internet's rapid growth and development served as the impetus behind this review.[2] The Internet Association has actively engaged in and monitored the committee's review process.

[1] The Internet Association's membership includes: Airbnb, Amazon, AOL, Auction.com, Coinbase, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Uber Technologies, Inc., Yelp, Yahoo!, and Zynga.

[2] Press Release, Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), *available at* http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw.

The Internet Association draws three core conclusions from the committee's review process:

- Existing U.S. copyright law and policy has adapted well to the Internet era. It strikes an appropriate balance between strong protections and clear limitations and exceptions such as fair use, the first sale doctrine, and the Digital Millennium Copyright Act (DMCA), which do not undermine the copyright owner's ability to exploit and benefit from their own creations. The flexibility inherent in the U.S. system allows for innovation in the marketplace, both for content creators and others, consistent with the Constitution's goal for copyright.
- In contrast, the Copyright Office has not adapted to the Internet era. Modernization of the Copyright Office should occur prior to any legislative efforts.
- Lastly, if legislative efforts are pursued following the comprehensive review, the committee should prioritize statutory damages and music licensing.

### A. The U.S. copyright system works well and achieves its intended goals.

History shows that with the introduction of new technologies, policymakers and regulators evaluate the technologies' impact on existing legal frameworks and consider whether revisions should be made to the law. Beginning in the 1990's, the Internet, like any new disruptive technology, created opportunities but also challenged traditional business models.[3] However, the U.S. copyright regime has adapted well to the Internet and recognized both the importance of providing adequate protections for works while also allowing for appropriate limitations and exceptions such as fair use, the first sale doctrine, and the DMCA safe harbors.[4]

Today, about 3 billion Internet users worldwide access online services to engage in a number of activities, including the creation and dissemination of content. The Internet is fast becoming the most important and predominant platform for content distribution globally. In a recent IP subcommittee

[3] Rightsholders have long feared the rise new technologies, which ultimate yielded significant benefits for these creators. *See, e.g., White-Smith Music Publishing Co. v. Apollo Company, 209 U.S. 1 (1908)* (finding that player piano music rolls did not infringe the plaintiff's copyright because they are not intelligible). *See also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417(1984) (finding the legality of VCR technology because it had substantially non-infringing uses and was frequently used for time shifting).

[4] The benefits offered by U.S. limitations and exceptions, particularly fair use, are not limited to Internet platforms but expand across many U.S. industries such as entertainment, media, and education. *See* Ali Sternburg, *Fairly Useful: The Many Ways Fair Use Helps Industry* (Jan. 21, 2015), *available at* http://www.project-disco.org/intellectual-property/012115-fairly-useful-the-many-ways-fair-use-helps-industry/.

hearing[5], then Chairman Coble stated that, "*the benefits to America's economy, brought about by our Nation's copyright laws are the envy of the world. Our economy is stronger and generates more original creativity than in any other country.*"[6] We agree. The success of the Internet in cultivating and promoting creativity is no accident but rather is attributable to the U.S. government's deliberate decisions regarding balanced copyright policy. Congress should continue to support these policies, both domestically and abroad, to ensure that the Internet continues to grow as a successful platform for innovation, economic growth, and free expression.

While our association believes that the comprehensive review process shows that the current U.S. copyright system generally works as intended, we acknowledge that it is not flawless. The unauthorized distribution over the Internet of digital copies of sound recordings, audiovisual works, and literary works remains a problem, but responses to that problem must be balanced and thoughtful. No one set of "players" is capable of (or should be responsible for) solving it alone. Rather, curbing this conduct requires the cooperation of many actors. In particular, Internet Service Providers (ISPs), Online Service Providers (OSPs), and copyright owners all must play a part. Section 512 of the current copyright statute, for example, does a reasonably good job of balancing the responsibilities of these parties.[7] Congress should be loathe to disturb significantly the sensible allocation of responsibilities that section 512 generates.

On top of this, we believe that the courts are in the best position to adapt the principles articulated by Congress under the current copyright system to changing technologies, activities, and business models and, moreover, have done that well. On several occasions courts have invalidated practices that disrupt the balance under the current copyright system.[8]

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[5] *See Rise of Innovative Business Models: Content Delivery Methods in the Digital Age: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet on the Committee of the Judiciary House of Representatives,* 113th Cong. 1 (2013) [hereinafter *Content Delivery Methods*].

[6] *Content Delivery Methods* (statement of Chairman Howard Coble, Member, H. Comm. on the Judiciary).

[7] The protections afforded by the Digital Millennium Copyright Act shield online service providers from monetary liability when providing the facilities that power the Internet. This balanced approach has driven tremendous innovation over the past 20 years, enabling entirely new industries to develop while also empowering creators to communicate directly with their fans without the involvement of traditional gatekeepers. In the absence of a legal regime that protects online service providers, it is highly questionable whether we would have had an explosion in new content creation, new forms of content distribution, social media that connects all of the world, and user-generated content platforms that give everyone person on the planet the ability to express themselves.

[8] *See MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (invalidating peer-to-peer file sharing services because they were found to have substantial infringing uses and induced infringement); *See also American Broad. Cos. v. Aereo,* 134 S. Ct. 2498, 189 L. Ed. 2d. 476 (2014) (finding Aereo's technology illegal because it had an "overwhelming likeness" to cable systems that Congress intended to regulate).

Rounding out this picture is the fact that Internet Association member companies have turned to free-marketplace solutions and constantly evolving industry standards and voluntary practices to tackle unlawful activity online, which have proven to be effective and workable solutions. These approaches have been driven in large part by evolving business models, as technology platforms increasing produce original content[9], content builds out its own online distribution platforms and voluntary standards[10] that can evolve as the technology and business models evolve.

The Internet Association believes that before the committee considers changes to copyright law, it should first consider and determine solutions that upgrade the Copyright Office (Office) for today's digital marketplace. We believe that this approach is consistent with testimony from the hearing record as well as the views of committee members.[11]

### B. The Copyright Office should be modernized to meet the needs of the digital marketplace.

Despite the incredible innovation and technological developments spurred by the Internet, the Copyright Office (Office) has lagged behind in offering services that reflect today's digital environment.

Multiple observers agree that the Office is in need of reform to meet today's demands and to better service all of its customers including rightsholders, licensees, and Internet users. According to a recent study by the U.S. Government Accountability Office (GAO), the Office experiences limitations and

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[9] Free-market solutions have resulted in a substantial shift of users from unlawful, online services towards licensed platforms. Studies indicate that the introduction of legal alternatives offered by online video and music services is typically followed by dramatic reductions in online infringement by 50 and 80 percent, respectively. *See* Sophie Curtis, *Spotify and Netflix curb music and film piracy,* (July 8, 2013), *available at* http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html.

[10] In addition to these marketplace developments, Internet companies engage regularly in voluntary initiatives to address online infringement. These initiatives supported by the White House Intellectual Property Enforcement Coordinator include development of best practices to withdraw payment services for websites selling counterfeit and infringing goods, as well as best practices by advertising networks to terminate advertising on websites engaged in widespread unauthorized dissemination of copyrighted works.

[11] During the hearing, Representative Doug Collins (R-GA) raised an important question to consider: "...what comes first, a modernization of the Copyright Office or a modernization of the Copyright Act?"[11] While witnesses did not directly answer this question, their statements indicate that process should come first. *See U.S. Copyright Office: Its Functions and Resources: Hearing Before the Committee on the Judiciary House of Representatives,* 114th Cong. 100-01 (2015) [hereinafter *U.S. Copyright Office Its Functions and Resources]* (statement by Rep. Doug Collins (R-GA)).

challenges in the performance and usability of its registration system.[12] The report also found that the Library of Congress suffers from a weak IT system, which prevents the Office from achieving its goal of supporting creative industries.[13] The Internet is a revolutionary platform offering its users unprecedented abilities to search and access current – *often real time* – information. Transitioning the Office's registration and recordation systems into online services would not only yield efficiencies achieved elsewhere in the digital marketplace but also help the Office fulfill its mission of ensuring the public has appropriate notice of the copyrights in various works.

The committee's review process also spurred debate about the Office's structure and autonomy. Suggested solutions range from turning the Office into an independent agency[14] to relocating the Office within the United States Commerce Department, specifically the United States Patent and Trademark Office. While the Internet Association does not have a position on the future location of the Office, we note that at least one committee witness[15] has suggested that Congress authorize a study to investigate the issue in detail. We agree that this would be a useful exercise. In particular, an independent review could ensure that Congress is provided with impartial advice on this important issue.

### C. If this Committee undertakes legislative reform, statutory damages and music licensing should be priority issues.

As previously stated, the Internet Association does not support broad legislative reform of U.S. copyright law. However, if the committee intends to amend existing laws, our association requests that the changes be limited to the existing regimes governing statutory damages and music licensing. Our association believes the current statutory regime's legal uncertainty in terms of the potential for enormous monetary damages being completely out of proportion to harm incurred and copyright plaintiffs' flexibility in timing of choosing their preferred damages award during litigation discourage investment and innovation. With respect to music licensing, we believe that certain amendments to

[12] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, COPYRIGHT OFFICE NEEDS TO DEVELOP PLANS THAT ADDRESS TECHNICAL AND ORGANIZATIONAL CHALLENGES 2 (2015).
[13] *Id.*
[14] Register Maria Pallante submitted a letter to House Judiciary Committee on March 23, 2015 in which she explained her belief that the U.S. copyright system would be best served if Congress established an independent copyright agency. *See* Letter from Register of Copyrights and Director Maria Pallante to House Judiciary Committee Ranking Member John Conyers (Mar. 23, 2015), *available at* http://copyright.gov/laws/testimonies/022615-testimony-pallante.pdf.
[15] *See U.S. Copyright Office Its Functions and Resources, available at* http://judiciary.house.gov/_cache/files/d4ef86c4-0f36-46b5-9f22-cc94a8742a00/114-4-93529.pdf at 10.

section 115 would create increased transparency, simplify a thoroughly complex ecosystem, and generate efficiencies that would benefit all stakeholders.

### 1. The current statutory damages regime is excessive and discourages investment and innovation.

In addition to the current marketplace and Copyright Office modernization, the committee has also reviewed whether existing copyright remedies are sufficient.[16] Under current law (17 U.S. Code Section 504), a copyright owner may seek either actual damages or statutory damages in cases of infringement. Plaintiffs are granted flexibility to choose their preferred remedies even after the jury returns its verdict. To receive statutory damages, current law does not require a plaintiff to prove actual harm. Statutory damages range from $750 to $30,000 per work for infringement. While damages can be as low as $200 for innocent infringement, damages relating to the infringement of a single work (*e.g.,* an MP3 file that retails for $.90) may escalate to $150,000 for willful infringement. For these reasons, the Internet Association submits the existing statutory damages scheme allows for damages, which are, in many instances, excessive.

Representative Nadler has flagged that many stakeholders believe statutory damages are "unreasonably high" and "have a chilling effect on innovation."[17] We agree. Our experience shows that the uncertainty around damages liability in the current statutory regime hinders rather than promotes the development of innovative products and services. Investors' decision-making process is partly based on their confidence (or lack thereof) in a nation's legal and regulatory environment, particularly with regards to uncertain and potentially large damages awards. A recent study revealed that 85% of investors surveyed either agree or strongly agree that the uncertainty presented by statutory damages regime creates a sense of discomfort when investing in online intermediary platforms.[18] And, companies themselves are less likely to invest resources in new technology if the monetary risks appear to be too great.

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[16] *Copyright Remedies: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet on the Committee of the Judiciary House of Representatives,* 113th Cong. 7 (2014) [hereinafter *Copyright Remedies*] (statement of Representative Jerrold Nadler (D-NY)).

[17] *Copyright Remedies* at 7.

[18] MATTHEW C. LE MERLE, ET. AL., THE IMPACT OF INTERNET REGULATION ON EARLY STAGE INVESTMENT 5 (2015), *available at* http://engine.is/wp-content/uploads/EngineFifthEraCopyrightReport.pdf.

Amendments to the current damages regime, such as rethinking the minimum and maximum standards applied, providing "predictability of statutory damages in secondary liability cases," and requiring plaintiffs to choose their preferred option for damages at the outset of litigation[19] would provide increased legal certainty, ultimately, strengthening the overall system, increasing investors' confidence, and enriching the marketplace and consumer choice with cutting-edge technologies and new content.

**2. The current music licensing system is complex and amendments to section 115 would promote increased transparency.**

Music-licensing issues are also critically important to several of our member companies who offer Internet radio to streaming services. The current music-licensing ecosystem remains riddled with requirements that are holdovers from an analog world. But in a digital world, this system fosters a largely ineffective complex regime that licensees find difficult to navigate. Our member companies believe that amending section 115 of the Copyright Act, which deals with compulsory licensing for the reproduction and distribution of musical works, would create a more efficient and effective licensing regime that would ultimately benefit songwriters, music publishers, and the American people.

While we disagree with many of the recommendations in the Copyright Office's recent music-licensing report, we do support its recommendation to establish a blanket licensing system for digital services covered under Section 115 as compared to the current system that requires licensing on a work-by-work basis.

The current system lacks transparency. Presently, there is no centralized database containing information to facilitate work-by-work licensing, which encourages a duplicative licensing system and exposes licensees to the risk of massive infringement damages (as discussed above). At a recent committee hearing, Pandora's Vice President Chris Harrison highlighted the current opaque system perfectly when he walked committee members through the inconsistencies between the ASCAP and Universal Music Publishing databases.[20]

[19] *See Copyright Remedies* at 61-64.

[20] "Those databases that are available (*e.g.,* ASCAP, BMI, and some music publishers maintain online databases that can be searched on a title-by-title basis) often contain conflicting information. For example, the ASCAP database indicates that Universal Music Publishing owns the composition for the song "Somebody that I Used to Know" co-written and recorded by Gotye; however, a search of the Universal Music Publishing websites results in no matches for the title "Somebody that I Used to Know" or songs recorded by Gotye." *See Music Licensing Under Title 17: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary House of Representatives,* 113th Cong. 336 (2014).

Due to the lack of transparency, licensees are often forced to identify the copyright owners of each musical work embodied in a sound recording. This can be a daunting task when a service has a database of millions or tens of millions of sound recordings. Further, given the fact that many musical works have multiple copyright owners, record labels do not provide ownership information on the musical works embodied in their recordings, and the common practice of music publishers to only license their respective ownership interests in a work, it is often challenging to identify and locate all relevant stakeholders in order to secure the necessary licenses.

A blanket license would obviate many of the risks associated with the current section 115 statutory license. Similar to the license under section 114 of the Copyright Act for noninteractive digital audio transmissions of sound recordings, a blanket license and combined collective administration for the mechanical and public performance rights would give licensees the right to reproduce and distribute any musical work lawfully released to the public. The efficiencies offered by such a regime would reward all stakeholders, including artists and songwriters, and facilitate the development of new products and services that would also create new revenue streams. Legislation should provide for the collective administration of mechanical and public performance royalties without the ability for individual publishers or songwriters to opt-out to establish such efficiencies.

Additionally, we support the creation of a single, public database, which the Office suggested in its report, coupled with a safe harbor for statutory damages. Such a publicly available database would further increase transparency, lessen anti-competitive behavior by music publishers,[21] and provide online music streaming services the certainty they need to develop their business and increase the flow of revenue to artists.

Our association supports fair compensation for artists, which would be facilitated by increased transparency across the system. Not only would licensees benefit from an accessible and comprehensive system to facilitate the clearing of all rights in a work, but artists and songwriters also deserve greater insight in how money flows from distributors, through the publishers and performance rights organization, and makes its way to their hands. Therefore, we respectfully urge the committee to

[21] Beyond legislative efforts, the Internet Association is actively monitoring the Department of Justice's review of ASCAP and BMI consent decrees. In a March 10, 2015 letter to the Subcommittee on Antitrust, Competition, and Consumer Rights of the Senate Judiciary Committee, we explained that the existing consent decrees should be maintained and should not be amended to permit partial withdrawals. This type of modification would only undermine their very purpose. *See Letter from the Internet Association to Chairman Mike Lee and Ranking Member Amy Klobuchar of Senate Judiciary Committee Subcommittee on Antitrust, Competition, and Consumer Rights* (Mar. 10, 2015), *available at* http://internetassociation.org/wp-content/uploads/2015/03/Internet-Association-Letter-On-Music-Licensing-031015.pdf.

consider section 115 amendments discussed above along with other proposals to improve music licensing.

## II. Conclusion

The current U.S. copyright system continues to successfully balance copyright owners' and the public interest. The legal framework is further bolstered by court decisions and marketplace developments to ensure that innovation and development of online platforms continue. As such, the Internet Association respectfully requests that Congress avoid sweeping legislative reform of domestic copyright policy. Rather, we urge Congress to focus its efforts on working with stakeholders to determine how best to modernize the Copyright Office. To the extent that reform efforts are pursued, we urge Congress to keep this effort narrowly tailored to the current statutory regime and music licensing issues.

Respectfully Submitted,

Michael Beckerman
President & CEO
Internet Association