

November 13, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C., 20515

Re: Enhanced statutory damages

Dear Chairman Conyers:

The undersigned professors at law schools around the United States write to express our concern with Section 104 of the draft Intellectual Property Protection Act of 2007. Section 104 would amend Section 504(c) of the Copyright Act to allow a judge to order a separate award of statutory damages for each work of "independent economic value" contained in a compilation. This amendment will have little impact on commercial piracy or on large-scale copyright infringement over the Internet. But it will have a serious chilling effect on a wide range of lawful uses.

Existing Section 504(c) grants courts the discretion to award statutory damages of \$150,000 per work infringed in cases of willful infringement. However, most commercial piracy occurs overseas – beyond the reach of U.S. law. Moreover, this penalty has a limited deterrent effect on Internet-based copyright infringement by individuals, but not because the penalty is too small. Rather, the existing statutory damages framework does not deter individual infringers (such as college students) because the odds of any particular infringer being detected and sued are small, and for the most part the individual infringers are judgment proof. Thus, an individual infringer's behavior is not likely to change regardless of whether the statutory damages for uploading all the tracks on a CD are \$150,000 or \$1.5 million. Furthermore, individuals already are exposed to enhanced awards of statutory damages, because their transactions usually involve exchanging multiple single tracks rather than entire CD's.

While the proposed amendment will not prevent infringement by either individual infringers in the U.S. or commercial infringers abroad, it will have a negative impact on many lawful uses. When an artist, documentary film producer, or technology company performs a fair use analysis to determine whether a proposed use is permitted under Section 107 of the Copyright Act, the user must at the same time assess the potential damages if his analysis is incorrect. Since the precise boundaries of fair use are uncertain, and statutory damages can reach large sums if a new work includes pieces of many preexisting works, the existing statutory damages framework already dampens fair uses. Authors often decide that the risk of statutory damages is simply too great, and either pay exorbitant license fees or forego the use altogether.

The proposed amendment will make this bad situation even worse. A director creating a documentary about California's Sixties "surf music" scene might already be anxious about including short excerpts of three tracks from a Beach Boys album to illustrate characteristics of the genre. The changes proposed in Section 104 would increase her potential exposure from \$150,000 to \$450,000. Likewise, a reviewer of a book of poetry might want to include a few lines from five different poems to demonstrate his assessment. The proposed amendment would increase his exposure from \$150,000 to \$750,000. We stress that we are not arguing that a court in fact is likely to award damages of this scale. However, the possibility of such large damages will deter some authors from making fair uses. And it will lead other authors who make such uses settle on terms more favorable to the plaintiff in the event litigation ensues.

Finally, proposed section 104 will exacerbate the impact of statutory damages on legitimate providers of technology products and services. Copyright owners claim that technology companies are liable for statutory damages for each work infringed by each of the users of their technology. By increasing the awards available for infringements of compilations, the proposed amendment subjects technology companies to even greater exposure. The risk of a statutory damages award that would bankrupt a company may cause the company to withhold a useful product or service from the market.

With your leadership, the House of Representatives recently adopted patent reform legislation containing provisions relating to apportionment of damages and willful infringement. You and Mr. Berman persuaded the House that the possibility of damages awards grossly disproportionate to any actual harm acted as a tax on innovation. In the same manner, the existing statutory damages framework in the copyright law acts as a tax on fair use and the introduction of innovative technologies. If Congress takes any action on 17 U.S.C. § 504(c), it should be to lessen its Draconian impact, not make it worse.

Respectfully,

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