United States Response to Questionnaire Concerning
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Copyright in Action: International Perspectives on Remedies

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***Authors' Note*: The US Copyright Act is contained in Title 17 of the United States Code and is available on the Copyright Office website, <http://www.copyright.gov>. Statutory references in this response are to Title 17, unless otherwise indicated.**

Question 1: Are statutory damages available? If so, please indicate the criteria for awarding them and the amount of such damages.

Yes, statutory damages are available under §504 of the US Copyright Act, with some requirements for specific works spelled out under §§411 and 412. Under §504(a), an infringer of copyright may be liable for either the copyright owner's actual damages and any additional profits she has made due to the infringement, or for statutory damages.[2] Under §411, however, no copyright holder of a US work may commence a civil action for infringement (including a request for preliminary injunction) until the work has been preregistered[3] or registered with the United States Copyright Office (USCO).[4] Section 412 limits availability of statutory damages for published works to works registered with the USCO before the infringement occurred, unless the registration is made within three months of the first publication of the work[5]; this restriction applies to Berne Convention and WTO country of origin works as well as to US works. Additionally, under §505, courts may award costs, including reasonable attorney's fees, to the prevailing party in an infringement suit.

Section 504(c) addresses the scope of statutory damages. Courts may award no less than $750 and no more than $30,000 for each work infringed, whether or not there are multiple infringements of that work or more than one infringer jointly and severally liable. For purposes of calculating damages, all parts of a compilation or derivative work constitute one work. These awards may be increased to a maximum of $150,000 per work if the court finds willful

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[2] In order to establish the infringer's profits, the copyright owner must provide proof only of the infringer's gross revenue. The infringer must provide his or her deductible expenses and how much of any profit can be attributed to factors other than her use of the copyrighted work. §504(b). This requirement does not apply to actions brought under §106A, the Visual Artists Rights Act.
[3] Section § 411(c) sets out special rules for preregistration of audio, visual, and audiovisual works.
[4] 17 U.S.C. § 411(a).
[5] 17 U.S.C. § 412(2). There are different registration rules for unpublished works (§412(1)) and for preregistered works (§412). Works that are preregistered with the USCO under §408(f) before the commencement of the alleged infringement must have an effective date of registration not later than the earlier of three months after the first publication of the work or one month after the copyright owner has learned of the infringement. Authors of unpublished works are not eligible to receive statutory damages or attorney's fees if the infringement occurred before the effective date of the work's registration.

infringement.[6] If the court finds the infringer was unaware or had no reason to believe she was infringing the work, the court may lower the award to no less than $200. In addition, the court shall remit (waive) damages if the infringer is an employee of a nonprofit educational institution, library or archive who had reasonable grounds to believe that his or her reproduction of the copyrighted work was a fair use under §107.[7] The court shall also remit damages if the infringer is a public broadcasting entity which, or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in §118(f)), infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.[8] One recent case highlighting the legal system's ability to grant statutory damages in cases of willful infringement is *Agence France Presse v. Morel*.[9] In this case, a jury found that the defendants acted negligently in using eight of the plaintiff's photographs of the 2010 Haitian earthquake and were not exempt from infringement under fair use.[10] The jury awarded Morel $303,889.77 in actual damages and $1,200,000.00 in statutory damages.[11] In addition, it awarded $20,000.00 for AFP's violation of §1202(a), the provision on distribution of false copyright management information, and §1202(b), concerning the removal of copyright management information. [12,13] In *Capitol Records Inc,. v. Thomas-Rasset*, a jury found the file-sharing defendant liable for infringing 24 copyrights and awarded the plaintiff damages in the amount of $222,000.[14] In *Sony BMG v. Tenenbaum*, another file-sharing case, a jury awarded $22,000 for each of the 30 copyrighted works that defendant illegally downloaded and distributed.[15] While these penalties do not reach the level awarded in the *Morel* case (where the defendant was a commercial actor, not an individual file-sharer) they do indicate, especially when coupled with *Morel* and other cases, the extent to which a jury can sanction willful copyright infringement.

For more information about penalties under the Digital Millennium Copyright Act for the removal or distortion of technological protection mechanisms, please see our discussion below in response to question 6.

Question 2: If punitive damages are available, indicate the criteria for rewarding them.

United States copyright law does not provide for punitive damages. As noted above, the Copyright Act gives judges discretion to increase the amount of damages in cases of willful infringement.

Although punitive damages are not a part of the US copyright regime, there are other ways a court can provide additional monetary relief (beyond statutory damages, actual damages and

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6 17 U.S.C. §504(c)(2).
7 *Id.*
8 *Id.*
9 *Agence Fr. Presse v. Morel*, No. 10-cv-2730 (AJN), 2014 U.S. Dist. LEXIS 112436 (S.D.N.Y. Aug. 13, 2014).
10 *Id*. at 20.
11 Morel opted to receive the statutory damages payment and was thus awarded $1,220,200, representing the $1,200,000 in statutory damages and the $20,000 in damages for the violations under 17 U.S.C. § 1201.
12 *Morel*, at 7.
13 Copyright Management Information is defined in 17 U.S.C. § 1202(c). It encompasses information such as the title of the work, the name of the author, and the permitted uses of the work, conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including those in digital form. It does not include any information gathered about the user of the work.
14 *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 901 (8th Cir. 2012).
15 *Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013).

profits) to successful parties, namely the awarding of attorney's fees and court costs. In *Kirtsaeng v. John Wiley & Sons, Inc.*, the Supreme Court clarified how the courts should make the determination that awarding costs is justified.[16] The Court wrote that, when deciding to award attorney's fees under § 505 of the Copyright Act, a court should give substantial weight to the objective reasonableness of the losing party's position, while still considering other circumstances relevant to awarding attorney's fees.[17] The Supreme Court in *Fogerty v. Fantasy, Inc.*[18] listed several of these other circumstances. They include, but are not limited to, frivolousness, motivation, objective unreasonableness, and the need in particular cases to advance considerations of compensation and deterrence.[19]

Question 3: Are class actions available? When?

Rule 23 of the Federal Rules of Civil Procedure outlines the conditions for availability of a class action—this Rule applies to all federal civil litigation, including copyright suits. To be certified, a putative class must first meet four threshold requirements: numerosity ("the class is so numerous that joinder of all members is impracticable"), commonality ("there are questions of law or fact common to the class"), typicality ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"), and adequacy of representation ("the representative parties will fairly and adequately protect the interests of the class").[20]

Additionally, a group seeking class certification must qualify as one of the three different class types described in Rule 23(b). Copyright suits historically fall under the type defined in Rule 23(b)(3), since this is the type used by plaintiffs seeking monetary relief. Rule 23(b)(3) permits class certification if all requirements in Rule 23(a) are met and "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[21] To determine whether the predominance and superiority requirements are met, courts consider four factors: (1) "the class members' interests in individually controlling the prosecution or defense of separate actions"; (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and (4) "the likely difficulties of managing a class action."[22]

As a final requirement, for any class certified under Rule 23(b)(3), the court must "direct to class members the best notice that is practicable under the circumstances," ensuring that they are made aware of the suit and informed that they may opt out of the class action and pursue litigation separately.[23]

<u>Case Notes</u>

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[16] *Kirtsaeng v. John Wiley & Sons* 136 S. Ct. 1979 (2016).
[17] *Id*. at 1989.
[18] *Fogerty v. Fantasy, Inc.* 510 U.S. 517, 532 (1994).
[19] *Id*.
[20] Fed. R. Civ. P. 23(a).
[21] Fed. R. Civ. P. 23(b)(3).
[22] *Id*.
[23] Fed. R. Civ. P. 23(c)(2)(B).

Authors Guild v. Google, Inc.

Judge Denny Chin's class certification decision in *Authors Guild v. Google, Inc.*, offers a leading example of the application of class action rules to copyright litigation. Named plaintiffs sought to certify a class of thousands of authors seeking injunctive and monetary relief after Google copied without permission more than 12 million texts for its Google Books search database.[24] Ultimately, the US Court of Appeals for the Second Circuit rejected Judge Chin's class certification, although not on the merits of his decision. Rather, the court determined that it would be premature to certify a class without first assessing the merits of Google's fair use defense.[25]

Judge Chin first found that the class satisfied the four 23(a) prerequisites: (1) numerosity: the class of authors and copyright holders whose books Google scanned would likely be in the thousands; (2) commonality: "every potential class member's alleged injury [arose] out of Google's unitary course of conduct"; (3) typicality: "each class member's claim [arose] from the same course of events"; and (4) adequacy: the named plaintiffs' claims did not conflict with the copyright claims of the other class members.[26] The Court ruled that even though some members of the class approved of Google's unauthorized copying, "that some class members may prefer to leave the alleged violation of their rights unremedied is not a basis for finding the lead plaintiffs inadequate."[27]

Judge Chin then found that the plaintiffs met the Rule 23(b)(3) requirements of predominance and superiority. With regard to predominance, he concluded the copyright infringement issues here could be proven by "generalized proof" of Google's actions as they applied to the class as a whole.[28] Concerning superiority, he noted the near impossibility of all class members suing individually.[29]

As an additional method to pursuing mass copyright litigation, a large number of individual parties may be represented by an association to which they all belong. In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court held that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[30] The first and second prongs of this analysis exist to protect the Constitution's standing requirement. The third, however, is only "prudential."[31]

Again, Judge Chin's class certification in *Google I* provides a thorough illustration of how the Supreme Court's test for associational standing can be applied to copyright cases. In his decision, Chin first established both that (1) the members of the Authors Guild (a writers' advocacy organization suing Google) would have had standing to sue individually and (2) the organization's purpose was in line with its members' interests in the suit. He then went on to push aside the test's third prong, arguing that, since it is merely a prudential requirement, judges may use "a certain

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[24] *Authors Guild v. Google, Inc.,* 282 F.R.D. 384 (S.D.N.Y. 2012). (*hereinafter,* "Google I").
[25] *Authors Guild v. Google, Inc.* 721 F.3d 132, 133 (2d Cir. 2013) (*hereinafter* "Google II") .
[26] *Google I,* at 394 (internal quotation marks omitted).
[27] *Id.*
[28] *Id*. at 395.
[29] *Id*.
[30] *Hunt v. Washington State Apple Advertising Com'n*., 432 U.S. 333, 343 (1977).
[31] *Google I*, at 388.

degree of discretion" when applying it.[32] Because (1) "an association can draw upon a pre-existing reservoir of expertise and capital that its individual members lack" and (2) the nature of Google's unauthorized copying was "sweeping and undiscriminating," Judge Chin ultimately concluded that equitable considerations outweighed any prudential issues caused by recognizing associational standing.[33]

Certification and Approval of Class Action Settlements

Rule 23(e)

Class action devices serve not only to facilitate efficient litigation; they may also promote mass settlements. After it certifies a settlement class under the framework laid out in Rules 23(a) and 23(b), a court must approve the subsequently-reached settlement following the principles in Rule 23(e). Specifically, the court must conduct a fairness hearing to determine that the settlement is "fair, reasonable, and adequate."[34] This analysis has both procedural and substantive prongs. "With respect to procedural fairness, a proposed settlement is presumed fair, reasonable, and adequate if it culminates from arm's-length negotiations between experienced, capable counsel after meaningful discovery."[35] With respect to substantive fairness, different circuits apply similar balancing tests. In the Second Circuit, courts apply the Supreme Court's *City of Detroit v. Grinnell Corp.*[36] test, which assesses substantive fairness on the basis of nine factors:

> "the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation."[37]

Case Notes:

Ferrick v. Spotify USA, Inc.

Ferrick is a recent example of a copyright settlement class certification and agreement approval. After years of litigation regarding music streaming service Spotify's action to make copyrighted musical compositions embodied in sound recordings available for interactive streaming and limited downloading, the court approved both a settlement class under Rule 23(b)(3) and a subsequent settlement agreement under Rule 23(e).[38]

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[32] *Id*. at 389.
[33] *Id*. at 391.
[34] Fed. R. Civ. P. 23(e)(2).
[35] *Ferrick v. Spotify*, 16-CV-8412 AJN, 2018 WL 2324076, 3 (S.D.N.Y. May 22, 2018) (internal quotation marks omitted).
[36] *City of Detroit v. Grinnell Corp.*,495 F.2d 448, 463 (2d Cir. 1974).
[37] *Ferrick,* at 4 (citing *Grinnell*).
[38] *Id*.

In finding that the Rule 23(b)(3) requirement was met, the Court applied a less stringent review standard to the superiority requirement, since when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial."[39]

In its Rule 23(e) analysis, the Southern District of New York found that the procedural fairness requirement was met because of the extensive negotiations conducted and the experienced counsel representing both sides.[40] It further weighed the *Grinnell* factors and found that the substantive fairness requirement was also met.[41]

In Re Literary Works in Electronic Databases Copyright Litigation

The *Electronic Databases* class action litigation—a class action suit filed in 2001 on behalf of freelance writers against publishers such as *The New York Times* and Dow Jones—shows that class actions do not always eliminate efficiency problems. The plaintiff class alleged that various publishers provided the writers' works to Lexis/Nexis and other digital publishers without their approval. The parties neared a settlement several times, but did not reach a final agreement until April 30, 2018. [42]

Question 4: If seizures before judgment are available indicate what gives rise to such procedures and the criteria for granting them.

Under 42 U.S.C. §1338(a), federal courts have exclusive jurisdiction over claims arising under the US Copyright Act. Rule 65 of the Federal Rules of Civil Procedure governs the granting of temporary restraining orders (TROs) or preliminary injunctions. In addition, §503 of the Copyright Act allows the court, at any point during an action, to impound any items claimed by the copyright owner to be infringing an exclusive right; any items that might be used to make infringing copies; or any records documenting the manufacture, sale or receipt of infringing items.[43]

Rule 65(b) authorizes the grant of a TRO only if the complainant shows "immediate and irreparable" injury.[44] TROs are often a precursor to a granting of a preliminary injunction and last no longer than 28 days.[45] TROs are similar to preliminary injunctions in numerous ways. A complainant seeking a TRO must provide security to cover the potential damage sustained by defendants should it be later determined they were wrongfully restrained.[46] Also, TROs must define their scope in "reasonable detail," and they are binding only if both parties receive actual notice.[47]

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[39] *Id*. at 2.
[40] *Id*. at 3.
[41] *Id*. at 4.
[42] *In re: Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d. 116 (2d Cir. 2007). *See, also,* Jaclyn Peiser, *It Took 17 Years: Freelancers Receive $9 Million in Copyright Suit*, N.Y. TIMES (April 30, 2018), https://www.nytimes.com/2018/04/30/business/media/freelancers-digital-copyright-lawsuit.html.
[43] 17 U.S.C. § 503(a)(1).
[44] Fed. R. Civ. P. 65(b)(1).
[45] Fed. R. Civ. P. 65(b)(2).
[46] Fed. R. Civ. P. 65(c).
[47] Fed. R. Civ. P. 65(d)(1)(c); Fed. R. Civ. P. 65(d)(2).

To receive a preliminary injunction, plaintiffs must show that they are likely to succeed on the merits of the case; that they are likely to suffer irreparable harm without the injunction; that the balance of equities tips in plaintiff's favor; and that the order is in the public interest.[48] Preliminary injunctions tend to last until the court enters a judgment on the merits or approves a settlement.[49]

In issuing impoundment and seizure orders after final judgment, judges have broad discretion,[50] except in criminal cases where seizure is mandatory.[51] Typically, the orders apply "to infringers who obviously sought commercial advantage, who had clear access, and who made substantially identical copies of the original."[52] Furthermore, constitutional concerns may also limit the extent to which judges may order the seizure and destruction of related equipment, if these have non-infringing uses.[53] Though the statute allows for discretion to impound "all copies or phonorecords" of infringing content, some courts have allowed seizure only of those infringing items still in possession of the infringer, and not those in the hands of secondary purchasers.[54]

Question 5: Are there, in your country, 1) criminal remedies; 2) customs measures, in connection with copyright? If so, which ones?

Section 506 of the Copyright Act provides for criminal penalties for willful copyright infringement under 18 U.S.C. §2319, provided the infringement was committed for commercial or private gain; or by the reproduction or distribution within a 180-day period of one or more phonorecords or copies of copyrighted works having a retail value of more than $1,000; or by making available on a computer network accessible by the public a work prepared for commercial distribution if the infringer knew or should have known that the work was to be made commercially available.[55] It should be noted that only the government can bring criminal charges against an alleged infringer; private actors are limited to civil damages claims.

Under §506(b), those who knowingly place fraudulent copyright notices on works, those who remove or alter valid copyright notices, or those who knowingly make false representations of fact in an application for copyright registration can be fined a maximum of $2,500.[56] Furthermore, a court can order the forfeiture or destruction of any materials bearing counterfeit marks or any property constituting or derived from any proceeds obtained directly or indirectly as a result of violating §506.[57]

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[48] *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

[49] *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.").

[50] 17 U.S.C. § 503 (a)(1) ("…the court may order the impounding…").

[51] 18 U.S.C. § 2323 (a)(1) ("…the following property is subject to forfeiture…").

[52] Marc Alexander, "Discretionary Power to Impound and Destroy Infringing Articles: An Historical Perspective," 29 J. COPYRIGHT SOC'Y U.S.A. 479, 492 (1982).

[53] *Id.* at 494.

[54] *See, e.g.*, *Societe Civile Succession Richard Guino v. Int'l Found. for Anticancer Drug Discovery*, 460 F.Supp.2d 1105, 1109 (D. Ariz, 2006); *North American Karaoke-Works Trade Association v. Entral Group International*, No. 06 Civ. 5158(LTS)(MHD), 2010 WL 2143661, 12 (S.D.N.Y. February 24, 2010) (reversed on other grounds).

[55] The definition of "work being prepared for commercial distribution" can be found in 17 U.S.C. §505(a)(3).

[56] 17 U.S.C. §§ 506(b), (c) and (d).

[57] 18 C.F.R. § 2323(b).

Under §1204, any person who willfully violates the protections of technological protection measures and of copyright management information set out in §§1201 or 1202 of the Copyright Act for the purposes of commercial advantage shall be fined not more than $500,000 and/or imprisoned for up to five years for the first offense.[58] Subsequent offenses increase the potential fines to $1,000,000 and the prison sentence to no more than 10 years.[59] These penalties do not apply to nonprofit libraries, archives, educational institutions or public broadcasting entities.[60] The statute of limitations for instituting any criminal proceeding is five years from the infringement.[61]

Sound recordings fixed prior to 1972 (but not including the sounds accompanying audiovisual works) are not protected under federal law; accordingly, any remedies will derive from the application of a patchwork of state statutory and common law.

Section 602 of the Copyright Act details what constitutes infringing importation or exportation. Importation into the United States of a copy or phonorecord of a work obtained outside the United States, without the permission of the copyright holder, constitutes infringement,[62] as does importation into or exportation from the United States of an copy or phonorecord that was unlawfully made either under the law of the country of manufacture, or whose making would have violated US copyright law.[63] The prohibition on importation does not apply to copies imported for archival use by the US Government; a single infringing copy intended for personal use and not for distribution; and single copies to be used by libraries and qualifying educational institutions.[64]

Section 603 of the Copyright Act states that the Secretary of the Treasury and the United States Postal Service shall make regulations to enforce the prohibition of infringing importation,[65] and that infringing copies are subject to seizure and forfeiture.[66] Under the resulting regulations, the director at a port of entry into the United States may withhold the delivery of an item that he or she "has any reason to believe" is infringing.[67] This process, conducted by the Customs and Border Protection (CBP) agency, may be initiated either through shipment data CBP receives — and matched with a corresponding database[68] of copyrighted works that owners may pay to register with — or through an owner-initiated e-Allegation system.[69] Once a port director seizes a shipment, he or she must notify the importer, who has 30 days to deny that the material is infringing.[70] If the importer submits a denial, the port director provides notice to the copyright owner, who then has 30 days to contest the denial — and in doing so the owner must also post a

58 17 U.S.C. § 1204(a)(1).
59 17 U.S.C. § 1204(a)(2).
60 17 U.S.C. § 1204(b).
61 17 U.S.C. § 507(a). The statute of limitations for civil actions is three years from date of infringement.
62 17 U.S.C. § 602(a)(1).
63 17 U.S.C. § 602(a)(2).
64 17 U.S.C. § 602(a)(3).
65 17 U.S.C § 603(a).
66 17 U.S.C. § 603(c).
67 19 C.F.R. § 133.43.
68 INTELLECTUAL PROPERTY RIGHTS e-RECORDATION, https://iprr.cbp.gov/ (last visited July 20, 2018).
69 e-ALLEGATIONS FREQUENTLY ASKED QUESTIONS, https://www.cbp.gov/trade/trade-community/e-allegations/e-allegations-faqs (last visited July 20, 2018).
70 19 C.F.R. § 133.43(a).

bond in an amount specified by the port director.[71,72] If this happens, the port director will grant parties the opportunity to provide additional evidence and legal briefs on the matter, and the dispute will be sent to CBP for final adjudication.[73] Alternatively, copyright owners who want to circumvent this administrative procedure may attempt to obtain a court action enjoining the importation of an infringing article, and CBP will then enforce the order.[74]

The White House Office of the Intellectual Property Enforcement Coordinator (IPEC) oversees US intellectual property law, including copyright, trademark and patent law.[75] One of the Coordinator's duties is to oversee the import and export of intellectual property and advise Congress and the President about what legislation would assist in the protection of US intellectual property assets. The Coordinator issues a yearly report summarizing the efforts of various government agencies working in this area.[76]

Question 6: Describe how circumvention of technological protection measures is dealt with, if such is done.

US law prohibits circumvention of technological access controls on a work protected under Title 17 except in certain circumstances.[77] Every three years, the Librarian of Congress, in consultation with the USCO, publishes a circumscribed list of works whose users are or are likely to be adversely affected by this ban on circumvention in their efforts to make non-infringing uses of those works.[78] Those users are then free of the prohibition on circumvention for the purpose of those specific uses during the three-year period in which this rulemaking is in effect.[79]

Section 1201 also bans the manufacture, import, or provision to the public in any manner of any technology or service that is primarily designed or whose primary commercial purpose is either to circumvent a measure that controls access to a work or to circumvent any measure designed to protect a right of a copyright owner.[80] There are exceptions, however, for several uses, including reverse engineering[81] and encryption research.[82]

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[71] 19 C.F.R. § 133.43(b).
[72] If the copyright owner disclaims the allegedly infringing goods or fails to post a bond, the port director must release the goods to the importer. 19 C.F.R. § 133.43(d)(2)-(3).
[73] 19 C.F.R. § 133.43(d)(1).
[74] 19 C.F.R. § 133.43(e).
[75] U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, https://www.whitehouse.gov/omb/office-u-s-intellectual-property-enforcement-coordinator-ipec/ (last visited July 17, 2018).
[76] *E.g.*, OFFICE OF THE INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, EXEC. OFFICE OF THE PRESIDENT, 2016 INTELLECTUAL PROPERTY ENFORCEMENT COORDINATE ANNUAL REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/IPEC/ipec_fy16_annual_report_webversion_002.pdf..
[77] *See generally*, 17 U.S.C. §§ 1201-1204.
[78] 17 U.S.C. §§ 1201(a)(1)(C), (a)(1)(D).
[79] 17 U.S.C. § 1201(a)(1)(B).
[80] 17 U.S.C. §§ 1201(a)(1)(E)(2) and 1201(b).
[81] 17 U.S.C. § 1201(f).
[82] 17 U.S.C. §1201(g).

Section 1202 states that it is illegal to knowingly and with the "intent to induce, enable, facilitate, or conceal infringement" provide, distribute or import false copyright management information.[83] It is also unlawful to intentionally remove or alter any copyright management information, or to distribute, publicly perform or import for distribution any work knowing that the copyright management information has been removed or altered without the approval of the copyright holder.[84] Sections 1203 and 1204 set out the civil and criminal penalties for violating these sections of the Copyright Act. Under §1203, a copyright owner may bring a civil suit against those violating §§1201 and 1202. Remedies include actual or statutory damages,[85] injunction, impoundment or destruction of any device believe to be used in the promulgation of these violations,[86] and the recovery of plaintiff's costs, including attorney's fees, if defendant is found guilty of violation the section.[87] Section 1203 sets statutory damages at a sum not less than $200 and not more than $2,500 per violation of §1201 and not less than $2,500, nor more than $25,000, for each violation of §1202.[88] If the court has found defendant liable for a §1201 or §1202 violation within the previous three years, it may triple these damages.[89] Damages may be lowered if the court finds that there was no knowledge or intent to remove or alter the technological access controls, and the court may remit damages when it finds lack of knowledge or intent to infringe on the part of a nonprofit library, archive or educational institution or public broadcasting entity.[90] While registration prior to the commission of an infringement is a prerequisite to the availability of statutory damages for copyright infringement (see response to Question 1), no such requirement conditions the availability of statutory damages for violations of §§1201 and 1202.[91]

Question 7: Is there a mandatory notice and notice regime, or notice and takedown regime, for intermediaries in the case of alleged copyright infringement? If so, describe it briefly, and indicate if how it is dealt with differs based on which rights holder requests it.

The United States does not mandate notice and takedown procedures. The notice and take down system is but one component of a broad regime insulating internet intermediaries from direct or secondary liability.

Section 512 of the Copyright Act provides certain types of internet service providers (ISPs) qualified protection from monetary or equitable liability.[92] The four types of ISPs given these protections under the Digital Millennium Copyright Act (DMCA)[93] are those which transmit or provide connections for the transmittal of material provided by a person other than the service provider through their network (mere conduit service providers);[94] those which temporarily store material made available by someone other than the service provider (caching service providers);[95]

[83] 17 U.S.C. § 1202(a).
[84] 17 U.S.C. § 1202(b).
[85] 17 U.S.C. § 1203(c).
[86] 17 U.S.C. § 1203(b).
[87] *Id*.
[88] 17 U.S.C. § 1203(c)(3).
[89] 17 U.S.C. § 1203(c)(4).
[90] 17 U.S.C. § 1203(c)(5).
[91] 17 U.S.C. § 411(a).
[92] A service provider can qualify under more than one safe harbor depending on the function they provide and their compliance with the statute.
[93] Pub. L. 105-304 (1998).
[94] 17 U.S.C. § 512(a).
[95] 17 U.S.C. § 512(b).

those which store on their servers material at the direction of a user (host service providers);[96] and those which use directories or indexes to refer or link users to an online location hosting infringing material (search engines).[97] It should be noted that these are brief summaries of the various types of ISPs protected under the DMCA and there are qualifications for each. We will discuss these in-depth in our answer to Question 8, below.

Certain of the ISPs described above must comply with a notice and takedown regime (in addition to other obligations, further discussed in Question 8, below) to take advantage of the "safe harbor" provisions.[98] The copyright owner's notification to a host ISP or search engine identifying the allegedly infringing material and the original copyrighted work, as well as a statement asserting a good faith belief that the content constitutes infringement, triggers the take down process.[99] The owner's subjective evaluation that the posted content infringes its rights can satisfy the "good faith" requirement.[100] In one circuit, the copyright owner must at least consider whether the content constitutes fair use.[101] Other circuits have not so far adopted this requirement.

If a notice meets statutory technical requirements,[102] host ISPs must then expeditiously remove the infringing content[103] and notify the individual responsible for the content of the complaint.[104] (Compliance with these procedures insulates the host ISP from any liability to users for the takedown or to copyright owners for the alleged infringement.[105])

A user may file a counter-notice asserting a good faith belief that the material identified in the original notice is not infringing.[106] If a counter-notice meets statutory technical requirements, the ISP must alert the original copyright owner of the counter-notice, and then re-enable access to the allegedly infringing material between 10 and 14 business days after the counter-notice is received, provided the copyright owner has not within that time initiated an infringement action and sent notice of the action to the ISP.[107]

The copyright owner or someone "authorized to act on behalf of the owner" may send notifications.[108] The same remedies are available, and the same obligations on the host ISP apply, whether a rights holder or its agent initiated the notice. Indeed, many rights holders partner with

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[96] 17 U.S.C. § 512(c).
[97] 17 U.S.C. § 512(d).
[98] Specifically, ISPs falling under 17 U.S.C.§§ 512(b), (c) and (d) must comply with notice and take-down requirements as spelled out in § 512(1)(C). *See generally* Jane Ginsburg et al., Comments of Kernochan Center for Law, Media & the Arts, Columbia Law School to *U.S. Copyright Office's Dec. 31, 2915 Notice of Inquiry on Section 512 Study*, U.S. COPYRIGHT OFFICE, https://www.regulations.gov/docketBrowser?rpp=25&so=ASC&sb=title&po=0&s=kernochan&dct=PS&pd=ALL-07%7C01%7C16&D=COLC-2015-0013 (last visited July 11, 2018).
[99] 17 U.S.C. 512(c)(3)(A). This notice (and any counter-notice) is submitted under penalty of perjury.
[100] *Rossi v. Motion Picture Ass'n of America*, 391 F.3d 1000, 1004 (9th Cir. 2004).
[101] *Lenz v. Universal Music*, 815 F.3d 1145, 1153-55 (9th Cir. 2016).
[102] See 17 U.S.C.(c)(3)(A) for a complete list of the requirements for valid notice.
[103] 17 U.S.C. § 512(c)(1)(C).
[104] 17 U.S.C. § 512(g)(2)(A). See discussion *infra* for remaining requirements of § 512.
[105] 17 U.S.C. §512(g)(1).
[106] 17 U.S.C. § 512(g)(3).
[107] 17 U.S.C. § 512(g)(2)(C).
[108] 17 U.S.C. § 512(c)(3)(A)(i).

reporting agents to file notices on their behalf.[109] If an unaffiliated third party alerts the host ISP of infringing content, notice and takedown requirements are not triggered, though such notice may be evidence of knowledge by the host ISP, which could impose a separate set of takedown obligations.[110]

8) Does the notion of secondary copyright infringement in the digital world exist in your country? If so, describe it briefly.

The notion of secondary liability exists in all cases of copyright infringement, including those in the digital world; however, the DMCA provides certain protections for online service providers who may otherwise be secondary infringers.[111]

Secondary liability is not a statutory copyright law doctrine, but rather a common law principle found in nearly all areas of US tort law.[112] In copyright suits specifically, courts recognize two types of secondary liability: contributory and vicarious. Those who knowingly either induce or materially contribute to copyright infringement by another are contributorily liable. To succeed on an inducement theory of contributory liability, a plaintiff must show that "the defendant has undertaken purposeful acts aimed at assisting and encouraging others to infringe copyright."[113] To prove material contribution, the copyright owner must show that the defendant knowingly facilitated access to specific infringing material, "can take simple measures to prevent further damages to copyrighted works," and "yet continues to provide access" to those works.[114] Those who have the right and ability to supervise the infringing activity of another and have a direct financial interest in the infringing activities are vicariously liable.[115] Selling a device or service that may facilitate infringement does not suffice to find vicarious liability; instead, a plaintiff must show that the defendant was "in a position to control the use of copyrighted works by others."[116] In one of the earliest cases regarding secondary liability and new technologies, *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court declined to hold the manufacturer of home usage videotape recorders liable for contributory or vicarious infringement, despite the company's knowledge that the devices could be used for infringing activity.[117] Within this framework, Congress passed the DMCA in 1998 to update copyright law to accommodate the

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[109] Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J. L. & TECH. 369, 396 (2014).
[110] *UMG Recordings, Inc. v. Shelter Capital Partners, Ltd. Liab. Co.*, 718 F.3d 1006, 1025 (9th Cir. 2013).
[111] For a general discussion of secondary liability, *see* Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1364 (2006); Mark A. Lemley & Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004); T. Randolph Beard et al., *Safe Harbors and the Evolution of Online Platform Markets: An Economic Analysis*, 36 CARDOZO ARTS & ENT. L.J. 309 (2018); Craig A. Grossman, *From Sony to Grokster, the Failure of the Copyright Doctrines of Contributory Infringement and Vicarious Liability to Resolve the War Between Content and Destructive Technologies*, 53 BUFF. L. REV. 141 (2005); Mark Bartholomew, *Copyright, Trademark and Secondary Liability After Grokster*, 32 COLUM. J.L. & ARTS 445 (2009).
[112] *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 435 (1984).
[113] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 545 U.S. 913, 937 (2005).
[114] *Perfect 10 v. Amazon*, 508 F.3d 1146, 1172 (9th Cir. 2007) (internal quotation marks omitted).
[115] *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996).
[116] *Sony Corp. of America* at 438.
[117] *Id.* at 491.

growth of the relatively new Internet.[118] The DMCA did not revise or alter the existing doctrines of contributory and vicarious liability; rather, it established four safe harbors that ISPs may invoke as affirmative defenses to limit liability for infringement.[119]

It is not just adherence to the notice and takedown provisions discussed in Question 7 that grants certain ISPs a safe harbor from liability. Under §512, there are other requirements to obtain this privilege. To qualify for any of the DMCA safe harbors, a service provider must first satisfy two threshold requirements. It must have "adopted and reasonably implemented" a termination policy for repeat infringers.[120] Second, it must not interfere with "standard technical measures" broadly used by copyright owners to protect their works.[121] Assuming an ISP meets these prerequisites, it may seek protection under one of the four safe harbors outlined below.

To elaborate on the distinctions between the four types of safe harbors described in Question 7, the first safe harbor, §512(a), protects service providers that operate as mere "conduits," temporarily storing and transmitting unmodified material between parties. The second, §512(b), provides protection for service providers who engage in "system caching," a process by which online entities temporarily store material on their servers, often to provide users access to archival copies of online content when (for whatever reason) the original is unavailable. The third safe harbor, §512(c), limits liability for service providers when their users store infringing content on the service provider's network without their knowledge of the specific infringing content. While §512(c) refers directly to storage of material for another user, the safe harbor also extends to functions performed "for the purpose of facilitating access to user stored material." [122] If the service provider gains actual or "red flag" knowledge, or it receives a sufficient notification of the infringement, the service provider must take down the content to qualify for the safe harbor. Section 512(c) also requires that the service provider not receive "direct financial benefit" from the infringing material when it has the "ability to control" users' activity. Factors that can determine whether a service provider receives a direct financial benefit from the infringing activity include advertiser revenue, such as in *Columbia Pictures Indus. v. Gary Fung*,[123] or in the case of subscription services, whether "the infringing activity constitutes a draw for subscribers, not just an added benefit" as in *Perfect 10, Inc. v. CCBill LLC*.[124] The fourth safe harbor, §512(d), shields service providers from liability for referring their users to infringing content using information location tools, such as an indexes or search engines. To qualify for the safe harbor, a service provider must meet the same requirements as those of §512(c), with the added provision that any notification by the copyright owner include a hyperlink to the infringing material.

If a service provider qualifies for one of the safe harbors, it may not be held liable for monetary relief, but certain types of injunctive relief may still be available.[125] If a service provider

[118] *See*, discussion surrounding 17 U.S.C. § 512, *supra*.
[119] S. Rep. No. 105-190 at 30 (1998).
[120] 17 U.S.C. § 512(i)(1)(A).
[121] 17 U.S.C. § 512(i)(1)(B).
[122] *UMG Recordings, Inc. v. Shelter Capital Partners, Ltd. Liab. Co*., 667 F.3d 1022, 1031-1035 (9th Cir. 2011).
[123] *Columbia Pictures Indus. v. Gary Fung*, 710 F.3d 1020 (9th Cir. 2013).
[124] *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007).
[125] 17 U.S.C. § 512(j).

does not qualify for one or more of the safe harbors it will still have the benefit of any other defense available in ordinary copyright suits—for example, fair use.[126]

9. Indicate for which rights collective management is available.

Blanket Licensing Collectives

Collective management organizations (CMOs) offer blanket licenses to copyright users, providing access to the CMO's entire library of work for a set price. This form of collective management is particularly prominent in the copyright management of non-dramatic performance rights ("small rights") in musical compositions. Performance rights organizations (PROs) such as: the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), the Society of European Stage Authors and Composers (SESAC), and Global Music Rights (GMR) represent most songwriters and major music publishers.[127] ASCAP and BMI are the two dominant collective licensing organizations in the industry. ASCAP and BMI collect royalties for the public performance of musical works in the US. SESAC is a similar organization which represents a wide variety of American songwriters and publishers, but unlike ASCAP and BMI, it is a for-profit organization and those wishing it to manage their catalogue must apply for affiliation. Founded in 2013, Global Music Rights is the youngest PRO and represents a "smaller client base."[128] Most of these organizations have searchable internet databases where the public can search for the appropriate party from which to license the work.

Another organization, Copyright Clearance Center, Inc. (CCC) offers licensing for a variety of text-based works (including in- and out-of-print books, journals, newspapers, magazines, blogs and e-books).[129] Licensees include for profit and not-for-profit businesses, academic institutions, government agencies and individuals. CCC offers both digital-use and photocopy-use licenses in *both* pay-per-use form and repertory form (one payment for all covered uses for a year), and in both centralized (through CCC's office and website) and decentralized (at rightsholders' own websites) contexts. It then collects royalties from licensees and remits them to the applicable rightsholder. CCC's services are entirely voluntary, opt-in and non-exclusive for both rightsholders and users; that means that, unlike somewhat similar organizations in most other countries, CCC operates pursuant to no statutory licenses or levy systems. It is important to note that CCC is not currently as widely representative of rightsholders as are many reproduction rights organizations in other countries.

Blanket Statutory Collective Licensing

In some cases, the US imposes obligatory collective licensing and management — namely under §§112(e) and 114(g). The §114 statutory license covers public performances of sound recordings by four classes of digital music services: eligible non-subscription services (i.e., non-interactive webcasters and simulcasters that charge no fees), preexisting subscription services (i.e., residential subscription services which began providing music over digital cable or satellite television before July 1998), new subscription services (i.e. non-interactive webcasters and

[126] 17 U.S.C. § 512(l).
[127] ASCAP, www.ascap.com (last visited July 10, 2018); BMI, www.bmi.com (last visited July 10, 2018); SESAC, https://www.sesac.com (last visited July 10, 2018); GLOBAL MUSIC RIGHTS, http://globalmusicrights.com (last visited last visited July 10, 2018).
[128] GLOBAL MUSIC RIGHTS, *supra* note 127.
[129] COPYRIGHT CLEARANCE CENTER, www.copyright.com (last visited July 10, 2018).

simulcasters that charge a fee, as well as residential subscription services providing music over digital cable or satellite television since July 1998), and preexisting satellite digital audio radio services (i.e., SiriusXM Radio). The §112 statutory license covers ephemeral reproductions (i.e., temporary server copies) made by all digital music services covered by §114. By contrast, the §114 compulsory license does not cover interactive digital audio transmissions.

Non-interactive services correspond to those in which the user experience mimics a radio broadcast. That is, the users may not choose the specific track or artist they wish to hear, but they are provided a pre-programmed or semi-random combination of tracks, the specific selection and order of which remain unknown to the listener (i.e. no pre-published playlist). For services which provide an interactive service or on-demand access to certain tracks or artists (e.g., Spotify), the statutory license does not apply, and a direct license must be obtained from the copyright holder.

SoundExchange is the collective management organization (CMO) that collects revenues from eligible services and distributes digital performance royalties.

Individual Licensing Collectives

Many artistic fields have organizations that facilitate licensing of individual works. These organizations are described below.

Visual Art

For works of visual art, the two largest licensing organizations are the Artists Rights Society (ARS) and the Visual Arts and Galleries Association (VAGA).[130] Each of these societies represents a list of visual artists.[131] In general, they represent all the exclusive rights in the works of the artist, including an exclusive right to negotiate all reproduction and licensing of the artists' works, although there are some artists for whom this is not true.[132] There is no firm rule; each artist or his or her estate negotiates individually with the organization regarding what rights they will grant to the licensing organization. Although these organizations represent the artists, each licensing opportunity that arises is brought to the artist in question and discussed with him or her (or his or her representatives). It should be noted that neither of these organizations, together or separately, represents the entire market. There are many artists who do not participate in collective management of their works at all.

Literary Works

Beyond the pay-per-use licensing opportunities through the CCC, discussed above, the Authors' Registry also collects and distributes to US authors of literary works royalty payments collected abroad.[133] The Registry acts as a clearinghouse or payment agent for certain foreign organizations with whom it has agreements. It receives payments from those organizations and distributes them to US-resident authors. Primarily it works with book authors, including authors

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[130] ARTISTS RIGHTS SOCIETY, www.arsny.com (last visited July 10, 2018); VAGA, www.vagarights.com (last visited July 10, 2018)
[131] For a complete list of artists represented by these two organizations, please visit their websites at http://www.vagarights.com/artists-represented/ and http://www.arsny.com/complete.html.
[132] VAGA and ARS do not handle sales of the physical originals or copies of works of art done by their members.
[133] THE AUTHORS REGISTRY, www.authorsregistry.org (last visited July 10, 2018).

of trade, academic, and technical books, but will collect royalties for any author of the written word. It should be noted that it does not represent the rights of the authors to whom they distribute these payments; they merely collect and distribute revenues collected from foreign collective management societies. Foreign organizations track all usage, and calculations are done in the context of the organization's local laws and corporate requirements.

Music

A current legislative proposal, known as the Music Modernization Act, would create a blanket licensing collective for digital music providers — including online streaming radio services like Spotify and Pandora — for mechanical rights in the musical compositions that the digital music providers use, replacing the time-consuming work-by-work regime that currently exists.[134] The proposal would also unify the standard the Copyright Royalty Board uses to set licenses, making all rates determined using the market-centric "willing buyer/willing seller" standard. The bill would also bring all pre-1972 sound recordings within the collective licensing scheme for digital audio transmissions.

Photography

Photographers do not have a collective licensing group, although they have recently started a nonprofit initiative which will assist in the consistent management of image rights.[135] The Picture Licensing Universal System (PLUS) does not perform licensing functions. Instead, it provides a uniform lexicon and glossary (in many languages) for the photography community and those wishing to reproduce copyrighted photographs.[136] The PLUS website also has a search engine allowing potential licensees to locate the contact information for an image they wish to license.[137]

Professional photographers often license their works through collective management groups called stock photo agencies.[138] Stock photo agencies differ from collective licensing societies in that stock photo agencies are for-profit businesses that are not set up primarily as royalty or fee distributors but as companies that license works, retain some of the license fees as payment for their services and remit the remainder to the photographer member. These organizations contract with the photographer to represent either his entire portfolio or just certain of his images. The stock photo agency then licenses the work on behalf of the author. Some of the images these agencies represent are available for license at the click of a button;[139] some are even royalty-free.[140]

Audiovisual Works

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[134] 17 U.S.C. § 115(b).

[135] THE PLUS COALITION, www.useplus.com (last visited July 10, 2018).

[136] *The System: What is PLUS?*, THE PLUS COALITION, www.useplus.com/aboutplus/system.asp (last visited July 10, 2018).

[137] *Plus Registry*, THE PLUS COALITION, www.plusregistry.org/cgi-bin/WebObjects/PlusDB (last visited July 10, 2018).

[138] Some examples of well-known stock photo agencies are Magnum Photos (www.magnumphotos.com) and Getty Images (www.gettyimages.com) (both last visited July 10, 2018).

[139] *See, e.g.*, News Imagery, GETTY IMAGES, www.gettyimages.com/Editorialimages/News?isource=usaen_home_FTV_quicklinks_news (last visited July 10, 2018).

[140] *Id.*

The major film and television studios grant public performance licenses of their full-length works (films and television shows) primarily through two groups: Swank USA and Criterion Pictures USA. These licenses include educational and non-educational uses. Swank issues licenses on a one-time basis, or an organization can ask for a license to cover multiple showings during a specified period of time. Swank does not handle requests for use of film or television clips. Studios handle requests for clips (as well as use of movie posters or related paraphernalia) on a case-by-case basis and there is no collective management system for these materials.

The Motion Picture Licensing Corporation grants umbrella licenses to groups and corporations who wish to host multiple public performances, allowing them to rent or purchase, via stream or download, copyrighted motion pictures from more than 1000 studios and producers.[141] This license does not cover showings where admission is charged or where specific titles are publicly advertised, whereas Swank licenses do cover these exploitations.

Finally, grassroots groups such as Creative Commons allow creators from a wide variety of disciplines to determine how they want their works licensed and then provide tools for authors to indicate these terms as their works are distributed across the internet.[142] Creative Commons, however, does not provide a means for creators to license their works for remuneration.

10. With respect to collective management, indicate who sets the tariffs and how they are set.

The Copyright Royalty Board sets rates for various licensing regimes for five-year terms[143] — allowing parties opportunities to comment before promulgating new rates.[144] The CRB sets rates for pre-1998 music services covered under §112 and §114 statutory licenses – such as satellite radio – by applying a four-factor standard; rates should aim to: maximize the availability of the work to the public, give the copyright owner fair compensation, consider the contribution to the final work of both the copyright owner and the copyright user, and minimize industry disruption.[145] For newer services, such as streaming internet radio, the statute imposes a more squarely market-based "willing seller/willing buyer" standard, which generally has led to higher rates paid to copyright owners.[146] With respect to digital audio recordings, the parties negotiate and the Copyright Royalty Board approves their agreement; in the absence of agreement between the parties, the Board sets the tariff (§110). SoundExchange, the sole administrative body for subscription services' statutory license fees, has its licensing rates set by the Copyright Royalty Board according to a willing buyer/willing seller standard.[147] The Audio Home Recording Act, Chapter 10 of the Copyright Act, imposes a 2% tariff on the sale of digital audio recording devices.[148] Parties whose work has been embodied in a digital music recording may make a claim

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[141] MOTION PICTURE LICENSING CORPORATION, "About the Umbrella License" https://www.mplc.org/page/about-the-umbrella-license (last visited July 16, 2018).
[142] CREATIVE COMMONS, www.creativecommons.org (last visited July 10, 2018).
[143] 17 U.S.C. § 804(b)(4).
[144] 17 U.S.C. § 803(b).
[145] 17 U.S.C. § 801(b).
[146] United States Copyright Office, "Copyright and the Music Marketplace" February 2015, page 82. https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (last visited July 11, 2018).
[147] *See* 17 U.S.C. § 112(e)(4); 17 U.S.C. § 114(f)(1)(B) and 17 U.S.C. § 801(b)(2).
[148] 17 U.S.C. § 1004(a)(1).

to collect a portion of these royalty payments, and the Copyright Royalty Board settles any disputes about the proper distribution of these funds.[149]

The Copyright Royalty Board is a statutorily-created body that sits within the Library of Congress.[150] Three administrative judges are appointed by the Librarian of Congress to six-year terms — with exacting requirements for eligible judges.[151] The Copyright Royalty Board sits *en banc* to determine and adjust royalty rates for the statutory licensing schemes in §112 and §114, as well as to determine the distribution of those royalties to rights holders. They set rates in the form of rulemaking – subject to participation and comment from interested parties[152] – and are subject to review for "legal error" by the Register of Copyrights and appeal to an Appellate Court.[153] Impacted parties may also petition for rate adjustments[154] or submit for approval voluntarily negotiated rates.[155]

ASCAP and BMI, described in more detail in our answer to question 9, operate under agreements overseen by the Department of Justice and enforced by the federal district court in New York to ensure they do not violate antitrust laws. These agreements are called Consent Decrees.

The Consent Decrees, originally entered in 1941, are the products of lawsuits brought by the United States against ASCAP and BMI under §1 of the Sherman Act, to address competition concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers.[156] The Decrees impose constraints on ASCAP's and BMI's membership and licensing practices. In ASCAP's case, this includes an express prohibition on licensing any rights other than public performance rights.

Since the Consent Decrees' entry in 1941, the Justice Department has periodically reviewed their operation and effectiveness. Both Consent Decrees have been amended since their entry. The ASCAP Consent Decree was last amended in 2001 and the BMI Consent Decree was last amended in 1994.

For some other voluntary collective rights organizations, like the Copyright Clearance Center, the rightsholders set their own licensing fees and conditions of licensing — while the management organization then handles the transactions (and may collect a fee for their services).[157]

Question 11: Are copyright remedies within the power of specialized courts or common law courts?

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[149] 17 U.S.C. § 1007(c).
[150] COPYRIGHT ROYALTY BOARD, https://www.crb.gov (last accessed July 11, 2018)
[151] Each judge must be an attorney with at least seven years of legal experience. The chief judge must have five years' experience in "adjudications, arbitrations, or court trials," and of the other two judges one must have copyright expertise and the other economics expertise. 17 U.S.C.§ 802(a)(1).
[152] 17 U.S.C. § 803.
[153] 17 U.S.C. § 802(d).
[154] 17 U.S.C. § 804.
[155] 17 U.S.C. § 805.
[156] 15 U.S.C. § 1.
[157] COPYRIGHT CLEARANCE CENTER, "Annual Pay Per Use Services," (last visited July 6, 2018) http://www.copyright.com/rightsholders/annual-pay-per-use-services/

Federal courts exercise exclusive jurisdiction over infringement claims arising under the 1976 Copyright Act.[158] State courts, however, retain jurisdiction over, and state statutory or common law applies to, infringement claims concerning sound recordings fixed prior to February 15, 1972. We do not have specialized courts for copyright disputes. However, Congress is considering the Copyright Alternative in Small-Claims Enforcement (CASE) Act, which would create a US Copyright Office Small Claims Board to decide certain civil copyright actions. If passed, the Act would allow parties seeking either actual or statutory damages up to $30,000 to voluntarily forego the often costly standard litigation process and instead elect to have their cases heard before the Board.[159]

New York, New York

July 27, 2018

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[158] 42 U.S.C. § 1338.
[159] Copyright Alternative in Small-Claims Enforcement Act, H.R. 3945, 115th Cong. (2017).