

PUBLIC SUBMISSION

As of: August 21, 2013 Received: June 20, 2013 Status: Pending_Post Tracking No. 1jx-860j-qzf4 Comments Due: July 22, 2013 Submission Type: Web
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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0001

Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study

Document: PTO-C-2013-0036-DRAFT-0001

Comment on FR Doc # 2013-14702

Submitter Information

Name: alexis

General Comment

My name is Alexis Parrish And I need to get my own patent please have someone. Contact me at alexisparrish28@gmail.com... US should come up with its own distinct logo that must be present somewhere on every item traded ;)

PUBLIC SUBMISSION

As of: August 21, 2013 Received: June 21, 2013 Status: Pending_Post Tracking No. 1jx-8619-afj3 Comments Due: July 22, 2013 Submission Type: Web
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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0001

Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study

Document: PTO-C-2013-0036-DRAFT-0002

Comment on FR Doc # 2013-14702

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General Comment

If you don't want someone to copy your tune, don't hum it out loud. The White House is asking for something untenable: to restrain personal copying for personal use. The Office is well aware that a key feature of the patent system is that anyone can practice a patented invention for personal, non-commercial use. Copyright law should be the same. If we extend the same principles to copyright law, then children should be allowed to freely copy online music, movies, and books for their personal enjoyment. But if copyrighted songs are played for commercial purposes, such as on a flight or at a grocery store, then without permission this is infringement under the same standard applied to patented intellectual property. Focusing on entrepreneurial infringement will strengthen protection rather than to diffuse it. In effect, big media companies have become the equivalent of the "patent trolls" who go after households with threats of lawsuits for infringement. In order to be effective, the White House should strive for consistency, and should stop caving to the bullying tactics of the copyright trolls. We all need to adapt, and in the new millennium copyright laws also need to adapt. There is plenty of room for creative minds to make a profit from their copyrighted works. But as with patents, this right must not infringe on the right of private individuals to copy for personal use. Back in the day, publishing houses performed a service of delivering copyrighted works in a form (paper) that was competitive with an individual's effort to make a copy on his or her own. But today that has changed. With the click of a button, a work can be copied. Such is life. Rather than fighting change, we should accept the principles that motivate us to adapt. If automobiles could be copied with the click of a button, the same would apply. We cannot change patent law to prevent personal copying even if someday individuals can copy inventions by clicking a button. Treat copyrights the same.

PUBLIC SUBMISSION

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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0001

Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study

Document: PTO-C-2013-0036-DRAFT-0003

Comment on FR Doc # 2013-14702

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General Comment

perhaps pressure your trading nations to start new international mark : IC ... not paid for....start by recommendation via host nation housing and hence benefiting from whatever the new IC mark is protecting ... then phase out or reintergrate T M and R C

PUBLIC SUBMISSION

As of: August 21, 2013 Received: June 23, 2013 Status: Pending_Post Tracking No. 1jx-862g-hfk8 Comments Due: July 22, 2013 Submission Type: Web
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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0001

Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study

Document: PTO-C-2013-0036-DRAFT-0004

Comment on FR Doc # 2013-14702

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Submitter's Representative: Self

Organization: Robert Patrick Reibold

General Comment

I learned that I would make a good inventor when I was 8 years old. I decided that I would Pursue this Dream when I became an adult. Along the way I met others like myself that had the same passion. I learned from them that when we talked about our ideas with certain people the ideas would get patented and be put on the market to sell; while leaving us still penniless for our creativity because the people that heard our ideas never let us know they were in a position to make our ideas possible. When I became an adult with a full time job I used all my savings \$5000 for the year to invest in getting a Patent with Inventors Helpline which I know now is not recognized by the Better Business Bureau and Neither are Any of the other so called help you patent your idea companies scene on tv or around towns across the country. I was never allowed to see my prototype and that was very suspicious to me. After I realized I was hustled by this very detailed strategic plan you say is going to help innovators that mimics the exact procedures used to protect corporations and big business before but now is being funded by the government I'm sure the Branded organizations are really pleased that you are now flipping the bill to protect them from individuals trying to reclaim their right to pursue an idea they've been developing but was slickly stolen by espionage of a little to fixed income individual who was pursuing a patent. You want to know how I made ideas happen during the Clinton and Bush Eras? I let you steal them; I put a lot of effort into the written design of my ideas knowing full well that Billionaires had no problem taking away the possibility of success from a struggling poor person knowing full well that instead of stating my name on the patent as how they discovered the idea they'd make up some scenario to make it seem like they thought of it all by themselves without ever paying me for my services. That is how the world works to make innovation work but I stay poor

PUBLIC SUBMISSION

As of: August 21, 2013 Received: July 07, 2013 Status: Pending_Post Tracking No. 1jx-86bo-apzc Comments Due: July 22, 2013 Submission Type: Web
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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0001

Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study

Document: PTO-C-2013-0036-DRAFT-0005

Comment on FR Doc # 2013-14702

Submitter Information

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Organization: concerned citizen

General Comment

In my humble opinion, one of the biggest negatives or hinderances to creative engineering is the limitation(s) around (reverse) engineering of intellectual or other properties. For example, under Federal legislation(DMCA) I was caught up in a digital trap set by Directv several years ago. I had ownership by purchased receipt of a smart card, and after Directv raided a dealer of programmers/de-programmers they obtained my name and demanded I pay them for a supposed theft of signal, etc - they eventually dropped this ridiculous lawsuit as I was Dismissed w/ Prejudice in August 2003. Now, companies like Directv simply will NOT allow ownership of a shared technology. As I explained to the Judge, there was NO difference in my curiosity of what was on that Smart Card, versus my own vested interest in my properly placed USPS mail-box. I owned the mail-box, by purchased receipt, and although the USPS and (only) I shared an interest in it's storage of information, I always had the ability to reverse engineer the Mail-Box by whatever means I & only I decided. The same goes for a purchased digital meida - if we as a society really want to unleash another Bill Gates or Thomas Edison, we need to encourage and maybe even mandate that once technology is transferred to another person, that person can peek under the rug - Not for re-sale or profit, but for expanding an inventor's own curiousness,and nothing more...especially since ownership is still 9/10 of the Law - all we need now, is for the powers-that-be to allow the final 1/10 to be in effect. Being curious about mechanical devices and how something works is ALOT different than profiting from stealing signals or even so-called intellectual property. Thanks for opportunity to express my opinion. Sincerely, James Cowart

PUBLIC SUBMISSION

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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0001

Requests for Comments: Joint Strategic Plan for Intellectual Property Enforcement, Voluntary Best Practices Study

Document: PTO-C-2013-0036-DRAFT-0006

Comment on FR Doc # 2013-14702

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Organization: Independent Film & Television Alliance

General Comment

See attached file(s)

Attachments

IFTA Comments to Voluntary Best Practices Study

July 22, 2013

U.S. Patent and Trademark Office
Office of Chief Economist
Attn: Saurabh Vishnubahkat, Expert Advisor
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Submitted electronically via <http://www.regulations.gov/#!submitComment;D=PTO-C-2013-0036-0001>

Re: Request for Public Comment Issued on June 20, 2013 by the U.S Patent and Trademark Office in connection with the Voluntary Best Practices Study [Docket No. 2013-0036]

Dear Mr. Vishnubahkat:

The Independent Film & Television Alliance (IFTA) welcomes the opportunity to provide comments to the U.S. Patent and Trademark Office in response to the above-captioned matter regarding voluntary agreements for reducing intellectual property infringement.

I. About IFTA

Based in Los Angeles, IFTA is the global trade association of the independent motion picture and television industry. Our nonprofit organization represents more than 140 Member Companies in 24 countries consisting of the world's foremost independent production and distribution companies, the majority of which are small to medium-sized U.S.-based businesses that include sales agents, television companies and institutions engaged in film finance.¹ IFTA works closely with the U.S. Government to highlight the unique concerns of independent producers and their essential need to protect the rights to their creative works.

For more than 30 years, IFTA Members have produced, distributed and financed many of the world's most prominent films, 20 of which have won the Academy Award® for "Best Picture" since 1980, most recently *The Artist* (Wild Bunch and The Weinstein Company), *The King's Speech* (The Weinstein Company) and *The Hurt Locker* (Voltage Pictures and Summit Entertainment). In fact, IFTA Members' films and television programs are regularly recognized with every major entertainment award from around the globe. Collectively, IFTA Members produce more than 400 independent films and countless hours of television programming each year and generate more than \$4 billion in sales revenues annually. Furthermore, the independent

¹ A list of IFTA Member Companies is available online at: www.ifta-online.org.

sector produces approximately 75% of all U.S. films,² which are financed, produced and internationally distributed outside of the major Hollywood studios. IFTA provides various copyright protection services to its Members including, in particular, the Copyright Alert System (CAS), which resulted from a voluntary agreement between content owners and Internet Service Providers. The CAS is further discussed below.

The independent sector of the film and television industry relies on license fees resulting from copyright ownership in order to continue business and fund subsequent productions. IFTA Members regularly secure financing and distribution for each project on a country-by-country basis by means of licensing deals with local distributors. After assessing the value of a project, local distributors enter into license agreements with the producer that provide minimum license fees to be paid in order to secure exclusive distribution rights to a project before production. Once enough minimum guarantees are secured through local distributors, those license agreements are collateralized by financial institutions which loan production funds to support the project. In exchange, these financial institutions typically retain the underlying copyright assignment of an audiovisual work until the production loan is repaid in full.

The lifeblood of independent producers and distributors is their intellectual property rights and their ability to secure financing to produce the film, to license exclusively for worldwide distribution, and to protect and enforce the exclusive rights to their works. However, for these small, entrepreneurial companies, private enforcement of intellectual property rights is often prohibitively expensive and time consuming. In addition, enforcement of intellectual property rights in foreign jurisdictions is especially difficult because it is often necessary to hire outside local counsel and local laws often do not address piracy and the resulting damage to the ability of the copyright owner to recoup the investment in the production and pay back the production loans. IFTA urges the U.S. Government to encourage other nations to adopt voluntary agreements,³ however such agreements should not displace the public enforcement of intellectual property rights under local law.

Given the financing realities of independent film and television production, the tools available to IFTA Members through voluntary, private agreements provide an invaluable means of protecting their creative works as an alternative to resorting to costly and time consuming litigation. U.S. voluntary agreements will likely be looked at by other governments, so care must be taken when endorsing voluntary agreements to ensure that they meet the minimum standards provided under the applicable law for enforcement of intellectual property rights.

² IFTA analysis of weekly production listings published in *The Hollywood Reporter & Daily Variety* (2002-2008) and in Baseline Studio Systems and IMDB Pro (2009 & 2010).

³ The International Intellectual Property Association files comments with the United States Trade Representative in response to the Special 301 annual review of intellectual property protection and market access practices in foreign countries. More information can be found at www.iipa.com/special301.html.

II. Measuring the Effectiveness of Voluntary Agreements to Reduce Infringement

IFTA supports the use of private voluntary agreements to reduce copyright infringement because they are a means of bridging the gap between stakeholders who might not otherwise be included in such discussion. In addition, voluntary agreements serve to create a knowledge base that may allow better mechanisms to be put into place.

The effectiveness of voluntary agreements to reduce intellectual property infringement should be defined by their true impact on the commercial marketplace, stakeholders and consumers. A number of features should be present, including: bringing all affected stakeholders together to protect a common interest in marketplace integrity; creating efficiency and cooperation in the industry by employing a fully-articulated plan for how complaints should be submitted by content owners and handled by service providers; and providing other affected stakeholders who have not yet joined in the agreements with enhanced confidence in the integrity of the systems.

The voluntary agreements recently adopted in the U.S. and endorsed by the White House Intellectual Property Enforcement Coordinator as well as the industry, such as the payment system operators' "Best Practices to Address Copyright Infringement and the Sale of Counterfeit Products on the Internet"⁴ and the "Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting,"⁵ are intended to reduce online infringement by making counterfeiting and piracy a less profitable business by cutting off revenue to sites that are "principally dedicated to selling counterfeit goods or engaging in copyright piracy and have no substantial non-infringing uses"⁶ and eliminating the indicia of credibility that attaches to rogue sites from legitimate advertisements and credit card logos. Voluntary agreements may also serve as an educational tool to notify consumers of their infringing activities and assist them with correcting such use. Moreover, voluntary agreements are effective at uniting the industry in protecting creative works. Presenting a united front to protect copyrighted works while educating users about copyright infringement will lead to more effective enforcement of intellectual property rights and reduce the corrosive effect of infringement on the creative community.

While these ways of measuring effectiveness may not be strictly quantifiable, that does not make the results any less vital for independent content creators, distributors and financiers who rely on the value of their intellectual property to conduct business.

⁴ See 2012 U.S. Intellectual Property Enforcement Coordinator Joint Strategic Plan at http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_two-year_anniversary_report.pdf.

⁵ See "Coming Together to Combat Online Piracy" posted by Victoria Espinel, U.S. Intellectual Property Enforcement Coordinator, at <http://www.whitehouse.gov/blog/2013/07/15/coming-together-combat-online-piracy-and-counterfeiting>.

⁶ Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting

III. Participation in Independent Film & Television Alliance in Voluntary Agreements

There are tangible ways of measuring the effectiveness of voluntary agreements, such as monitoring analytics from organizational bodies, service providers and channeling associations for content owners. IFTA Members may individually participate in three voluntary agreements currently in place: (1) the Copyright Alert System (CAS) (2) the Best Practices implemented by Payment System Operators, and (3) the recently announced Best Practices Guidelines for Ad Networks.

A. Copyright Alert System (CAS)

The CAS arose from a four year voluntary agreement between content owners in film, television and music and certain internet service providers (ISPs). Through the CAS, the ISPs have voluntarily agreed to employ procedures to combat peer-to-peer (P2P) file sharing. The technology used to identify Internet Protocol (IP) addresses that share content illegally was subjected to extensive testing to avoid false positives. Once the content is confirmed to have been shared illegally, the ISP to which the particular IP address is assigned sends a Copyright Alert to the subscriber associated with that IP address. Since its implementation in February 2013, each ISP has been processing notices and generating Alerts.

Copyright Alerts are designed to educate subscribers about copyright, inform them of the consequences of copyright infringement and deter them from allowing such infringement to occur on their accounts. A maximum of six Alerts will be given to a subscriber, with the initial Alerts aimed to educate the subscriber and subsequent Alerts to reinforce the seriousness of content theft and the consequences of continued content theft on the subscriber's account. Failure to respond to the Alerts will result in Mitigation Measures which can include temporary reductions of internet speeds or redirection to a landing page until the subscriber contacts the ISP to discuss the matter or reviews and responds to educational information about copyright. Before a Mitigation Measure is imposed, the subscriber receives notice that an independent review of the process is available. Upon a subscriber's request, and payment of a nominal fee (which is refunded if the subscriber prevails), an Independent Review will be administered by the American Arbitration Association.

The Center for Copyright Information (CCI)⁷ manages the CAS and is directed by an Executive Director and a three member Advisory Board, which includes consumer advocates. The CCI is in the process of compiling data on the efficacy of the program.

While the CAS is still in the early stages and numerical data is not yet publicly available, systems are in place to evaluate the effectiveness of the voluntary agreement and may be useful for future voluntary initiatives.

⁷ The website for the Center for Copyright Information is www.copyrightinformation.org.

B. Best Practices Implemented by Payment Processors

Five major payment system operators⁸ have signed on to a voluntary agreement that outlines policies and procedures to respond to reports from content owners that a website is selling copyright infringing products and counterfeit trademark products. Under the agreement, the exact procedure employed by each payment system operator may vary, but at a minimum, the payment system operators will maintain a website containing a clearly identifiable complaint mechanism for content owners, including a point of contact for the payment system operator and policies prohibiting the sale of illegitimate products using the payment system operators' services.

Upon receipt of a complete request, the payment system operator conducts an investigation, which may result in the merchant providing evidence that it has the right to legitimately sell the product in question. The payment system operator will relay the results of the investigation to the content owner. If it is determined that the merchant is selling illegitimate products, then the payment system operator will demand that the merchant prevent future improper transactions. If the merchant refuses to comply, then the payment system operator will suspend or terminate payment services to that merchant with respect to U.S. account holders. IFTA has successfully worked with each payment system operator to clarify procedures for complaints and acts as a channeling association to the payment system operators for its Members. Early indications are that the process can result in removal of the ability of the offending website to process payments with the five payment system operators who participate in the voluntary agreement.

C. Best Practices Guidelines for Advertising Networks

Several U.S. advertising networks ("ad networks")⁹ have recently announced a set of voluntary best practices guidelines in an effort to avoid supporting websites which are in the business of distributing counterfeit or pirated goods. The guidelines are designed to reduce revenue flows from advertisements to websites that are engaged in widespread piracy and counterfeiting.

The participating ad networks have agreed to be certified against the Interactive Advertising Bureau Networks' Quality Assurance Guidelines and have formulated a mechanism for content owners to submit complaints regarding websites which are alleged to be "principally dedicated to selling counterfeit goods or engaging in copyright piracy and to have no substantial non-infringing uses." The Guidelines will not affect any other takedown procedures or agreements currently in place. We hope that this agreement and the industry's implementation brings further relief to independent producers by cutting off money to those who infringe intellectual property rights and profit from such infringement.

⁸ Visa, MasterCard, American Express, Discover, Pay Pal

⁹ 24/7 Media, Adtegrity, AOL, Condé Nast, Google, Microsoft, SpotXchange, and Yahoo!



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IV. Conclusion

IFTA is pleased that the US Patent and Trademark Office is seeking input as to the usefulness of voluntary agreements to address and reduce online infringement. IFTA supports the use of voluntary agreements and believes that clear, practical guidelines built on the consensus of all stakeholders, and effectively and efficiently implemented, provide additional and crucial tools to the independent film and television industry.

Thank you for your time and support of the intellectual property industries.

Respectfully submitted on July 22, 2013

INDEPENDENT FILM & TELEVISION ALLIANCE

/s/

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PUBLIC SUBMISSION

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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0002

Voluntary Best Practices Study; Extension of Comment Period

Document: PTO-C-2013-0036-DRAFT-0007

Comment on FR Doc # 2013-17166

Submitter Information

Name: Ted Dengler

General Comment

Copyright laws have been very helpful to the writers and musicians and movie makers of America. I would say more helpful than patent laws have been to the inventors of America. America needs to regain it's technology advantage.

We should take this opportunity to harmonize patent and copyright laws so that writers, musicians, movie makers and inventors are treated equally.

PUBLIC SUBMISSION

As of: August 21, 2013 Received: August 17, 2013 Status: Pending_Post Tracking No. 1jx-872z-olru Comments Due: August 21, 2013 Submission Type: Web
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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0002

Voluntary Best Practices Study; Extension of Comment Period

Document: PTO-C-2013-0036-DRAFT-0008

Comment on FR Doc # 2013-17166

Submitter Information

Name: Victoria Sheckler

Organization: Recording Industry Association of America

General Comment

See attached file(s) re voluntary submissions best practice study

Attachments

response to pto request re voluntary best practices study final

**BEFORE THE
UNITED STATES PATENT AND TRADEMARK OFFICE**

In the Matter of)
)
Request of the United States Patent and) Docket No. PTO-C-2013-0036
Trademark Office for Public Comments:)
Voluntary Best Practices Study)
)

COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

AUGUST 19, 2013

The Recording Industry Association of America (“RIAA”) welcomes the opportunity to submit comments in response to the request by the U.S. Patent and Trademark office for comments concerning the voluntary best practices study.

The RIAA is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of this mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies. As part of this, RIAA has been a key stakeholder in various cooperative agreements and other voluntary initiatives to reduce copyright infringement.

At the outset, we note that we believe that voluntary initiatives can be useful tools to curbing online infringement. We appreciate the spotlight the Intellectual Property Enforcement Coordinator has brought to these initiatives, and the encouragement the Administration has provided to develop and implement such initiatives.¹ We believe this has helped promote a growing recognition among all responsible stakeholders in the Internet ecosystem that they have a role to play in promoting a legitimate online environment and deterring illegal activity.

¹ See, e.g., U.S. Intellectual Property Enforcement Coordinator, 2013 Joint Strategic Plan on Intellectual Property Enforcement. June 2013, p. 36, available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf> (“IPEC 2013 Report”).

We further agree that it is important that these voluntary initiatives be benchmarked and measured to determine whether the private sector can adequately “self-regulate” to deter infringing and other abusive behavior. While no one would suggest that voluntary initiatives provide a silver bullet to eradicate illegal activity, it is still important to understand whether their intended purposes makes sense and, if they do, what practical impact, if any, they have to satisfy their intended purposes.

However, at the same time, we note that one of the key attributes of voluntary initiatives is that they are flexible, and can be molded over time. We also note that several of the initiatives are relatively young and/or not yet implemented, and that time is needed to see what impact such initiatives may have. We caution against holding any initiative up against a stringent, unbending standard, and recommend a common sense, practical approach to evaluating them. Further, we suggest giving these initiatives time to operate in the marketplace.

With this in mind, we offer a few general observations followed by some more detailed suggestions for evaluating various specific voluntary initiatives.

General

In order to measure “effectiveness,” we recommend that the PTO start by evaluating what is the intended goal of the voluntary initiative. As a threshold matter, the PTO should consider whether or not the intended goal, if achieved, would likely be useful to deter online infringement. In considering this, one should think about the scope of the voluntary initiative as compared to the problem it is trying to help solve, and the problem as it exists generally.

Next, the PTO should, to the extent practical, take a baseline measurement of the activity at issue, and then measure impact as compared to the baseline. If determining a historical baseline is not practical, the PTO should determine if there are proxies available to use for such a baseline.

We also suggest that the PTO consider the various academic and similar papers that have addressed these issues to some extent or another. We provide at [Exhibit 1](#) a list of such papers that we have identified that may be useful for background material.

In addition to measuring the impact on the initiative to reach its goal, the PTO should consider qualitative impacts as well. For example, has the initiative had an impact in raising awareness among consumers about the problem? Other stakeholders? Other governments? Has it changed attitudes towards infringement? For example, we note that voluntary initiatives that are negotiated and agreed to among stakeholders carry the promise of continued commitment and cooperation from all involved. Those voluntary initiatives that are unilateral, while an important commitment, may suffer from a lack of stakeholder cooperation.

Finally, because the various voluntary initiatives are intended to address different aspects of the online infringement problem, we recommend that the PTO consider evaluating each one

separately. We further recommend that the PTO speak with the direct stakeholders/ participants in the various voluntary initiatives to understand the goals of the initiative and status of implementation, and that the PTO give due consideration to the suggestions offered by them in determining whether, when and how to evaluate the initiative.

Payment Processor Best Practices²

The payment processors, along with the International Anti-Counterfeiting Coalition (“IACC”) may be in the best position to provide guidance on when and how these best practices should be measured, as well as to provide data on the number of notices processed through the IACC portal, and the percentage of sites for which payment processor services have been removed. We note that the IACC has already provided some data on the impact of its program, and its previous submissions, listed on Exhibit 1, may be useful in identifying appropriate metrics.

Copyright Alert System³

As noted in the comments of the Center for Copyright Information, Inc. (“CCI”), the Copyright Alert System program (“CAS”) is still in its initial implementation stages, and CCI is in the process of determining what metrics may be appropriate to evaluate the impact of the program. It may be appropriate for the government to delay measuring this program until it has been in operation for a reasonable period of time, and CCI has had the opportunity to assess its impact.

At the appropriate time (*i.e.*, after the program has had some time in operation), any metrics the government may use to evaluate the program should consider not just quantitative measurements about the impact on unauthorized P2P usage and any corresponding impact on other sources to the content at issue, but also qualitative measures in terms of attitudes towards unauthorized activity and use of authorized services.

In addition we note that P2P content protection programs have been measured in other countries, and have been found to have an impact on either the amount of unauthorized P2P activity in the country or on sales. These studies, listed in Exhibit 1, may provide guidance in some ways, but not the exclusive ways, to evaluate the copyright alert system program.

² See IPEC 2013 Report, p.36, for a brief description of this best practice. See also International AntiCounterfeiting Coalition. IACC Payment Processor Portal Program: First Year Statistical Review, October, 2012, available at <http://www.gacg.org/Content/Upload/MemberNewsDocs/October%202012%20Report%20to%20IPEC%20-%20FINAL.pdf>.

³ See p. 36 of the IPEC 2013 Report for a brief description of this voluntary initiative. See also www.copyrightinformation.org for more information.

ANA/ 4As Pledge to Deter Advertising on Rogue Sites,⁴ Ad Network Best Practices⁵ and the IAB Network and Exchanges Quality Assurance Guidelines⁶

For the past several months, the USC Annenberg Innovation Lab has produced monthly reports on advertisers and ad networks that have appeared in connection with rogue sites. These reports may provide useful data and metrics to evaluate the impact of these best practices on the placement of ads on the sites evaluated in the Annenberg study.

In addition, we note that there are vendors, such as MarkMonitor, WhiteBullet, ad verification companies, and others, that collect and provide data on the advertisers and ad networks involved in placing ads on sites that facilitate infringement. These vendors may be a source of data that would be helpful in measuring the impact of these best practices as well.

Finally, it may be useful for the government to request information from the ad networks and advertisers directly to get a sense of the prevailing attitudes among these entities about providing advertising to sites that facilitate infringement, and what steps they have taken to address this issue.

Domain Name Registries/Registrars⁷

ICANN recently passed a resolution that, among other things, provides that a “Registry Operator will include a provision in its Registry-Registrar Agreement that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.”⁸

In evaluating the impact of this resolution, the government may wish to monitor what best practices, if any, develop to implement this resolution, and track how this provision is implemented in the new gTLD space as compared with controls chosen from existing gTLDs whose operators are not parties to the updated registry-registrar agreement.

⁴ See p. 36 of the IPEC 2013 Report for a description of the ANA/4As voluntary initiative. See also ANA press release about Pledge to Deter Advertising on Rogue Sites, May, 2012, with link to pledge, available at <http://www.ana.net/content/show/id/23408>.

⁵ To view the Best Practice Guidelines for Ad Networks to Address Piracy and Counterfeiting, and related press release dated July 15, 2013, see <http://www.whitehouse.gov/blog/2013/07/15/coming-together-combat-online-piracy-and-counterfeiting>.

⁶ To view the Internet Advertising Bureau Network and Exchanges Quality Assurance Guidelines v. 2.0, and related documentation, released July 25, 2013, see http://www.iab.net/QAGInitiative/overview/quality_assurance_guidelines and http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-072513.

⁷ See p. 36 of the IPEC 2013 Report, which recommends seeking voluntary initiatives with registrars/registries.

⁸ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>.

Search Engines⁹

On August 10, 2012, Google announced that:

“Starting next week, we will begin taking into account a new signal in our rankings: the number of valid copyright removal notices we receive for any given site. Sites with high numbers of removal notices may appear lower in our results. This ranking change should help users find legitimate, quality sources of content more easily—whether it’s a song previewed on NPR’s music website, a TV show on [Hulu](#) or new music streamed from [Spotify](#).”

We believe it would be useful to see voluntary initiatives by search engines that take into account whether or not a site is authorized to provide the content at issue in determining search result rankings for searches to consume that content. This should take into account not only the absolute number of copyright removal requests sent about a site for demotion of that site, but also whether the site is authorized to provide the content in determining a higher search rank for that site.

In evaluating the effectiveness of these type of programs, it is important to consider what searches are relevant – *i.e.*, what searches are used to locate sites to consume the content at issue (*i.e.*, whether by streaming, downloading, etc.). The fact that other more general searches about the content may be more popular is irrelevant if there are detailed searches that are performed by large numbers of persons to find locations to consume content.

RIAA performed a study to assess the impact of Google’s demotion policy, which was published in February, 2013.¹⁰ This study may provide useful metrics to consider in determining the impact of this policy. Other copyright holders may have alternative analyses that the government may also want to consider in evaluating the impact of this policy.

In addition, the government may want to consider what other voluntary action could be taken by search engines to deter encouraging and directing users to illegitimate sources of copyrighted material, and evaluate whether such measures could have a demonstrable impact, possibly by proxy to similar efforts with other content. For example, Google has announced that it intends to develop and deploy technology to eradicate links to child pornography images from the web. Can similar technology be used to remove links to other illegal content? Also, Google has tools in its Chrome browser to warn users if they are going to sites that may be malicious. Can that technology be used to warn users of rogue sites? Evaluating these tools may help determine the impact such tools could have to deter copyright infringement.

⁹ See p. 26 of the IPEC 2013 Report, which recommends seeking voluntary initiatives with search engines.

¹⁰ Available at <http://76.74.24.142/3CF95E01-3836-E6CD-A470-1C2B89DE9723.pdf>.

Storage Services¹¹

In a recent Congressional hearing, Van Lindberg, Vice President of Intellectual Property and Associate General Counsel at RackSpace, noted concerns with the current implementation of the DMCA and RackSpace's general view that RackSpace does not want copyright infringing material on their networks. It would be helpful to engage online storage service companies like RackSpace in developing best practices for deterring infringement on their networks and reducing the escalation in automated unauthorized distribution of content and related take down notices.

To our knowledge, RackSpace is not a haven for websites that engage in widespread infringement of our members' music, and we thank them for that. Unfortunately, other storage services – whether unwittingly or not – appear to be the “go to” services for rogue websites, and it would be useful if they could learn from RackSpace's practices.

As a first step, the government may want to measure if any U.S.-based online storage companies host a concentration of sites that engage in widespread infringement. To determine which sites to include in such a study, the government could look at those sites for which Google has received multiple notices of infringement, as indicated on the Google Copyright Removal Transparency Report, or engage website reputation services, such as WhiteBullet or Veri-Site. The government may also want to consult copyright holders directly, or those services that engage in anti-piracy efforts on their behalf.

Thank you again for the opportunity to provide these comments. Please let us know if you have any questions or if we can be of further assistance.

Regards,

Recording Industry Association of America, Inc.

A handwritten signature in black ink, appearing to read 'Victoria Sheckler', with a long horizontal flourish extending to the right.

Victoria Sheckler
Senior Vice President, Deputy General Counsel

¹¹ See p. 36 of the IPEC 2013 Report, which recommends seeking voluntary initiatives with storage services.

Exhibit 1 – Background Studies/Papers

On Impact of Payment Processor Best Practices:

International AntiCounterfeiting Coalition. IACC Payment Processor Portal Program: First Year Statistical Review, October, 2012. Available at <http://www.gacg.org/Content/Upload/MemberNewsDocs/October%202012%20Report%20to%20IPEC%20-%20FINAL.pdf>.

On Impact of P2P Content Protection Efforts:

Danaher, B, M.D. Smith, R. Telang, S. Chen. 2012. The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from a Natural Experiment in France, *forthcoming in Journal of Industrial Economics*.

Danaher, Brett, Smith, Michael D., Telang, Rahul and Chen, Siwen, The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France (January 21, 2012). Available at SSRN: <http://ssrn.com/abstract=1989240> or <http://dx.doi.org/10.2139/ssrn.1989240>.

Danaher, B, M.D. Smith, R. Telang, Piracy and Copyright Enforcement Mechanisms. A chapter in *Innovation Policy and the Economy, Volume 14*, 2013.

Alcock, S, Nelson, R. Measuring the Impact of the Copyright Amendment Act on New Zealand Residential DSL Users. In IMC '12 Proceedings of the 2012 ACM Conference of Internet Measurement, p.551-558, 2012.

On Impact of Advertiser and Ad Network Best Practices:

For Annenberg Reports, see <http://www.annenberglab.com/projects/ad-piracy-report-0>.

On Impact of Search in Directing Users to Unauthorized Sources of Content:

Wiggin Digital Entertainment Survey 2013, April 23, 2013. See http://www.wiggin.co.uk/?option=com_content&view=article&id=2625&catid=24&Itemid=213 and http://www.comres.co.uk/polls/Wiggin_DES_Data_28_March_2013.pdf.

On Digital Piracy Problem Generally:

Smith, Michael D. and Telang, Rahul. Assessing the Academic Literature Regarding the Impact of Media Piracy on Sales (August 19, 2012). Available at SSRN: <http://ssrn.com/abstract=2132153> or <http://dx.doi.org/10.2139/ssrn.2132153>.

Barker, George Robert and Maloney, Tim John, The Impact of Free Music Downloads on the Purchase of Music CDs in Canada (August 11, 2012). ANU College of Law Research Paper No. 4. Available at SSRN: <http://ssrn.com/abstract=2128054>.

Danaher, Brett and Smith, Michael D., Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales (March 6, 2013). Available at SSRN: <http://ssrn.com/abstract=2229349> or <http://dx.doi.org/10.2139/ssrn.2229349>.

[T. Lauinger](#), M. Szydowski, [K. Onarlioglu](#), G. Wondracek, [E. Kirda](#), [C. Kruegel](#). Clickonomics: Determining the Effect of Anti-Piracy Measures for One-Click Hosting, In Proceedings of the Network and Distributed Systems Security Symposium (NDSS). San Diego, CA USA, February 2013. Available at <http://seclab.ccs.neu.edu/publications/ndss2013clickonomics.pdf>.

PUBLIC SUBMISSION

As of: August 21, 2013 Received: August 20, 2013 Status: Pending_Post Tracking No. 1jx-8754-djgk Comments Due: August 21, 2013 Submission Type: Web
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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0002

Voluntary Best Practices Study; Extension of Comment Period

Document: PTO-C-2013-0036-DRAFT-0009

Comment on FR Doc # 2013-17166

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General Comment

PharmacyChecker.com, LLC comments are uploaded. Voluntary Best Practices Study.

Attachments

PharmacyChecker Submission to USPTO Docket PTO-C-2013-0036 PDF

August 20th, 2013

Teresa Stanek Rea

Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office

RE: Request of the U.S. Patent and Trademark Office for Public Comments: **Voluntary Best Practices Study**

Docket #PTO-C-2013-0036

Gabriel Levitt, Vice President, PharmacyChecker.com, LLC

Founded in 2003, PharmacyChecker.com verifies online pharmacies, provides drug price comparisons among verified online pharmacies, and advocates for expanding access, online and off, to safe and affordable medication. Our main mission is to help Americans find the lowest prescription drug prices offered by safe online pharmacies or discount cards offered by U.S. pharmacy benefit managers. We are a stakeholder in the online business community seeking an open Internet environment that promotes innovation and new business models, especially those that serve the public health. Thus, the main focus herein is to examine the effectiveness of cooperative voluntary initiatives (CVIs) encouraged by the White House Office of the Intellectual Property Enforcement Coordinator (IPEC) as they relate to online pharmacies. The formation of the Center for Safe Internet Pharmacies (CSIP) is often noted as one of IPEC's achievements in encouraging and facilitating the development of CVIs to protect intellectual property on the Internet and its operation will be discussed accordingly.

Reducing intellectual property infringement (IPI) is the goal of IPEC, and CVIs are a part of its strategy to curtail IPI on the Internet. Generally, effectiveness of such efforts is defined by whether or not CVIs are actually reducing IPI. However, it's more complex when it comes to online prescription drug sales than for other types of Internet commerce. For instance, counterfeit handbags do not impact the public health, whereas counterfeit or real medication, which can kill or save lives, respectively, can have a great public health impact. That's why IPEC's main focus when it comes to online pharmacies appears to be protection of the public health, not IPI. The excerpt below, from a March 2011 IPEC document, exemplifies this public health focus:

"On December 14, 2010, White House Intellectual Property Enforcement Coordinator, Victoria Espinel, announced that GoDaddy, Google, Microsoft, Yahoo!, Network Solutions, Neustar, eNom, PayPal, MasterCard, Visa, and American Express have agreed to support an initiative which will start taking voluntary action against illegal Internet pharmacies.

"This fall, Espinel challenged the private sector to voluntarily address the health and safety issues presented by rogue online pharmacies...These discussions culminated in a well-attended, cross-industry meeting at the White House on November 9th, 2010. At that meeting, GoDaddy and Google

took the lead on proposing the formation of a private sector 501 (c)(3) non-profit organization dedicated to promoting information sharing, education, and more efficient law enforcement of rogue online internet pharmacies".ⁱ

From this excerpt it's clear that the basis for IPEC's "challenge" and the subsequent formation of CSIP was predicated on "health and safety issues." We believe that this is the proper focus for engaging the private sector to deter and shutdown online pharmacies that intentionally sell counterfeit, adulterated, or substandard medications, or sell real medications but without requiring a prescription. In addition to protecting the public health, violations of intellectual property rights will be curtailed by curtailing online sales of counterfeit drugs.

CVIs against online pharmacies should, at a minimum, *do no harm*, the philosophical foundation of medical ethics. Harm can be caused by CVIs that curtail or block online access by consumers to safe and affordable medication. In fact, any actions that block access to safe and affordable medication are harmful ones. The public health importance of incorporating this truism into metrics for effectiveness of CVIs dedicated to infringing online pharmacies merits a full explanation.

There is a vast and well documented crisis of prescription drug non-compliance in our country, and, according to a CVS/Caremark study the main cause is the cost of medication in the United States.ⁱⁱ Fifty-million Americans ages 19-64 did not fill a prescription due to cost in 2012, up from 48 million in 2010, according to the Commonwealth Fund.ⁱⁱⁱ An analysis of a 2005 study by Kaiser, USA Today, and the Harvard University School of Public Health, found that approximately twenty-five million Americans became sicker from not taking their medications due to cost.^{iv} The FDA estimates \$290 billion in added annual healthcare costs due to prescription non-compliance.^v

Other documented adverse effects from prescription non-compliance include the death of 125,000 Americans who were not adhering to their prescribed heart medication.^{vi} It's likely that hundreds of thousands more die each year from prescription non-compliance for other medications. The numbers above suggest that high drug prices are a major factor in these deaths.

Almost five million Americans personally import medication because of more affordable prices abroad.^{vii} Over the past decade, tens of millions of prescriptions have been ordered online and filled internationally through which Americans have received safe and effective medication: the same medications sold in the United States but at a much lower price. Empirical studies and over a decade of experience show the high degree of safety of personally imported medication from properly credentialed online pharmacies. This remains an inconvenient truth for those who seek to curtail access to such safe online pharmacies. Countless Americans would have gone without needed medication if not for these international and online sources.

A study published in the National Bureau of Economic Research in 2012 called "In Whom We Trust: The Role of Certification Agencies in Online Drug Markets" demonstrates the safety of properly credentialed online pharmacies. The study tracked 370 prescription orders placed with online pharmacies, *both foreign and domestic*. The population of online pharmacies included international and domestic ones credentialed by PharmacyChecker.com, international ones who are members of the Canadian International Pharmacy Association (CIPA), and domestic ones in the National Association of Boards of Pharmacy's (NABP) Verified Internet Pharmacy Practice Sites and LegitScript.com programs. The study concluded that all credentialed online pharmacies, foreign and domestic, required a prescription and passed all drug authenticity tests. Of those drugs ordered from non-credentialed online pharmacies, 9% of products were fake or counterfeit medication, all of those for Viagra only.^{viii}

The real health and safety *threat* stems from domestic and international prescription drug orders that are filled by *un-credentialed online pharmacies*, many of which are not safe.

Thus, to maximize positive public health outcomes, CVIs should endeavor to encourage access to *all* safe online pharmacies for Americans, including international online pharmacies, while preventing access to dangerous online pharmacies.

From here we try to address the USPTO's questions in the "Supplementary Information" section:

1. *How should effectiveness of cooperative voluntary initiatives (CVIs) be defined?*

Effectiveness is the degree to which CVIs can reduce and stop access to dangerous online pharmacies while encouraging access to safe online pharmacies, specifically those credentialed by PharmacyChecker.com, Canadian International Pharmacy Association, LegitScript.com and the NABP.

Dangerous and fraudulent online pharmacies are often referred to as "rogue online pharmacies." Unfortunately, the NABP, which represents U.S. pharmacy boards and pharmacists, defines any online pharmacy that is based outside the United States and sells to Americans as "rogue," regardless of its credentials. NABP publishes a "Not Recommended" list that includes fraudulent and dangerous online pharmacies but also includes some safe international online pharmacies approved in the PharmacyChecker.com Verification Program because they are not based in the U.S.^{ix} We believe this conflates the problem of "real" rogue online pharmacies (which hurt consumers) with the practice of safe personal drug importation (which helps consumers). As a practical and ethical matter we believe IPEC should reject NABP's definition of "rogue online pharmacy."

LegitScript.com comes closer to the right classification system for "rogue online pharmacy," but it suffers from too much ambiguity and potential for overreach. Like the NABP, LegitScript.com's program does not allow for the approval of non-US, international, online pharmacies that sell to consumers in the United States. However, to its credit, safe international online pharmacies are *not* classified as "rogue" by LegitScript.com. Instead, safe international online pharmacies, such as those approved by PharmacyChecker.com are generally categorized as "unapproved." The "unapproved" designation is misleading, as it scares consumers who are seeking safe and affordable medication away from safe sources, but at least it distinguishes safe international online pharmacies from "rogue online pharmacies".

A reasonable definition of "rogue online pharmacy" is any website that:

- 1) Sells prescription medication without requiring a prescription;
- 2) Engages in fraudulent and deceptive business practices;
- 3) Does not follow accepted safety standards of pharmacy practice;
- 4) Intentionally sells adulterated and counterfeit medication.

This definition would certainly describe most online pharmacies that are dangerous but not sweep into its ambit ones that are safe. CVIs are effective when they reduce the volume of, and access to, dangerous online pharmacies.

2. *What type of data would be particularly useful for measuring effectiveness of voluntary initiatives aimed at reducing infringement and what would the data show?*

The answer depends in part on how “infringement” is defined. In the case of online pharmacies “infringement” should be defined within the framework of IPEC’s main goal of protecting the public health. By defining “infringement” as “the intentional sale of counterfeit or adulterated medication, or the sale of genuine and safe medication but without a prescription,” CVIs would target not only the worst offenders, such as criminal networks known to sell counterfeit drugs, but the large majority of websites that the U.S. Food and Drug Administration (and the pharmaceutical industry) seek to put out of business and, in some cases, prosecute.

Using the definition of “infringement” above, the data needed to measure effectiveness would show on a year-to-year basis the reduction in the number of infringing online pharmacies *caused by CVIs – private sector actions that led to the shutdown of a website that did not entail any corresponding government action*. It would also show if any non-infringing sites – safe online pharmacies – were inadvertently shutdown by CVIs.

Useful data could be obtained by working with companies, organizations and associations that currently verify online pharmacies, including our company, PharmacyChecker.com, as well as LegitScript, NABP, and CIPA. More data to determine how to classify an online pharmacy could be obtained by conducting mystery purchases from online pharmacies to show if they are rogue or not, such as by using the methods of the National Bureau of Economic Research study mentioned above.

A national survey on consumer purchases of prescription medication would also be helpful in determining the public safety and health ramifications of online pharmacies (good and bad). This would help identify the types of websites that help and hurt the public health. Considering the public health threat that federal authorities see from online pharmacies it should engage the U.S. Centers for Disease Control and Prevention (CDC) by asking CDC to include questions relating to online pharmacy purchases in their National Health Interview Survey. In its last such survey, the following questions were asked of 33,014 Americans ages 18 and over:

“DURING THE PAST 12 MONTHS, are any of the following true for you? ...You skipped medication doses to save money ...You took less medicine to save money ...You delayed filling a prescription to save money ...You asked your doctor for a lower cost medication to save money ...You bought prescription drugs from another country to save money ...You used alternative therapies to save money.”^{vii}

A survey to determine public health ramifications of online pharmacies could ask: “are any

of the following true for you? You ordered medication from another country through an online pharmacy to save money. You ordered medication from a U.S. online pharmacy to save money. You ordered from an online pharmacy that required a prescription from your doctor. You ordered from an online pharmacy that issued you a prescription based on an online questionnaire. You ordered from an online pharmacy that did not require a prescription at all. You received the medication that you ordered. The medication you ordered online worked as you expected. The medication you ordered did not work as expected. You experienced negative health effects after taking the medication ordered online.

LegitScript.com’s online pharmacy database already contains tens of thousands of websites identified as “rogue” that can be used as a baseline to measure progress. Encouragingly, its data shows that the number of “not legitimate” sites has decreased over the past year by 10,240 or 23.7%.

June 24, 2013	July 23, 2012
43,075 Internet pharmacies	32,835 are active Internet pharmacies
225 are legitimate (0.5%)	279 are legitimate (0.8%)
1,210 are potentially legitimate (2.8%)	1,512 are potentially legitimate (4.6%)
41,640 are not legitimate (96.7%)	31,204 are not legitimate (94.6%)
Source: LegitScript.com Home Page as viewed on June 24 th , 2013.	Source: LegitScript.com’s home page on July 23 rd , 2012, as crawled by Alexa.com.

The question is how many of these were actually shut down by CVIs, rather than from government actions. The answer is simply those cases where a private company’s action effectively shut down the rogue online pharmacy. Private company actions include refusal of service to rogue online pharmacies by payment processors, domain registrars, and search engines. A LegitScript press release claims that LegitScript has “dismantled over 40,000 rogue Internet pharmacies since 2009.”* Since LegitScript doesn’t have legal authority to “dismantle” a company we believe that it has influenced domain registrars to end service to rogue online pharmacies: In other instances, LegitScript may identify for federal agencies those websites that ought to be seized by the government.

To determine what techniques are most effective, Center for Safe Internet Pharmacies, LegitScript.com, or both should enumerate the number of rogue online pharmacies shut down by the different private actions mentioned above.

To prevent inadvertently shutting down safe online pharmacies, and to better assist the Center for Safe Internet Pharmacies and the public, LegitScript.com should provide a breakdown of the number of sites that are classified as *not legitimate* by “rogue” and “unapproved,” since the latter designation, as per the discussion above, usually refers to safe online pharmacies that require a prescription, follow the laws where they operate, and provide affordable medication to Americans.

Effectiveness should also be measured in line with the Obama Administration’s goals that CVIs are “consistent with due process, free speech, privacy of users, and competition” while being as “transparent” as possible. CSIP should make public its protocols for action against infringing online pharmacies and the due process available to those websites targeted for takedown. When a website is shutdown through CVIs it should be informed of the legal basis for the action. CSIP’s website, for example, should:

- 1) clearly state what recourse companies and people have if their businesses are shut down by actions taken by CSIP;
- 2) provide information on those sites that were shutdown, and the reasons they were shutdown;
- 3) identify the precise public health risk of a website; and
- 4) provide the legal basis for determining intellectual property infringement activities of those websites which are shut down, if there are any.

One of the Obama Administration’s goals for CVIs is that they do not stifle competition. There’s an inherent risk in “deputizing” private companies for law enforcement-type activities when such activities could curtail competition and business innovation. Thus, the degree to which CVIs curtail competition and business innovation, especially if such curtailment threatens the public health, must be factored in measuring effectiveness.

Online pharmacies are a relatively new business model for distributing medications and offer a good example to show how CVIs could stifle competition. Online pharmacies provide significant benefits to consumers in terms of cost and convenience. They make it easier for consumers to find companies in different states and countries that operate mail-order pharmacies, providing them more choices and lower prices. Their operations, which can greatly benefit consumers and the public health, challenge existing pharmacy business models. Entrenched business interests often seek to stifle new competition. For example, on behalf of U.S. chain pharmacies, the National Association of Chain Drugstores has lobbied the government to stop Americans from buying lower cost medication from Canada and other countries for over a decade^{xi}. For drug companies it’s a commercial imperative to segment national markets by preventing them from parallel trade of pharmaceuticals, especially in protection of the U.S. market from which they derive the greatest profits. Furthermore, international drug price transparency serves to advantage consumers vis a vis drug companies as it gives rise to the former’s advocacy for lower domestic drug prices.

Like U.S. pharmacies, but for somewhat different reasons, the pharmaceutical industry lobbies the U.S. government to prevent Americans from buying lower cost medication from licensed Canadian or other international pharmacies for their personal use.^{xii}

The discussion above is necessary because drug companies and U.S. pharmacies are lobbying the government to promote CVIs that stifle the development of international online pharmacies. In the case of the Center for Safe Internet Pharmacies, some of its member companies pay LegitScript.com to assist them in taking actions against online pharmacies. However, LegitScript.com is a steering committee member of the Alliance for Safe Online Pharmacies, a group that is funded by the NACDS and Eli Lilly:^{xiii} both are engaged in lobbying Congress and federal agencies to stop Americans from personal drug importation. This interplay of private action to bring about CVIs will no doubt disadvantage consumers in areas other than online pharmacy.

To prevent CVIs from anticompetitive policies and actions, we recommend an **independent** ombudsman. For example, the CVI ombudsman would be someone with neither a financial interest nor alignment with pharmacy or pharmaceutical companies nor a federal or state regulator. The CVI Ombudsman will analyze CVIs to make sure private sector actions aren't blocking Internet competition and innovation. As part of his or her efforts the CVI Ombudsman would determine the negative effects to the public health of CVIs.

We understand that while the main goal of IPEC in combatting rogue online pharmacies is protecting the public health it's also concerned with online IPI. For the sake of effectiveness and transparency, IPEC should clearly, and with the greatest specificity, identify what practices by rogue or other online pharmacies constitute intellectual property violations. Only then can we measure how effectively CVIs are protecting intellectual property rights.

3. If the data is not readily available, in what ways could it be obtained?

LegitScript's data is useful for measuring a reduction in the number of active rogue online pharmacies. As stated above, it should go one step further and show the number of "illegitimate" online pharmacies that are not rogue but classified as "unapproved" since many of those are safe and should not be subject to takedown actions by CVIs.

Please also refer to the recommendation above for the CDC to conduct a national survey of Americans who buy medication online.

4. Are there particular impediments to measuring effectiveness, at this time or in general, and if so, what are they?

There may be a lack of political will to actually determine the public health effects of online pharmacies because they are inconveniently positive. Indeed, millions of prescriptions have been safely filled internationally by Americans through online pharmacies, despite the fact that under most circumstances they may have broken the law or violated intellectual

property rights. Keeping in mind the tens of millions of Americans who skip filling prescriptions due to cost, what are the public health effects if such access is blocked?

The dangers of rogue online pharmacies – “rogue” as defined by LegitScript.com – are very clear and compelling. Publicizing patient harm from such websites would 1) deter Americans from buying from them, and 2) clarify those sites that need to be shutdown to protect the public health.

5. What mechanisms should be employed to assist in measuring the effectiveness of voluntary initiatives?

As stated above, identifying the specific private actions taken under CVIs that led to the shutdown or dismantlement of rogue online pharmacies will be helpful. For example, out of the 40,000 rogue online pharmacies dismantled by LegitScript.com, it should be determined how many such takedowns occurred via domain registrars refusing service to rogue online pharmacies vs. payment processors refusing to service them.

6. Is there existing data regarding efficacy of particular practices, processes or methodologies for voluntary initiatives, and if so, what is it and what does it show?

The number of rogue online pharmacies has diminished, according to LegitScript.com, and many through CVIs. The processes include identifying rogue online pharmacies to domain registrars, payment processors and search engines and asking them to refuse service to such websites, effectively dismantling them.

ⁱ “Counterfeit Pharmaceutical Inter-Agency Working Group Report to the Vice President of the United States and Congress.” Executive Office. Prepared by the Office of the Intellectual Property Enforcement Coordinator. March 2011, page 9. See http://www.whitehouse.gov/sites/default/files/omb/IPEC/Pharma_Report_Final.pdf [Last accessed 8/14/13].

ⁱⁱ “CVS Caremark Study Says Cost is Biggest Barrier to Prescription Adherence”. 2012. CVS Caremark Cooperate: <http://www.cvscaremarkfyi.com/blogs/cvs-caremark-survey-says-cost-biggest-barrier-prescription-adherence>. (Last accessed 7/22/13).

ⁱⁱⁱ “The Commonwealth Fund 2012 Biennial Health Insurance Survey”. *The Commonwealth Fund*. See <http://www.commonwealthfund.org/Publications/Fund-Reports/2013/Apr/Insuring-the-Future.aspx> (Last accessed 7/22/2013).

^{iv} “USA Today/Kaiser Family Foundation/ Harvard School of Public Health Care Costs Survey, 2005”. *The Kaiser Family Foundation*. See <http://www.kff.org/newsmedia/upload/7371.pdf> (Last accessed 8/10/2012). Twenty percent of survey respondents reported not filling a prescription due to cost; and 54% of those said their condition got worse as a result. Extrapolated to the 2012 population of adults 18 and older, which is

234,564,071, the number is 25 million.

^v U.S. Food and Drug Administration. 76 FR 12969. March 2011. [Campaign To Improve Poor Medication Adherence: https://www.federalregister.gov/articles/2011/03/09/2011-5287/campaign-to-improve-poor-medication-adherence-u18](https://www.federalregister.gov/articles/2011/03/09/2011-5287/campaign-to-improve-poor-medication-adherence-u18). (Last accessed 8/10/12)

^{vi} McCarthy, R. "The Price You Pay for the Drug Not Taken". *Business Health* 1998. See http://findarticles.com/p/articles/mi_m0903/is_n10_v16/ai_n27541886/. (Last accessed 8/10/2012)

^{vii} Cohen RA, Kirzinger WK, Gindi RM. Strategies used by adults to reduce their prescription drug costs. NCHS data brief, no 119. April 2013. Hyattsville, MD: National Center for Health Statistics. 2013. See <http://www.cdc.gov/nchs/data/databriefs/db119.pdf>. (Last accessed 7/22/2013).

^{viii} Bate, Roger and Ginger Zhe Jin, Aparna Mathur. "Unveiling the Mystery of Online Pharmacies: An Audit Study. *The National Bureau of Economic Research*. March 2012. See <http://www.nber.org/papers/w17955>. (Last accessed 8/10/2012)

^{ix} National Association of Boards of Pharmacy publishes a list of "Not Recommended Sites" found here: <http://www.nabp.net/programs/consumer-protection/buying-medicine-online/not-recommended-sites> (Last accessed 8/12/2013). All sites on the list are defined as "rogue". The definition of "rogue" can be found here: <http://www.nabp.net/programs/consumer-protection/buying-medicine-online/why-not-recommended/>. Online pharmacies that are safe and approved by PharmacyChecker.com appear on this list alongside dangerous websites that intentionally sell counterfeit and adulterated medication and/or do not require a prescription.

^x "LegitScript Shuts Down 6,700 Rogue Internet Pharmacies." LegitScript Press Release dated June 28th, 2013. See <http://online.wsj.com/article/PR-CO-20130628-909470.html> (Last accessed 8/12/2013)

^{xi} Kocot, S. Lawrence, Senior Vice President and General Counsel, National Association of Chain Drug Stores. April 5th, 2004. Statement on Importation of Prescription Drugs Prepared for United States Department of Health and Human Services Task Force on Drug Importation. <http://archive.hhs.gov/importtaskforce/session2/presentations/NACD.pdf> [Last accessed 8/13/13].

^{xii} Ismail, M. Asif. "Drug Lobby Second to None: How the Pharmaceutical Industry Gets its Way in Washington." July 7th, 2005. [The Center for Public Integrity. http://www.publicintegrity.org/2005/07/07/5786/drug-lobby-second-none](http://www.publicintegrity.org/2005/07/07/5786/drug-lobby-second-none) [Last accessed 8/13/2013]. Also: Peter Baker. "Obama Was Pushed by Drug Industry, E-Mails Suggest." June 6, 2009. *New York Times*. <http://www.nytimes.com/2012/06/09/us/politics/e-mails-reveal-extent-of-obamas-deal-with-industry-on-health-care.html?pagewanted=all& r=0> (Last accessed 8/12/2013)

^{xiii} See Alliance for Safe Online Pharmacies "Who We Are" web page: <http://safeonlinerx.com/about-us/who-we-are/> [Last accessed 8/14/2013].

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Voluntary Best Practices Study; Extension of Comment Period

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Comment on FR Doc # 2013-17166

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General Comment

See attached Comments of the International AntiCounterfeiting Coalition re: Voluntary Best Practices Study

Attachments

IACC Comments re Voluntary Best Practices Study_FINAL



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August 21, 2013

VIA WORLD WIDE WEB

<http://www.regulations.gov>, docket number PTO-C-2013-0036-02

Ms. Teresa Stanek Rea
Acting Under Secretary of Commerce for Intellectual Property and
Acting Director of the United States Patent and Trademark Office
United States Patent and Trademark Office
P. O. Box 1450
Alexandria, VA 22313-1450

Re: Request of the United States Patent and Trademark Office for Public Comments: Voluntary Best Practices Study. 78 Fed. Reg. 37210 (June 20, 2013)

Dear Under Secretary Rea:

The attached written comments are submitted on behalf of the International AntiCounterfeiting Coalition, Inc. (“IACC”), in response to the request by the United States Patent and Trademark Office (“USPTO”), published in the Federal Register on June 20, 2013, for written submissions from the public concerning the processes, data metrics, and methodologies that could be used to assess the effectiveness of cooperative agreements and other voluntary initiatives to reduce infringement.

With a membership composed of over 200 corporations, trade associations, and professional firms, and founded over 30 years ago, the IACC is the world’s oldest and largest organization representing exclusively the interests of companies concerned with trademark counterfeiting and the related theft of intellectual property. The members of the IACC represent a broad cross-section of industries, and include many of the world’s best known companies in the apparel, automotive, consumer goods, entertainment, pharmaceutical, and other product sectors. The IACC is committed to working with government and industry partners in the United States and abroad to strengthen IP protection by encouraging improvements in the law and the allocation of greater political priority and resources, as well as by raising awareness regarding the enormous—and growing—harm caused by IP violations.

The IACC applauds the USPTO for undertaking this important study, and for its ongoing work to improve protection and enforcement of intellectual property rights more broadly. We look forward to assisting in those efforts, and we are available at any time for clarification of any issues raised in this submission.

Protecting Rights Holders Since 1979

Overview of Online Trafficking of Counterfeit and Pirated Goods

Where illicit sales of counterfeit and pirated goods were once confined to brick-and-mortar shops, the Internet's maturation as a commercial platform has created new opportunities for the distribution and marketing of such goods. The relative anonymity, minimal cost of entry, and decreased overhead of the online retail market, compared to traditional brick-and-mortar, provides criminals with a highly desirable environment for illegal sales; while also resulting in various practical impediments to civil and criminal enforcement of IP rights. U.S. Customs and Border Protection has noted the “[c]ontinued growth of websites selling counterfeit and piratical merchandise directly to consumers” as a contributing factor to a trend of increased importation of such goods via mail and express courier shipments.¹ Such “direct-to-consumer” trafficking represents a marked shift from the traditional distribution chain; that shift has been a critical factor in the development of new enforcement strategies. The “follow the money” approach embodied by the IACC's Payment Processor Initiative & Portal Program (the “Portal Program”) is an example of these emerging strategies.

Background on IACC's Voluntary Collaborative Efforts

The IACC launched the Portal Program in January 2012, after a short beta testing period in December 2011, with the main objective of providing a streamlined, simplified procedure by which rights-holders could report online sellers of counterfeit or pirated goods directly to our credit card and payment processing network partners² (the “Card Networks”), thereby facilitating action against the corresponding merchant accounts and diminishing the ability of individuals to profit from their illicit sales. The Portal Program is dependent on the Card Networks' policies, which prohibit merchants from using their services for illegal transactions. If, upon the submission and investigation of a verified complaint, the Card Networks determine that a merchant has breached its contractual obligations to the Card Networks, remedial action may be taken. And because merchants are bound by Card Network policies regardless of jurisdiction, the Portal Program has global reach.

To implement this program, the IACC developed an access-controlled portal system to facilitate the flow of information between and among participating rights-holders, the IACC, the National Intellectual Property Rights Coordination Center (the “IPR Center”), and the Card Networks, utilizing a master IACC portal as the clearinghouse for such information. The portal system also contains a reporting mechanism that provides disposition results and statistical data to the reporting rights-holders.

Evaluating Effectiveness

At its inception, the IACC identified several goals for the Portal Program, as well as underlying strategies to accomplish each overall goal:

¹ CBP Office of International Trade, Intellectual Property Rights Fiscal Year 2011 Border Seizure Statistics, <http://www.ce-ip.com/downloads-free/2011-Border-Seizure-Statistics.html>.

² Current credit card and payment network partners in the Portal Program include: MasterCard, Visa International, Visa Europe, PayPal, American Express, Discover / PULSE / Diners Club, MoneyGram, and Western Union.

- Goal 1: Increase the cost of doing business for, and decrease profits to, the counterfeiter.
 - Assist Card Networks in identifying merchants who are violating Card Network policies, so that those merchants may lose their ability to process payments, and the acquiring banks of such merchants may potentially incur fines for their violations; and
 - Improve investigation techniques, so that it becomes more difficult and more expensive for counterfeit merchants to develop measures to evade detection.³

- Goal 2: Shrink the universe of third-party acquiring banks willing to do business with rogue merchants.
 - Maximize financial disincentives for third-party acquiring banks to do business with merchants willing to violate Card Network policies; and
 - Participate in trainings of payment industry personnel to increase awareness as to the risk associated with taking on counterfeit merchants.

- Goal 3: Facilitate efficient use of resources.
 - Provide a centralized reporting system for rights-holders, with a standardized procedure for submitting claims regarding merchant violations to the Card Networks;
 - **Provide for effective use of each program participant's** individual expertise;
 - Allow for elimination of duplicate reports from different rights-holders; and
 - Reduce administrative burdens (both for IACC-member rights-holders, as well as the Card Networks).

- Goal 4: Disrupt and dismantle counterfeit networks.
 - Increase intelligence regarding networks of counterfeit sellers and their affiliates; and

³ One trend identified since the Portal Program was established is that whenever the IACC improves its investigation abilities, counterfeit merchants have followed suit with enhanced measures to avoid detection by the IACC and the Card Networks. However, any measures taken to avoid detection in turn decrease the market share of the merchant and/or increase the probability that the merchant will be fined. For example, if a merchant employs sophisticated anti-fraud measures in order to block investigative transaction, this will likely increase the cost of doing business, and will also result in a significant decrease in sales to the actual customer. **See** Brian Krebs, Rogue Pharma, *Fake AV Vendors Feel Credit Card Crunch*, Krebs on Security, Oct. 8, 2012, <http://krebsonsecurity.com/2012/10/rogue-pharma-fake-av-vendors-feel-credit-card-crunch/> (describing how “security measures can be self-defeating”).

- Encourage collaboration between the payment industry, rights-holders, academic experts, and law enforcement to address criminal networks.

In the context of these goals, the Portal Program has proven to be a resounding success over the past year and a half. To date, participants in the Portal Program have referred nearly 7,000 websites for investigation, resulting in the termination of over 1,500 individual merchant accounts. In addition to such data, the collaboration between the IACC and its partners in the program has resulted in several opportunities to engage directly with merchant banks, and to provide training to banks around the world on relevant issues; in some cases, merchant banks have pro-actively reached out to the IACC seeking input and assistance in improving their existing systems. Though the impact of such engagement may be impossible to quantify, the likely result will be systemic long-term improvement in addressing the trafficking of counterfeit goods online, as the banks refine their processes and capabilities for on-boarding new merchants and monitoring the compliance of existing merchants.

While there remain obvious challenges to quantifying the impact of this program or others on the overall availability of counterfeit and pirated goods for sale online, there is significant anecdotal evidence that online sales of such illicit products are becoming more difficult. For example, we now frequently encounter sites that have moved away from using credit card-based payments, and request that consumers pay for goods via bank transfer or an alternate payment service. It is unclear whether this is due to the fact that the operators of the site have already had their merchant account terminated and are unable to process credit card transactions, or if the increased scrutiny associated with the Portal Program has resulted in their reluctance to use such payment methods. Further, the program has created a growing pool of empirical data (e.g., correlations between various service providers frequently used by traffickers) that may be leveraged by both the public and private sector for more effectively targeting their efforts in terms of traditional enforcement and in developing appropriate policy responses to such trafficking.

Determining the effectiveness of cooperative voluntary initiatives is an inherently difficult proposition, particularly in light of the illicit nature of the activity that such initiatives are seeking to address. Further, because of the variety of forms that these initiatives are taking (e.g., while the Portal Program focuses on disrupting counterfeiters' ability to misuse payment services, others focus on the ads that direct consumers to illicit sites, on individual product sectors, or on general consumer education), a single set of metrics is unlikely to enable such an analysis. However, there are a number of types of data which may prove useful in gauging the effectiveness of these efforts. For example, in a payment-focused system such as the Portal Program, the overall number of website submissions and the number of remediated merchant accounts connected to those sites are one measure. However, because operators of illicit sites often funnel payments for multiple websites, or networks of sites, through a single payment channel; making use of the data points generated by that initial action to map the broader network of sites connected to the same merchant account, or using publicly-available WHOIS data, can provide a clearer picture of the broader impact of disabling the payment processing abilities of the initial target. Analysis of page rankings and web traffic to known illicit sites, over time, may also provide a means of assessing the impact of such programs. Similarly, publicly available data concerning advertising intended to drive traffic to sites known to be engaged in the sale of illicit goods, or revenue generated by the placement of

advertising on those sites may provide a means of gauging the effectiveness of efforts. **Further, qualitative studies regarding consumers' attitudes and purchasing behavior may** be useful in the analysis of public awareness initiatives. Extensive research has been conducted into analogous areas of online criminal activity including spam marketing, phishing, and the distribution of viruses, malware and the like which might suggest additional methodologies and data that would aid in measuring the effectiveness of efforts currently under review. We strongly encourage the PTO to review the existing literature in the above-mentioned areas to guide their present research.

Given the variety of the collaborative programs that have been implemented during the **past two years, the PTO's inquiry and evaluation** should look to historical data regarding the availability of infringing goods and content, and efficacy of comparable processes for reporting, removal, and remediation of illicit sales and distribution of such goods. For example, most, if not all, of the third-parties who have entered into collaborative programs with rights-holders have had systems in place to receive IP-related complaints for several years. Those systems may have been as simple as a providing a single point of contact for the submission of complaints via email, or a web-based form requiring specific details of alleged infringement. **The proper focus of the PTO's current evaluation** should look at data points from those prior systems in contrast to the more recently implemented programs. For example, a comparison of both the total volume of complaints received, the average time required for resolution of those complaints, and **the number of "bad actors" removed from the system would all be relevant** considerations; as would an evaluation of the quality of information detailed in the complaints (i.e., whether the data provided is actionable for the purposes of identifying and remediating individuals engaged in the illicit trafficking of counterfeit and pirated goods in violation of the service providers' policies).

We would welcome the opportunity to discuss our experiences with the Office of the Chief Economist, and to explore other ways in which we might be able to assist in this effort. Please contact me at your convenience via email at: tjohnson@iacc.org or by phone at: 202-223-6667.

Respectfully submitted,



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Voluntary Best Practices Study; Extension of Comment Period

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Comment on FR Doc # 2013-17166

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General Comment

Please see attached file for Comments of The Center for Copyright Information.

Attachments

CenterforCopyrightInformationComments821-signed

**BEFORE THE
UNITED STATES PATENT AND TRADEMARK OFFICE
ALEXANDRIA, VA 22314**

In the Matter of)	
)	
Request of the United States Patent and)	Docket No. PTO-C-2013-0036
Trademark Office for Public Comments:)	
Voluntary Best Practices Study)	

COMMENTS OF THE CENTER FOR COPYRIGHT INFORMATION, INC.

The Center for Copyright Information, Inc. (“CCI”) submits these comments in response to the request by the United States Patent and Trademark Office (“USPTO”) for comment on processes and methodologies for assessing the effectiveness of voluntary initiatives to reduce online intellectual copyright infringement.^{1/} CCI is responsible for implementing and overseeing the Copyright Alert System (“CAS”), the first major voluntary initiative between the members of the content industry and Internet Service Providers (“ISPs”) intended to reduce piracy and provide consumers the tools they need to find movies, TV shows, and music legally.

CCI appreciates the Administration’s strong support of voluntary approaches aimed at stemming the tide of online piracy through the use of balanced, fair, and reasonable measures. The Administration’s recognition of the important role that voluntary multi-stakeholder efforts can play in its comprehensive plan to address digital intellectual property infringement illustrates the Administration’s understanding of the complex and ever-changing digital content environment. In particular, support from the Administration of the CAS has played an important role in bringing it to fruition.

^{1/} *Request of the United States Patent and Trademark Office for Public Comments: Voluntary Best*

We would, however, urge the USPTO to move carefully as it considers how voluntary initiatives should be evaluated. While establishing standard metrics for evaluation may seem immediately appealing, it is precisely the flexibility and adaptability to develop programs and evaluation metrics that address particular problems that make the creation of voluntary programs so attractive. We would not want to see the development of voluntary efforts unintentionally stifled by the establishment of inflexible frameworks for evaluation or rigid reporting requirements.

Moreover, especially given their nascency, programs such as the CAS should be allowed sufficient time to get off the ground and address any structural issues as they arise. CAS participants are in the earliest stages of data collection, measurement, and interpretation. Until CAS participants have gained experience on these matters, it would be difficult for CCI to recommend or endorse the creation of specific evaluative mechanisms, and we encourage the USPTO to move cautiously.

Importantly, one of the primary purposes of CCI – to change the public conversation about online movies and music by emphasizing the availability of legal sources of such content – lends itself more to “qualitative” rather than “quantitative” interpretation and thus may be less susceptible to measurement by “data metrics and methodologies.” This qualitative aspect of anti-piracy efforts is yet another reason why it would be difficult to proactively develop specific standards for measuring results that could apply across multiple efforts.

Having said that, CCI recognizes the Administration’s keen interest in the success of the CAS and other programs – both in curbing piracy and in preserving important user expectations, such as the protection of user privacy interests. As a result, CCI believes that the federal government should continue to encourage voluntary approaches like the CAS and seek evidence

that such initiatives are designed to address both industry and consumer interests in reducing piracy and increasing the use and availability of legal digital content.

BACKGROUND

CCI was formed as a collaboration between the content community – represented by the movie, television, and music industries – and the nation’s five largest ISPs to educate consumers about the importance of copyright protection and help them find legal ways to enjoy digital content. Through a series of progressive alerts embodied in the CAS, content owners identify – and ISPs pass along to their customers – notices of possible unlawful sharing of copyrighted content that has occurred over peer-to-peer networks using their Internet accounts. These notices or “Alerts” identify the possible instances of infringement and educate broadband Internet subscribers on how they can prevent such activity from happening again. In addition, the Alerts provide information about the growing number of ways to access digital content legally. In addition, while still in its early stages, CCI is building the capability to offer and support more direct education efforts outside of the Copyright Alert System.

The Administration has been a strong supporter of CCI and the CAS since the agreement underlying its creation was first announced in 2011,^{2/} and CCI is pleased that the Administration’s *Joint Strategic Plan for Intellectual Property Enforcement* recently highlighted the CAS as one of the key existing voluntary initiatives attempting to reduce intellectual property infringement in the digital world and to educate the public about the importance of the protection of intellectual property rights.^{3/} As the *Joint Strategic Plan* notes, the Administration has

^{2/} Victoria Espinel, U.S. Intellectual Property Enforcement Coordinator, “Working Together to Stop Internet Piracy,” (White House Blog, July 7, 2011), available at <http://www.whitehouse.gov/blog/2011/07/07/working-together-stop-internet-piracy>.

^{3/} *2013 Joint Strategic Plan on Intellectual Property Enforcement*, U.S. Intellectual Property Enforcement Coordinator, at 1-2 (June 2013), available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipecc-joint-strategic-plan.pdf> (“*Joint*

“adopted the approach of encouraging the private sector to develop and implement cooperative voluntary initiatives to reduce infringement that are practical and effective. . . . Together with law enforcement efforts, private sector voluntary actions can dramatically reduce online infringement and change the enforcement paradigm.”^{4/}

I. THE EFFECTIVENESS OF VOLUNTARY INITIATIVES TO REDUCE COPYRIGHT INFRINGEMENT IS BEST MEASURED BOTH QUALITATIVELY – BY THE CHANGE IN CONSUMER ATTITUDES - AND QUANTITATIVELY BY THE CHANGE IN CONSUMER BEHAVIOR

The *Notice* requests comment on “the processes, data metrics, and methodologies that could be used to assess the effectiveness of cooperative agreements and other voluntary initiatives to reduce infringement.”^{5/} Inherent in these questions is the view that voluntary initiatives should be judged (by the government as well as the parties themselves) on the basis of clearly quantifiable data. While the use of data metrics may appear to be the simplest way in which to evaluate programs like the CAS, we believe that an approach based solely on quantitative metrics will make it very difficult to evaluate all aspects of our program and others like it.

In order to evaluate, for example, the success of the CAS, we can certainly look over time at the trends of Alerts sent across all of the levels of the CAS, as well as the general use of peer-to-peer networks for infringement. However, without also looking at the trends in the use of

Strategic Plan”) (“Private sector companies have voluntarily agreed to adopt best practices aimed at curbing the sale of counterfeit goods and reducing online piracy. For example . . . AT&T, Cablevision, Comcast, Time Warner Cable, Verizon, and major and independent music labels and movie studios entered into a voluntary agreement to reduce online piracy. Under the agreement, Internet Service Providers (ISPs) will notify subscribers, through a series of alerts, when their Internet service accounts appear to be misused for infringement on peer-to-peer networks.”).

^{4/} *Id.* at 35-36 (noting as an example of such a cooperative voluntary initiative the “memorandum of understanding . . . among several ISPs — AT&T, Comcast, Cablevision, Verizon, and Time Warner Cable — and major and independent music labels and movie studios to reduce online P2P piracy”).

^{5/} *Notice* at 1.

legal content services and the growth of the legal market, we would have an incomplete picture of whether the CAS had succeeded in its entire educational mission. Success in educating consumers and changing public attitudes about piracy will not be fully reflected in the kind of data-based metrics suggested in the *Notice*.

In addition, the timing of any such evaluations will be critical, and drawing conclusions about a program as a whole or in part on a regular basis will undoubtedly prove difficult. As we learned in the 18 months it took to build and implement the CAS, the benefit of voluntary programs is that their elements and requirements can be altered through experience to meet the needs of consumers and the marketplace. It would be difficult to continue to be as nimble in approach with data-driven requirements imposed on the program for the sole purpose of quantitatively reporting on its success. Accordingly, the USPTO should not adopt strict measurement standards that would have the effect of unnecessarily constraining parties voluntarily working to help consumers adopt lawful Internet use practices.

II. METHODS OF MEASURING EFFECTIVENESS ARE EMERGING, WILL EVOLVE OVER TIME, AND WILL LIKELY DIFFER AMONG PROGRAMS

While CCI recognizes the need to find ways to measure the success of voluntary anti-piracy programs and the difficulty inherent in measuring them, non-quantitative metrics – for example, qualitative discussions and anecdotal evidence – may also present effective mechanisms by which such programs may be understood. There is no one way to measure the success of these programs, and, although CCI believes that success metrics for each effort will emerge over time, there is unlikely to be a silver bullet answer to the question of how to evaluate all such programs across the board.

For example, even though the CAS was rolled out in February of this year and therefore is still in its nascent stages, some initial anecdotal responses from customers have been both

productive and positive, with ISP customer service lines in some cases receiving calls from customers receiving Alerts who were appreciative of being alerted to potentially infringing activity. In one specific instance, a parent who was originally convinced he had received a Copyright Alert in error, found that his teenager had engaged in the behavior that triggered the Alert and had the teen write a note of apology. In other cases, ISPs have been able to help consumers take the necessary steps to protect their accounts from being used for illegal behavior. While it is still very early in the roll-out of the CAS, based on the limited data thus far, CCI is encouraged by the initial trends that show that its ISP participants are sending out a much larger number of first stage Alerts than later stage Alerts. If this trend continues, it may be an important signal that the Alert system is positively impacting user decisions going forward and that the CAS is helpful to consumers who receive Alerts.

In addition to qualitative or anecdotal evidence, another mark of success is the ability of such programs to provide a forum for stakeholders to discuss issues and engage in finding solutions to reduce online piracy. CCI has already engaged in numerous discussions with its consumer Advisory Board about the CAS as it was implemented and will continue to do so as we review its success. Our ability to engage across a variety of stakeholders is vitally important to the success of our program and yet, it is not susceptible to numerical measurement.

III. THE GOVERNMENT SHOULD CONTINUE TO VIGILANTLY SUPPORT AND MONITOR PRIVATE SECTOR VOLUNTARY INITIATIVES WHILE AVOIDING UNNECESSARY INTERVENTION

CCI recognizes the government's strong public policy interest in ensuring that private sector voluntary initiatives for curbing online piracy are effective, fair, balanced, and reasonable. However, it is critical that cooperative voluntary initiatives be able to develop, evolve, and adapt under their own internal yardsticks for measuring the success of their programs. The benefits of

the Administration's encouragement of voluntary private sector initiatives to reduce infringement may well be undermined if compulsory or overly restrictive data collection or measurement programs are imposed on initiative participants. Rather, the government should approach its role as an active and supportive partner as opposed to a prescriptive regulator. As noted in the *Joint Strategic Plan*, programs like the CAS are already well underway, but still nascent. The Administration should continue its valuable support and encouragement of such efforts while providing the parties spearheading these programs with the freedom to innovate and devise program measurement strategies tailored to the objectives of such programs.

CONCLUSION

CCI welcomes the Administration's continuing support for voluntary private sector initiatives to curb online infringement. For the foregoing reasons, however, we would urge the Administration to continue to give the initiatives time to develop effective measurement tools and latitude to change and adapt them through experience by refraining from imposing a strict, one-size-fits-all data-centric framework to measure the success of these programs.

Respectfully submitted,



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August 21, 2013

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Voluntary Best Practices Study; Extension of Comment Period

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Comment on FR Doc # 2013-17166

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General Comment

Please see the attached comments from the Alliance for Safe Online Pharmacies.

Attachments

ASOP Submission to USPTO_2013_08_21_Final

**Submission in Response to the Request of the United States Patent and Trademark Office's
(USPTO) Request for Public Comments: Voluntary Best Practices Study**

Docket No.: PTO-C-2013-0036

August 21, 2013

INTRODUCTION

The Alliance for Safe Online Pharmacies (ASOP) appreciates the opportunity to provide comments regarding the processes, data metrics, and methodologies that could be used to assess the effectiveness of cooperative agreements and other voluntary initiatives to reduce intellectual property infringement that occurs online, including specifically the crimes of illegal online drug sellers.

ASOP is a nonprofit organization with the goal of protecting patient safety and ensuring patient access to safe and legitimate online pharmacies in accordance with applicable laws. ASOP's membership includes the American Pharmacists Association, Eli Lilly & Company, Enforce the Act, European Alliance for Access to Safe Medicines, International Pharmaceutical Federation, LegitScript, Merck, Men's Health Network, National Association of Chain Drug Stores, NeedyMeds, the Partnership at Drug-Free.org, and Takeda Pharmaceuticals.

ASOP believes that patients deserve protection from illegal or illegitimate websites selling or offering to sell drugs purporting to be licensed and compliant pharmacies, while endangering patients' lives. Despite the existence of many safe online pharmacies which do adhere to safety standards, the nature of the Internet has opened the door to thousands of criminal (aka "rogue") Internet sites posing as legitimate pharmacies and selling potentially unsafe medicines. The result: patients are just one click away from purchasing medicine that could have a dangerous or fatal consequence.

A. ASOP SUPPORT FOR VOLUNTARY BEST PRACTICES

ASOP applauds the White House for its continued commitment to a strategy that aims to protect public health and safety and combat illegal online drug sellers that peddle counterfeits and other unsafe products to unsuspecting patients. The Obama Administration and its Intellectual Property Enforcement Coordinator, Victoria Espinel, have made significant strides on this issue, beginning with their initial Joint Strategy in 2010.

The Administration's strategy rightly recognizes and encourages the critical role and responsibility of the private sector in adopting voluntary practices that can better protect consumers and prevent criminal activity that may result in harm or even deaths. In the 2013 strategy, the Administration calls particular attention to the Center for Safe Internet Pharmacies (CSIP), a nonprofit organization comprised of Internet commerce companies, which was established to increase collaboration and actions to reduce the number of rogue online "pharmacies." ASOP agrees that CSIP and other Internet commerce companies have the unique ability to adopt and commit to enforcing practices that can protect patients in a way no

government or other organization can. As such, ASOP greatly appreciates and encourages the Administration's support for CSIP and relevant voluntary actions by the private sector to combat rogue online "pharmacies". ASOP is also supportive of effective oversight and constructive engagement regarding the value of such voluntary practices and how they can be measured, improved, and strengthened as necessary for the benefit of patient safety, public health, and crime prevention.

CSIP and its thirteen member companies have taken the following efforts to date which have helped to raise awareness about the threat and the CSIP organization's own commitment to disrupt this criminal activity:

- Development of a functional infrastructure to facilitate the sharing of information about suspect online pharmacy websites amongst the nonprofit's corporate members;
- Partnership with ASOP, other nonprofits and the US government on education and public messaging;
- Collaboration with FDA on Operation Pangea, an international law enforcement initiative to identify and address illegal online drug sellers;
- Participation in international dialogues with EU and Japan stakeholders; and
- Donation of search engine advertisements which direct consumers to awareness videos, developed in partnership with ASOP and/or the LegitScript pharmacy URL verification tool.

We applaud these activities from CSIP and encourage their increased collaboration to reduce illegal online "pharmacies" and protect patients. However, all stakeholders -- public and private, domestic and international -- must do more to put criminals on the defensive and prevent continued growth of their online presence. There are critical elements that are needed from the private sector, including increased vigilance to monitor and cease business transactions with illegal online "pharmacies," as well as increased collaboration to establish model responsible business practices that can help prevent this growing crime in a more systematic way.

The private sector's involvement in protecting the public health from Internet criminals will not be successful if it is not assessed critically, reviewed, and improved upon. In order to ensure that it is successful and meaningful, it must not be restricted to the policies of a few individual companies or isolated public relations activities. The goal of these voluntary initiatives must be to realize a significant change in the online environment that will either prevent or greatly deter criminals from operating freely as they do in today's environment. The commitment to do this has already been made in principle with the establishment of CSIP and their public announcement to work together to protect the public from these illegal sites. If appropriately measured, their work (and the work of other responsible private sector actors, including those abroad) can change the environment online and realize outcomes that make a difference in patients' lives, now and in the future. Accordingly, ASOP offers the following specific comments on how to assess the effectiveness of voluntary initiatives aimed at combatting illegal online drug sellers.

B. ASOP RESPONSE TO SPECIFIC QUESTIONS IN THE FEDERAL REGISTER NOTICE

Question #1: How should “effectiveness” of cooperative voluntary initiatives be defined?

Specific to the rogue online pharmacy issue, “effectiveness” of voluntary initiatives to combat illegal online drug sellers ought to be defined in terms of the direct impact on the safety of patients/consumers, including:

- a. The “cleanliness” of the Internet pharmacy marketplace (i.e. the number of illegitimate online pharmacies found in search results and other online locations);
- b. Transparency of Internet commerce company corporate policies and development of recommended best practices to monitor and prevent the facilitation of illegal online “pharmacies;”
- c. Increased consumer awareness about the dangers of purchasing from illegal online drug sellers including providing consumers with a list of legitimate online pharmacy websites.

However, only CSIP and other Internet commerce companies have the direct ability to affect the cleanliness of the marketplace. For this reason, ASOP’s comments will focus on how to measure the impact of voluntary actions that could directly improve the safety of the Internet pharmacy marketplace, rather than how to measure the effectiveness of consumer awareness initiatives.

Question #2: What type of data would be particularly useful for measuring effectiveness of voluntary initiatives aimed at reducing infringement and what would that data show?

Specific data regarding key voluntary initiatives of CSIP and its members would provide a useful tool for measure the effectiveness of their efforts, which ASOP strongly supports.

The following suggestions include recommended metrics for measuring the effectiveness of various voluntary practices ongoing today:

1. *Mimicking consumer behavior:*
 - a. Searching terms such as “Buy [insert drug name]” in search engines, social media sites and other Internet platforms and then identifying and quantifying the illegal online pharmacies in those locations (such as on the first two pages of results). This would mimic the behavior of consumers looking online to purchase a prescription medicine. These data have the benefit of being readily available and not sensitive or confidential, and could also be tracked over time for trends and measurement of progress.
2. *Effectiveness of CSIP members’ standards of conduct and/or other voluntary best practices:*
 - a. The measurable outcomes from CSIP members’ own voluntary enforcement activity in 2012 and 2013, other than the aggregate data related to Operation Pangea that has been publicly released, including:
 - i. The percentage of illegal online pharmacy activity on each member’s platform, as evidence members’ commitment to CSIP’s mission and to shed light on what, if any, voluntary policies are working;

- ii. The number of websites blocked/transactions stopped by each sector involved in CSIP, which as a stand-alone number (not a percentage) shows the scope of the problem and how individual policies or best practices being employed by CSIP members are helping to achieve these results and/or curb the threat;
 - iii. Percentage change in the number of solicitations to CSIP companies by illegal online drug seller operators, as evidence of the effect that corporate policies can have on rogue actors' activities (e.g. the rogue actors may stop trying to use XYZ registrar and instead seek out a safe-haven registrar who does not enforce policies against illegal sites);
 - iv. The number of internal appeals by illegal online drug sellers that each company (or sector) has had to respond to, which informs future efforts to establish effective, tailored voluntary enforcement protocols;
 - b. The internal policies, strategies and tactics adopted and the resources (internal or external) that have been helpful in creating effective corporate voluntary enforcement programs within CSIP member companies, which will demonstrate to stakeholders what works and what doesn't;
 - c. CSIP's standards for membership (e.g. expectations of voluntary enforcement), to evidence CSIP members' tangible commitments to addressing the issue and to help set standards/best practices against which other Internet commerce companies could be evaluated;
 - d. CSIP's recommendations for what other Internet commerce companies (non-CSIP members) could be doing to help clean up the Internet pharmacy marketplace in order to help export standards/best practices and establish guidelines against which other companies could be evaluated.
- 3. *Effectiveness of CSIP's "neutral forum for sharing relevant information about illegal Internet pharmacies among members (forum)":*
 - a. The type, quantity and frequency of information shared in the forum, e.g. prospective threats or only post-investigation information, to show whether and how such a forum can be used to proactively address rogue activity;
 - b. Information on breadth of participation among members, i.e. what sectors most actively use the forum and at what frequency, to inform how to improve the forum for increased effectiveness across multiple sectors and platforms;
 - c. Data on what CSIP members do in response to shared information, e.g. send warning letters, cut-off transactions, etc., as evidence of the tangible outcomes resulting from the forum;
 - d. Information on how and to what extent the FDA, FBI, DHS or other law enforcement agencies have access to or utilize the forum for sharing information, to show the measurable value of the public-private partnership.
- 4. *Effectiveness of CSIP's assistance with "law enforcement efforts where appropriate?"*
 - a. Data on how CSIP assisted in Operation Pangea in 2012 and 2013, to show the direct additional value of CSIP's involvement:
 - i. Number of leads solely attributable to CSIP members;
 - ii. Number of leads from other sources reviewed or confirmed by CSIP members;

- iii. Number of illegal online drug seller websites shut down by CSIP members (as opposed to taken down in response to law enforcement warning letters or other actions);
- b. Information on other ways CSIP has aided law enforcement efforts, aside from Operation Pangea, to show whether and to what extent the Internet commerce companies are involved in regular or ongoing enforcement efforts:
 - i. Data on how often CSIP liaises with law enforcement to deconflict, share, and take joint action on lead.

Question #3: If the data is not readily available, in what ways could it be obtained?

ASOP recognizes that some of these data may be sensitive and/or may not be readily available to Internet commerce companies, i.e. it may not be currently produced or collected through currently existing business practices or processes. However, for CSIP members who have committed publicly to combating illegal online drug sellers, we would nonetheless expect these companies to establish systems and processes by which to evaluate the effectiveness of their voluntary initiatives. While the Internet commerce companies themselves would best know how to measure the outcomes of their own initiatives, use of the following of systems and processes might be helpful:

1. *Monthly monitoring of the number of:*
 - a. Companies using the platform for both legal Internet pharmacies and illegal online drug sellers business purposes;
 - b. Illegal online drug seller transactions blocked;
 - c. Appeals from illegal online drug sellers seeking to use the platform's services;
 - d. Warning letters and/or compliance bulletins distributed to clients.
2. *Annual (if not monthly) use of a third-party to audit the platform for:*
 - a. Rogue activity;
 - b. Overall cleanliness, e.g. percentage rogues using the company's system for illegal online pharmacy activities.

Question #4: Are there particular impediments to measuring effectiveness, at this time or in general, and if so, what are they?

If measured by the number of illegitimate online pharmacies found in search results and other online locations, ASOP does not have first-hand knowledge of any particular impediments that would prevent Internet commerce companies and/or the government from measuring the effectiveness of voluntary actions.¹ Nonetheless, we have heard from CSIP that the following issues make it difficult to measure effectiveness:

¹ We note, however, that if measuring effectiveness were to require test purchases of pharmaceuticals from suspect online drug sellers, then impediments could include the cost and effort needed for such test purchases (including obtaining prescriptions where needed), as well as the analytical lab testing and secure handling and storing of such samples.

1. Due to differences in the sectors involved in CSIP (e.g. payment processors vs. registrars), it is difficult to determine a consistent way to measure and reflect CSIP's effectiveness;
2. Even within a sector (e.g. advertising providers), there are substantial differences in the way each company operates, again creating challenges in measuring "apples to apples;" and
3. Companies, especially smaller organizations, may not have allocated the resources (staff time, budget, etc.) that are needed to measure tangible outcomes.

While these issues may present initial challenges to CSIP's ability to measure the effectiveness of its, and its members', voluntary actions, there is a compelling public health interest in finding ways to do so. In order to vigilantly protect consumers, policymakers, regulators, law enforcement and health groups must be able to assess whether voluntary actions are working or not. If not, these stakeholders owe it to the public to take additional action, whether through new legislation, increased enforcement or other measures. Accordingly, Internet commerce companies must be expected to bear some burden of proof – even if such requires establishing additional systems and processes to measure new data points or the hiring of a third-party monitoring organization – to evidence that their programs are working. Without these data, stakeholders are unable to appropriately evaluate existing practices and determine what, if any, additional actions are warranted to better protect public health.

Question #5: What mechanisms should be employed to assist in measuring the effectiveness of voluntary initiatives?

ASOP encourages the Administration consider the following mechanisms to help evaluate the effectiveness of voluntary initiatives:

1. Mimicking the behavior of consumers looking online to purchase a prescription medicine (see response to Question #2 above) and tracking the "cleanliness" of results over time for trends and measurement of effectiveness;
2. Issuance of official recommendations from the Administration on metrics for measuring the success of voluntary initiatives that have been undertaken already and included in the IPEC strategy (2013), including a procedure to promote accountability for reporting on the outcomes;
3. An annual request for a public report to the Administration or to Congress from companies and organizations who have committed to voluntary initiatives, which would provide year-over-year information from which long-term effectiveness may be evaluated;
4. GAO investigation and/or other government audit of (1) the effectiveness of voluntary initiatives every three years which would take into consideration the Administration's official recommendations (item #1 above) and use the annual reports from companies and organizations as a means of evaluating progress (item #2 above); and (2) the extent to which rogue Internet pharmacies are utilizing companies in the same sectors that have not engaged in voluntary compliance measures; and
5. U.S. Government-organized annual public meeting to facilitate information-sharing about key voluntary initiatives and to increase dialogue among private sector, public sector, and non-government organizations to promote evaluations and improvements.

Question #6: Is there existing data regarding efficacy of particular practices, processes or methodologies for voluntary initiatives, and if so, what is it and what does it show?

ASOP understands that CSIP has made efforts to evaluate the efficacy of particular initiatives the nonprofit and its members have undertaken since 2012. CSIP has reported results available at <http://www.safemedsonline.org/who-we-are/our-results/>.

We applaud these initial outcomes from CSIP. That said, ASOP does not have full information on the methodology used or consistency (“apples to apples” nature) of information provided by CSIP’s members and thus cannot comment on the accuracy of the information provided. Also, these data reflect only the voluntary initiatives taken by the thirteen companies involved in CSIP; there are many other companies (including those based off-shore but who provide services and/or facilitate transactions to U.S. consumers) who should similarly be dedicated to protecting patients and likewise measuring the efficacy of their practices. ASOP is not aware of other existing data.

CONCLUSION

Despite the various recommendations provided herein to increase the effectiveness and impact of CSIP’s actions to date and in the future, and that of its members and future members, ASOP considers CSIP to be a crucial partner in the fight to protect patients and ensure improvements that can bring about a change to the online environment as it relates to reducing the prevalence of illegal online “pharmacies.” CSIP has undertaken a brave and new initiative that will require much learning, evaluation, and adaptation to ensure its success. The willingness to embark upon this initiative is symbolic of the corporate responsibility and forward-thinking nature of its members, and for that, we applaud them and look forward to their continued partnership and commitment to this issue.

The U.S. government plays a critical role in protecting patient safety, enforcing laws, and preventing crime. In the case of illegal online “pharmacies,” voluntary and good corporate practices by Internet commerce companies can provide a solution to advance all of these goals, decreasing the burden on government and reducing threats to patient safety (and associated costs to the health-care system). As such, the voluntary initiatives must be measured effectively to ensure progress and advance the Administration’s overriding goals. We applaud this exercise as a tool to achieve that outcome, and we hope it will be completed and used effectively to advise on next steps and future policy.

We must all work together to protect patients and the public health, public and private sector. ASOP remains committed to playing our role. In order to achieve the most beneficial outcome for patients, we must be able to adapt our rules, regulations, laws, and voluntary corporate policies to accommodate for advances and changes in technology and the availability and wide use of the Internet today. As such, we cannot allow the Internet to be a platform for crime against patients. But we must also remain vigilant to work together in a way that ensures the sustained integrity, free and open nature, and conveniences of the Internet so it continues to be a vital tool for all, enjoyed by all.

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Voluntary Best Practices Study; Extension of Comment Period

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Comment on FR Doc # 2013-17166

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General Comment

See attached file(s)

Attachments

Public Knowledge Comments on Voluntary Best Practices Study

Before the

**United States Patent and Trademark Office
Department of Commerce**

In the Matter of

Voluntary Best Practices Study

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Docket No. PTO-C-2013-0036

COMMENTS OF PUBLIC KNOWLEDGE

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August 21, 2013

COMMENTS OF PUBLIC KNOWLEDGE

Measuring the effectiveness of any policy can be difficult; in the case of the various voluntary initiatives discussed in the Intellectual Property Enforcement Coordinator ("IPEC") report, the task may be more difficult than usual. Anyone seeking to evaluate effectiveness must account for the varying types of programs,¹ the parties involved in each program, and the multiple goals that must be balanced in every initiative. Even after particular metrics are selected, the evaluator needs to be mindful of the fact that a wide variety of unpredictable factors can influence any given figure; the data from which an evaluator might wish to draw conclusions is never generated in a vacuum. Finally, to ensure accurate results, the data and methodologies underlying any evaluation should be available to the public; transparency is a necessary part of ensuring not only the quality, but also the legitimacy, of the evaluation, and of the measures themselves.

I. Defining Effectiveness Requires Accounting for Multiple Goals

In measuring the effectiveness of any particular voluntary program, it is necessary for an evaluation to identify and account for a number of potentially competing goals. While the various programs discussed in the IPEC's Joint Strategic Plan may share a goal of reducing online infringement, it would be inaccurate to say that this is the only goal of any of these programs. Each of the programs should also have as goals the preservation of users' rights in privacy and free speech; respect for due process; minimal (if any) impact on legitimate activities; and allowing competition between various content creators, providers, and distributors. For instance, a program that reduced online

¹ Without more detailed discussion of which voluntary measures are being evaluated, or

trademark infringement at the cost of preventing legitimate resales of trademarked goods could not necessarily be said to be "effective." Similarly, a measure that required or encouraged a service provider to disclose private consumer communications, even if it had some salutary effect on online infringement, should still not meet criteria for effectiveness.

Viewed another way, effectiveness is not simply a matter of a policy's ability to move any one particular metric; it is also a measure of costs and benefits. The costs of a voluntary initiative will include not only the monetary cost borne by the various parties involved in the system (rightsholders, intermediaries, and consumers included), but also the non-monetary costs represented by the considerations above—the cost of any impingement upon free speech, privacy, due process, or competition. Measurement of these costs should also include the costs of false positives that can be generated in any voluntary system. Even a relatively unlikely event, if applied in enough instances, and with a catastrophic enough cost, would result in an aggregate cost that would render the program a net loss to the parties.

II. Results Can Depend Upon Complex and Interrelated Factors

Given the complexity of the systems underlying most of the available information about media consumption, network usage, and online infringement, any data on these topics will necessarily reflect the confluence of a wide variety of factors, not all of which can always be adjusted for. This complexity will frequently stem less from any technological means than from the need to account for the varied interests of hundreds of millions of individual consumers and users; hundreds of thousands of available works;

and hundreds of conduits via which those works can be obtained.² The vast number of entities involved, and the complex interactions between them, can make measurement as difficult as weather forecasting—possible in broad strokes in the immediate future, but increasingly unpredictable and unreliable in the medium-to-long term and imprecise in details. The effectiveness of a given voluntary measure therefore cannot be tied to changes in any one or two factors. An evaluation must account for a complex set of factors, many of which will interrelate.

A change in the sales of any particular work can be affected by, among other things, the breadth of its availability, the overall state of the economy and available disposable income, the presence of intra- and intermodal competition (consumers might start buying a competing movie, or might be spending on the next new videogame instead), or even the effects of popular opinion or criticism of the work. The same factors and more can contribute to changes in the number of infringements of a particular work, or aggregate figures on sales or infringement.

While it may be obvious that factors like consumers' overall spending power need to be considered, the availability (or lack thereof) of legitimate options can vary widely from work to work. For example, at least one outlet has noted a rise in BitTorrent downloads of the CBS program "Under the Dome" that corresponds to blackouts caused

² This will include not just modes of consumption (such as the difference between viewing a movie in theaters, on television, or online), but will also include the interaction and competition between different channels, different online streaming services (both legitimate and illegitimate), physical or digital purchases, library lending, lending from friends, sharing with family, and so on. Modes of consumption are also multiplying, with digital technology able to create a spectrum of uses between, for example, purchase and rental, or between real-time and stored media. Content channels can either impose a specific mode upon consumers with technology (for instance, offering a "purchase" that limits certain uses), while consumers can also use technology that creates uses unintended or unanticipated by the channels (such as time-shifting or space-shifting content).

by the CBS/Time Warner Cable retransmission dispute.³ Downloads of the show rose 34% over earlier periods in the markets affected by the blackout, suggesting that viewers who paid for, but were not receiving, the CBS program were instead turning to filesharing to access their content.

Conversely, other analyses indicate that the presence of legal alternatives may reduce online infringement. A report by Ipsos MMI shows that online infringement of video and music dropped dramatically in Norway as Spotify and Netflix began to be adopted.⁴ Other studies seem to indicate that the growth of Netflix has reduced demand for infringing downloads of content in North American internet traffic,⁵ and indicate a general trend of decreased infringement with increased availability, compared with regions that lacked easy access.⁶

Availability of legal alternatives is but one example of a factor that can influence figures. Variations in legal availability for a given work, as well as variations in the work's price and popularity over time, in comparison with its alternatives, will all affect the number of legitimate and infringing copies consumed. These and many other factors

³ Ernesto, "CBS Blackout Triggers Surge in TV-Show Piracy," *Torrentfreak*, Aug. 7, 2013, <http://torrentfreak.com/cbs-blackout-triggers-surge-in-tv-show-piracy-130807/>. While the numbers may not be conclusive, they lend additional credence to the idea that legitimate availability can reduce infringement, and that, conversely, a lack of availability may increase it.

⁴ Sophie Curtis, *Spotify and Netflix curb music and film piracy*, *THE TELEGRAPH*, July 18, 2013, <http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>.

⁵ Ryan Singel, *Is Netflix Reducing Illicit File Sharing? Depends on Which Stats You Believe*, *WIRED*, Apr. 28, 2011, <http://www.wired.com/business/2011/04/netflix-file-sharing/>; Glenn Peoples, *Business Matters: How Netflix Reduces Piracy*, *BILLBOARD BIZ*, May 6, 2013, <http://www.billboard.com/biz/articles/news/digital-and-mobile/1560720/business-matters-how-netflix-reduces-piracy>. The uncertainty expressed in these conclusions further reflects the complexity of the issue: as much as the effects of availability seem to have effects, their impact, like that of any legal or voluntary efforts, will be mediated by a host of other factors.

⁶ Will Page, *Adventures in the Netherlands*, *SPOTIFY*, July 17, 2013, <http://press.spotify.com/uk/2013/07/17/adventures-in-netherlands/>.

will have to be accounted for before those data could be considered reliable measurements of effectiveness.

III. Transparency is Necessary for Legitimacy

Measuring effectiveness will require access to accurate data. This access, however, cannot be restricted only to a limited number of picked evaluators. Making this information openly available to the public will ensure accuracy, allow for further analysis of available complex information, and bolster public trust in the legitimacy of the measures.

Transparency allows the public to verify the conclusions of an evaluator. Given the complexity of the interactions mentioned in Part II, conclusions drawn from confidential, proprietary, or otherwise withheld or restricted data will be regarded with more skepticism than conclusions drawn from open data. Making this information open will allow more uses to find any potential errors or oversight in analysis.

This will also help ensure the legitimacy of the measures and evaluation. Increasing transparency reduces potential for abuse. This is particularly critical in voluntary measures, which, existing outside of a traditionally-defined legal process, can create public uncertainty about the fairness and effectiveness of the system, as well as its avenues for redress. Merely stating that the systems are fair and effective will not assuage these concerns without more definite information. In fact, evaluations themselves can be questioned in a number of ways—the independence or impartiality of a private evaluator can be questioned, and a government-based evaluator can be accused of capture, being lobbied, or interfering with the voluntary nature of the process. Providing to the public

the same data used by any evaluator is essential to earn public trust in the legitimacy of both the voluntary measures and any evaluator's conclusions about them.

Finally, making data available to the public will allow for innovative and creative analysis unforeseen or beyond the original scope of internal evaluations. Researchers investigating consumer habits, network usage, and the spread of media can all make use of information generated by voluntary initiatives, leading to valuable insights that can benefit a variety of fields. In addition to the inherent value of adding to research, these findings could potentially further inform future policies to reduce infringement and increase access.

CONCLUSION

None of these considerations mean that evaluation and analysis is impossible or unnecessary. Rather, they serve as a reminder that policy evaluation is a complex endeavor. Merely focusing on one goal will inevitably distort, and undermine, the larger purpose of thoughtful policy formation.

Any evaluation of a voluntary measure needs to take into account that measure's necessarily multiple goals, including the protection of user rights and the prevention of false positives. Any metrics selected must also take into account the extreme complexity of the digital economy, and the difficulty of directly attributing causes and effects. Finally, voluntary measures must be transparent, and the data by which they are evaluated should be made available to the public, to improve accuracy, legitimacy, and contribute to new insights into the issue.

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General Comment

See attached file(s)

Attachments

CDT comment to PTO 8-21-13



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COMMENTS ON VOLUNTARY BEST PRACTICES STUDY

Docket number PTO-2013-0036

August 21, 2013

The Center for Democracy & Technology (CDT) submits these comments to the U.S. Patent and Trademark Office in response to the June 20, 2013 request for public comments on the Voluntary Best Practices Study (FR Doc. No. 2013-14702, extended by FR Doc. No. 2013-17166). CDT is a non-profit, public interest organization dedicated to keeping the Internet innovative, open, and free. CDT works with a broad range of stakeholders to ensure that Internet policy continues to develop in ways that reflect core civil liberties values and promote innovation. On copyright matters, CDT seeks balanced policies that respect the rights of content creators without curtailing the Internet's tremendous potential for fostering free expression and innovation.

We offer the following observations and recommendations in support of a full and balanced assessment of the effectiveness, accuracy, and fairness of voluntary, cooperative initiatives to reduce infringement.

1. Limited transparency poses serious challenges for empirical assessment.

The transparency of voluntary initiatives varies, but it is generally subject to significant limits. For example, as far as CDT has been able to determine, the cooperative initiative of credit card and payment systems has no public website and the best practices that were apparently agreed to in 2011 have not been publicly disclosed. In terms of public information, there is a brief description of the voluntary agreement in the 2011 annual report of the U.S. Intellectual Property Enforcement Coordinator (IPEC), and individual company websites provide some information about their practices (see, for example, <http://corporate.visa.com/about-visa/security-and-trust/intellectual-property-rights.shtml>). CDT is not aware of any public information regarding how the initiative is operating in practice.

At the other end of the spectrum, the Copyright Alert System (CAS) launched by major Internet Service Providers and copyright owners features a public-facing website that provides information about the initiative and even includes the full text of the Memorandum of Understanding (MOU) establishing it. Even in this case, however, information regarding the actual operations of the system, including the data reported to and compiled by the Center for Copyright Information (CCI) under section 9 of the MOU, is likely to remain non-public. Section 9.C of the MOU makes this clear: "CCI shall keep confidential all records

and data relating to the Notice Process and Copyright Alert Programs. None of the records and data relating to the Notice Process and Copyright Alert Programs shall be made publicly available by CCI without prior approval by a majority of the Executive Committee.”

Limited transparency makes it very difficult to conduct outside oversight or scrutiny of the programs in question – or of the data participants may provide as evidence of effectiveness. Participants may choose to report some results, but there is no ability for independent third parties to offer alternative interpretations or evaluations. Moreover, there is a significant risk that participants with access to operational information may “cherry pick” data or statistics to suit their own purposes. Given the “black box” nature of the data, it is not clear how claims regarding the operation of the initiatives may be independently assessed.

At a minimum, PTO should require that where quantitative information is provided by initiative participants, the sources and methods used to collect and compile the data should be open enough to permit independent review and analysis. This is particularly true since, in many cases, infringement-related statistics may be highly sensitive to assumptions. As the GAO noted in 2010, assumptions about whether and how much infringement substitutes for legal sales can greatly influence estimates of the economic costs of piracy. The baselines chosen for comparisons could similarly influence estimates of infringement trends. Openness about methods and assumptions should be essential for any quantitative information to be considered.

2. Assessments should include careful inquiry into the existence and effectiveness of procedural safeguards, transparency, and the actual incidence of errors, collateral damage, or imposition of disproportionate sanctions.

Assessments should not focus exclusively on the impact voluntary initiatives may have on infringement. As the Administration observed in the Federal Register notice soliciting these comments, the goal of voluntary initiatives should not be to reduce online infringement in any manner possible, but rather to find approaches that are “consistent with due process, free speech, privacy of users and competition.” The notice likewise calls for initiatives to be as “transparent as possible.” Any full analysis of how voluntary initiatives are working in practice, therefore, needs to examine how the systems are performing with respect to these other considerations. In other words, assessments need to ask questions about how well the initiatives avoid unfairness, mistakes, and unintended impairment of interests such as free expression, privacy, and competition.

Limited transparency, as noted above, complicates this inquiry. Participants are unlikely to highlight possible risks or downsides of their voluntary initiatives by affirmatively releasing information about instances in which the process may have been misapplied or harmed innocent parties. PTO will likely need to seek specific information from initiative participants.

In terms of quantitative information, PTO should ask for the following types of data about each initiative's operation (though some adaptation might be needed to reflect differences in the different initiatives):

- The number of notices/complaints received from rights holders alleging infringement;
- The percentage(s) of those notices/complaints that led to specific action(s) against alleged infringers, and the percentage of notices/complaints that did not;
- The number of disputes regarding both notices and actions; and
- Data about how those disputes were resolved, and at what stage.

Non-quantitative information would be important to collect as well. PTO should also seek information about the following:

- What procedural safeguards are in place to ensure due process, prevent mistakes or abuse, and protect values such as free expression, privacy, and innovation? In particular, what are the opportunities for investigation or challenges to allegations of infringement? Is the process able to take account of factors such as potential hardship, unintentional violations, or impact on innocent third parties? What is the experience with these procedural safeguards in practice?
- To what extent does the process target only straightforward cases of infringement, where the unlawful infringement is flagrant and clear? There is a strong argument that voluntary programs are not appropriate venues for pursuing cases that present legally complex or unsettled questions. How does each initiative ensure that it will not wade into borderline or disputable cases?
- Are the results or decisions of the process transparent? In particular, is there adequate explanation to affected parties, so that they can challenge or complain about results or decisions they believe are unfair?
- Does the process include mechanisms to track mistakes and troubleshoot? That is, if and when the process is misapplied, is there a way for the system to learn from the mistakes and adjust? For example, is there a process for flagging parties who carelessly or abusively submit unwarranted complaints, to bar them from further participating in the program? Are there other examples of the process being modified or fine-tuned in response to problems that crop up?
- Is there any anecdotal evidence of mistakes, abuse, or collateral damage? Are there any known examples of the imposition of disproportionate sanctions – that is, relatively minor violations resulting in overly harsh penalties? Have there been any specific incidents or complaints along any of these lines, expressed either publicly or privately to those implementing the voluntary program?
- To what extent were representatives of consumer and innovation interests involved in the development of the initiative, or in its ongoing operation or oversight? (Recall that the 2011 OECD Communique on Principles for Internet

Policy-Making concluded that “multi-stakeholder processes should involve the participation of all interested stakeholders.”)

3. Assessments should not place too much weight on statistics regarding the persistence of piracy. Other metrics, such as those measuring the reach or success of educational messages delivered to consumers, may better reflect the impact of some initiatives.

Statistics indicating substantial ongoing infringement should not be taken as evidence that voluntary initiatives are unsuccessful, for several reasons.

First, voluntary initiatives are just one of many factors that may influence the level of infringement activity. The online content marketplace is in a high state of flux, with competition and innovation disrupting traditional business models and distribution channels. Infringement levels may well be influenced more by gaps or mismatches between consumer demand and current supply (i.e., lawful offerings) than by anything being done with respect to enforcement. For example, recent reports have suggested that when CBS/Showtime curtailed online access to its programming in connection with its retransmission consent dispute with Time Warner Cable, infringement rates for certain popular shows jumped in the affected markets. Overall infringement levels offer no easy way to isolate the impact of voluntary enforcement initiatives from that of other factors.

Second, neither voluntary initiatives nor any other plausible enforcement techniques have a realistic prospect of substantially eliminating infringement. Modern information technology is here to stay and will continue to give users powerful tools for copying and disseminating data. Inevitably, some people will choose to misuse those tools to engage in infringement. It will therefore *a/ways* be possible for parties arguing for ever-stronger enforcement tools to point to statistics demonstrating that infringement persists. But the goal of voluntary initiatives, like enforcement in general, should be realistic: not eliminating piracy, but rather encouraging the bulk of the population to decrease participation in infringement compared to participation in lawful markets. Infringement may persist and may remain stubbornly substantial (especially in the eyes of rightsholders), but if more and more of the public is turning to legal distribution channels, real progress can be achieved and creators can thrive.

Third, many voluntary initiatives carry a significant educational component. That is, they are not (or not exclusively) aimed at preventing immediate infringements from occurring, but rather at influencing user perceptions and understandings of infringing websites or behaviors. The impact of educational efforts may well be gradual; people may not change behavior overnight. Over time, however, efforts to stigmatize or otherwise communicate the illicit nature of some websites or distribution channels could well bear fruit. In the long run, success in the fight against infringement is likely to depend more upon public attitudes and behavior choices than enforcement policies.

If part of the goal of voluntary initiatives is to influence public attitudes and perceptions, then assessments of such programs should consider metrics more directly related to the educational purpose. For consumer-facing initiatives, relevant metrics might include the number of users served educational messages. Numbers on recidivism (e.g., how often such messages are sent multiple times to the same party due to unchanged behavior)

would be enlightening as well, if available. For initiatives with less direct interface with consumers, relevant metrics might include the number of piracy websites stripped of the mainstream advertising or payment options that consumers would likely perceive as indicators of legitimacy.

In short, a full assessment should consider a variety of data regarding the reach and impact of voluntary initiatives, including their educational impact.

* * *

CDT appreciates this opportunity to comment and would be happy to discuss these issues further as the effort to study these voluntary programs proceeds.

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PUBLIC SUBMISSION

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Comment On: PTO-C-2013-0036-0002

Voluntary Best Practices Study; Extension of Comment Period

Document: PTO-C-2013-0036-DRAFT-0015

Comment on FR Doc # 2013-17166

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General Comment

Attached are the comments of the Motion Picture Association of America, Inc. in response to the Request of the United States Patent and Trademark Office for Public Comments: Voluntary Best Practices Study (Docket No. PTO-C-2013-0036) appearing at 78 Fed. Reg. 37,210 (June 20, 2013).

Attachments

Voluntary agreements MPAA.8.21.13

**Before the
DEPARTMENT OF COMMERCE
UNITED STATES PATENT AND TRADEMARK OFFICE**

)		
In the Matter of)		Docket No. PTO-C-2013-0036
)		
Voluntary Best Practices Study)		Submitted August 21, 2013
)		

**COMMENTS OF THE
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

I. PRELIMINARY COMMENTS

The Motion Picture Association of America, Inc. (“MPAA”) is pleased to provide these comments in response to the Request of the United States Patent and Trademark Office for Public Comments: Voluntary Best Practices Study (Docket No. PTO-C-2013-0036) appearing at 78 Fed. Reg. 37,210 (June 20, 2013).

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA’s member companies are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets. The MPAA’s members produce, distribute, and own tens of thousands of extremely valuable copyrighted works – works that, unfortunately, are subject to widespread piracy, resulting in billions of dollars annually in financial losses and undermining legitimate business models.

The MPAA’s members employ various strategies and tactics to combat such piracy, which include efforts aimed at educating consumers about intellectual property and piracy and directing them to legitimate offerings, as well as targeting, through appropriate legal means, enterprises seeking to enrich themselves at the expense of content creators and owners. In particular, MPAA members focus on making their works available to consumers in a wide variety of formats, on various platforms, at different price points, to meet consumer demand. In addition, they employ digital rights management technologies to thwart unauthorized copying. They make extensive use of the notice-and-takedown process set forth in Section 512 of the Digital Millennium Copyright Act. They bring copyright infringement lawsuits in federal court. They refer particularly egregious commercial infringers to law-enforcement authorities. And, as

relevant here, they engage in a variety of cooperative, voluntary initiatives with participants in the Internet ecosystem.

To achieve its important societal goal of encouraging creativity – by acting as the “engine of free expression”¹ – it is necessary that the copyright system include “appropriate enforcement mechanisms to combat piracy, so that all stakeholders benefit from the protection afforded by copyright.”² Thus all players in the Internet ecosystem – copyright owners, as well as the various intermediaries that facilitate online commerce and speech – have a responsibility and must play a meaningful role in addressing the problem of rampant piracy on the Web. This is not only true as a matter of law; it is also a matter of corporate ethics and an acknowledgment that stakeholders whose systems, networks and services are used by unrelated third parties to commit wrongdoing are oftentimes best placed to assist in the prevention of that harm.

One form of such cooperation with other players in the ecosystem is taking commercially reasonable, technologically feasible steps to help curb copyright infringement. Therefore, as a general proposition, the MPAA supports – and urges the PTO and other government entities to encourage all relevant parties to support – cooperative, voluntary initiatives. Such initiatives, which range from precatory sets of “best practices” (which can be either unilateral or negotiated among various parties) such as the UGC Principles³ to formal, binding agreements (such as the Copyright Alert System⁴), can, in certain circumstances, improve upon default legal standards (such as the DMCA), and are often preferable to expensive, contentious civil litigation and criminal enforcement actions. But, as we detail below, cooperative, voluntary initiatives are not a panacea, and they are not appropriate to address all forms of piracy. Some voluntary initiatives work well; some have more modest success; and some are simply not effective. As noted below, some players, such as major Internet service providers, via the Copyright Alert System, and user-generated content sites, via the UGC Principles, have shown admirable willingness to enter into voluntary agreements and take concrete and effective anti-piracy measures, and should be applauded for the constructive roles they have played. Unfortunately others, such as the major search engines, have largely refused to take a proactive role in addressing the problems of illegal activity online.

Voluntary initiatives like the ones described below are, and will remain, a complement to – not a substitute for – other anti-piracy initiatives. And it must always be remembered that, when negotiating voluntary agreements, the parties are always bargaining in the shadow of the law. In other words, a party’s willingness to commit to a particular practice will depend to a significant degree on what it perceives to be the legal consequence (or lack thereof) of continuing its current course of action, and not committing to any voluntary agreement. Thus

¹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

² The Department of Commerce Internet Policy Task Force, “Copyright Policy, Creativity, and Innovation in the Digital Economy,” Message from Secretary of Commerce Penny Pritzker, July 2103, available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>.

³ *See infra*, Section II.E.

⁴ *See infra*, Section II.A; *see also* comments submitted by the Center for Copyright Information.

improvements in the law are likely to encourage recalcitrant players to engage in voluntary initiatives.

MPAA details below several of the specific initiatives in which it, its members, and other copyright owners have participated in recent years.

II. SPECIFIC INITIATIVES IN WHICH CONTENT OWNERS ARE INVOLVED

A. Copyright Alert System

The Copyright Alert System (“CAS”) is a program to address one specific form of piracy: the use of peer-to-peer networks to download and distribute movies, television shows, and music over the Internet (sometimes referred to as “file-sharing”). The participants are the major movie studios (via the MPAA) and record labels, a large group of independent movie producers and record labels, and five major U.S. ISPs (Comcast, AT&T, Verizon, Cablevision, and Time Warner Cable). Under the CAS, copyright owners scan publicly-accessible peer-to-peer networks to detect unauthorized distributions of their works, and then send notices of such infringements to the ISPs through which these works are being made available. The ISPs then send “Copyright Alerts” to the subscribers associated with such infringing activity. The first alerts are purely educational, informing the subscriber that he/she has been detected engaging in suspected copyright infringement, and providing instructions on how to stop, as well as information about where to legally access movies and music online. But if the subscriber persists in his/her wrongdoing, later Alerts will impose “Mitigation Measures,” which may, depending on the particular ISP, include temporary slowing of Internet access or suspension of service pending completion of an online course or contact with an appropriate ISP representative. At no time is the subscriber’s personal information provided to the copyright owners, and the system includes a dispute-resolution system administered by the American Arbitration Association known as the “Independent Review Program” through which subscribers may challenge Copyright Alerts that they believe were sent in error.

The CAS launched in February 2013, and the participants – including the Center for Copyright Information (“CCI”), the body established to administer the program – are only now beginning to evaluate the results. While it is too soon to comment on the efficacy of the CAS, MPAA will consider the program a success if it fulfills its goal of educating the public about illegal distribution and downloading of copyrighted works, reducing the prevalence of such activity, and ultimately encouraging users to shift from the use of illegal peer-to-peer services to legitimate sources of content, including the hundreds of legitimate digital services that currently distribute content online.⁵ The MPAA and its members are also hopeful that the CAS will serve as a stepping-stone or model for similar cross-industry collaborations to address forms of piracy other than peer-to-peer downloading and distribution.

⁵ Additional information about the CAS and CCI may be found at <http://www.copyrightinformation.org/>.

B. Advertising Networks

The past 15 months have witnessed three significant announcements by players in the online advertising ecosystem in the U.S. meant to address the problem of advertisements placed on sites engaged in piracy:

- On May 3, 2012, the Association of National Advertisers (“ANA”) and the American Association of Advertising Agencies (“4As”), with the support of the Interactive Advertising Bureau (“IAB”) released a Statement of Best Practices that “encourages all marketers to take affirmative steps to address the serious problems of online piracy and counterfeiting.”⁶ The statement specifically advises marketers to include language in their contracts and insertion orders to prevent ads from appearing on “rogue” sites dedicated to infringement of others’ intellectual property rights. As the MPAA stated upon the announcement, “This is a major step forward by the associations representing online advertisers and marketers to help ensure that their ads are not unintentionally providing financial support and credibility for online sites whose primary purpose is to steal and market intellectual property.”
- Only July 15, 2013 several major participants in the online advertising ecosystem, including Google, Yahoo, and AOL, with the support of the IAB, announced a set of best practices to address the problem of advertisements placed on sites engaged in piracy.⁷ While we appreciate the recognition by ad agencies, networks and others of the problem, and applaud the support of the Administration’s Intellectual Property Enforcement Coordinator for initiatives such as this, we are disappointed in the particular set of best practices announced in July, which we consider merely an incremental step forward that addresses only a narrow subset of the problem and places a disproportionate amount of the burden on rightsholders. Absent meaningful proactive steps by players in every sector – advertisers, ad agencies, ad placement services, online ad exchanges and rightsholders – the results will be similarly incremental. It is our hope that all parties will work together and build upon July’s announcement. We encourage the Administration to continue its leadership and convene a meaningful and transparent multi-stakeholder process, with a goal of developing a comprehensive and effective response to significantly reduce the presence of legitimate advertising on illegal Internet sites. We especially encourage an approach that would incorporate information from independent third-party organizations such as DoubleVerify⁸, Integral Ad Science⁹, Veri-Site¹⁰ and whiteBULLET¹¹ regarding the amount of infringement on particular sites, enabling

⁶ See http://www.aaaa.org/news/press/Pages/050312_online_piracy.aspx (press release); see also http://www.aaaa.org/news/press/Pages/050312_online_piracy.aspx (text of best practices).

⁷ See <http://www.2013ippactices.com/>

⁸ See <http://www.doubleverify.com/>

⁹ See <http://integralads.com/>

¹⁰ See <http://www.veri-site.com/>

¹¹ See <http://www.white-bullet.com/>

advertisers, ad networks and others to make informed decisions about where their ads should appear, thus avoiding placement on sites with high levels of infringement.

- Lastly, on July 25, 2013, the IAB announced its “Quality Assurance Guidelines 2.0.”¹² Unfortunately, these guidelines are largely toothless when it comes to copyright infringement. While the QAG states expressly that “[c]omplaints regarding QAG non-compliance may affect certification ... *IP infringement complaints do not.*” (emphasis added). That is so even though another section of QAG sets forth a “prohibition” on sale of ad inventory on “copyright infringement” sites. Moreover, as with the Google/Yahoo/AOL best practices referenced above, MPAA and its members were also disappointed that these best practices place nearly all of the burden of ensuring that ads do not appear on sites dedicated to piracy upon rightsholders, and do not adequately encourage other players in the ecosystem to assume their share of responsibility for addressing the problem.

In addition to these examples in the U.S., major rightsholders and players in the online advertising ecosystem in the U.K. have entered into voluntary agreements intended to combat the problem of advertising on sites that contain large amounts of infringing material. Pursuant to the program, rightsholders (represented by the Federation Against Copyright Theft, of which MPAA is a member; the British Phonographic Industry; and the Publishers’ Association) submit evidence of infringement to the National Fraud Intelligence Bureau (“NFIB”), a division of the City of London Police. Once NFIB is satisfied that the submitted evidence meets criteria set forth in the agreements, they may attempt to contact the site operators and ask them to address the infringements.¹³ Also, NFIB will, after allowing time for the site operators to respond, provide a register of the targeted websites to representatives of entities within the U.K.-based advertising ecosystem in the hope that this will encourage brand owners, advertisers and those who purchase advertising for them to address the concerns. Although this is a small pilot program in its early days, initial results look promising in terms of responses from website operators as well as a reduction in the volume and variety of advertising observed on a number of the sites, and this may prove to be a useful model for the U.S. to observe.

The varying strengths of these sets of best practices demonstrates that all voluntary initiatives must be evaluated on their own merits; to say as a general matter that voluntary initiatives are generally a good thing is not to say that any particular voluntary initiative will be effective.

C. Payment Processors

Payment processors remain a lynchpin in helping to reduce potential financial gains by the operators of infringing websites. Well-documented and oft-publicized voluntary efforts between rights-holders and payment processors have resulted in the creation of new relationships

¹² See http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-072513 (press release); see also <http://www.iab.net/media/file/QualityAssuranceGuidelines7252013.pdf> (Quality Assurance Guideline Version 2.0).

¹³ See BBC, “London police start to target pirate websites,” June 4, 2013, available at <http://www.bbc.co.uk/news/technology-22768850>

among interested parties, and we applaud the IPEC's efforts to facilitate and encourage these efforts. Consequently, the creation of both systems and processes for addressing the issues have produced meaningful results, at least with respect to sites that traffic in counterfeit hard goods (e.g., pirated DVDs and Blu-ray discs). We have also seen some positive results with respect to sites that traffic in illegal devices and software that circumvent technical protection measures, although our experience with respect to cooperation in that area has been more mixed. In addition to more consistent cooperation, we would like to see greater leadership from the major credit card networks on the problem of so-called "cyberlockers," which are a category of rogue sites engaged in digital piracy that are typically supported by paid subscriptions. The MPAA and its members continue to engage in dialogue with the card networks and other payment processors and welcome greater and more effective measures that can be taken with respect to cyberlockers. Due to the pivotal position that payment processing holds in regards to the online ecosystem, both the MPAA and payment processors must maintain vigilance in this important area while expanding their efforts to address new forms of copyright infringement as they arise.

D. Search Engines

Search engines represent an obvious and pivotal presence within the online ecosystem. Search plays an important role for those seeking out content – including infringing content – as both a discovery and navigational tool. Many users find infringing content through search engines when they were simply looking for that content – quite possibly from a legitimate source. However, "free" options are highlighted for the user, both in suggested search terms (like autocomplete) and in the search results themselves. When one considers the discovery aspect of search – a significant number of users first find a rogue site through search but then navigate directly to that site upon subsequent visits – the importance of search as a contributor to internet piracy becomes clear. Unfortunately, search engines have thus far failed to undertake sufficiently effective action to address their role in directing users to infringing (and otherwise illegal) content. To give one prominent example, Google, the search engine with by far the largest market share, announced in August 2012 that it would alter its search algorithm to begin factoring in takedown notices for Google links to infringing content when displaying search results, *i.e.*, the more takedown notices that Google received leading to infringing content on a particular site, the lower the site would be listed in Google search results, lessening the chance that users would click on links to that site. While at the time we applauded Google's announcement as a step in the right direction, unfortunately the results to date have been disappointing; the evidence demonstrates that Google's algorithm change has *not* resulted in a demonstrable down-listing of pirate sites.¹⁴

MPAA and its members have shared their concerns with search engines. To date however, the search engines have not undertaken the range and depth of efforts required to

¹⁴ A study by the Recording Industry Association of America concluded, "Six months [after the announcement of Google's algorithm change], we have found no evidence that Google's policy has had a demonstrable impact on demoting sites with large amounts of piracy. These sites consistently appear at the top of Google's search results for popular songs or artists." See Recording Industry Association of America, "Six Months Later – A Report Card on Google's Demotion of Pirate Sites," Feb. 21, 2013, available at <http://76.74.24.142/3CF95E01-3836-E6CD-A470-1C2B89DE9723.pdf>.

address these concerns adequately, despite the fact that the leading search engines have repeatedly stated that the theft of intellectual property is a serious problem.¹⁵

E. User Generated Content Sites

In October 2007, a number of leading producers of audiovisual content (including several of the MPAA's members) and operators of websites that host user-generated content ("UGC") signed on to the "Principles for User Generated Content Services" (the "UGC Principles") to address the problem of infringing content hosted on UGC services.¹⁶ Most significantly, the UGC Principles call on UGC sites to implement automated filtering technologies that block the upload of infringing material. From content owners' perspective, the use of automated filters is a major improvement over the baseline DMCA notice-and-takedown system, which often results in the re-posting of infringing content immediately after it is removed. The promulgation of the UGC Principles has played a major role in the widespread adoption of filtering technologies by responsible UGC sites. Even sites that have not themselves signed on to the UGC Principles – most prominently YouTube – have nonetheless deployed filters to identify copyrighted content, providing the rightsholders with the option to block or monetize the content and share revenues. MPAA thus believes that the UGC principles have played a major role in making adoption of filtering technologies a widespread industry practice, not just in the U.S. but also in international territories like China. We encourage the administration to advance the successful and balanced framework of the UGC Principles in its international outreach efforts, especially to encourage similar progress in Russia.

F. Domain Name Registration

Although voluntary initiatives have met with some success domestically, the global nature of the Internet continues to pose challenges for US copyright holders. Notably, the U.S. Government (through NTIA) committed in the 2013 Joint Strategic Plan for Intellectual Property Enforcement to work with the Internet Corporation for Assigned Names and Numbers ("ICANN") – a private sector, non-profit global organization – to improve the new generic top-level domain ("gTLD") program, including through "mechanisms for intellectual property protection."¹⁷

ICANN recently adopted a resolution requiring safeguards to address the problem of Registered Domain Name Holders engaging in practices that are illegal or harmful to Internet

¹⁵ In addition to the down-ranking of sites based on infringement notices described above, other steps MPAA believes search engines should undertake to address their role in directing traffic to infringing material would include: 1) de-indexing (*i.e.*, not listing in search results) sites substantially dedicated to infringement; 2) de-indexing multiple infringements of the same content on the same site; 3) providing "red light" warnings about rogue sites to warn users on the search results page before they permit them to click links they provide to rogue sites (similar to the system Google currently uses to warn users of links to pages that may contain malware); and 4) adjusting "autocomplete" and related features so that they don't suggest queries that lead to rogue sites.

¹⁶ See <http://www.ugcprinciples.com/>

¹⁷ See <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf>

users, including copyright infringement.¹⁸ Although implementation is still in the early stages, MPAA remains optimistic that the new ICANN requirements will be an important tool for combating copyright infringement on a more global level. Currently, content owners are negotiating with new gTLD applicants over which safeguards are most appropriate and how they should be implemented. ICANN enforcement will be critical to the success of the new gTLD program, and it will be important to monitor the effectiveness of safeguards going forward.

III. HOW TO EVALUATE THE EFFECTIVENESS OF VOLUNTARY INITIATIVES

Here, MPAA responds to the questions listed under “Supplementary Information” at the end of the Federal Register Notice.

1. How should “effectiveness” of cooperative voluntary initiatives be defined?

The definition of effectiveness of a voluntary initiative should be defined by the degree to which the goals of the initiative have been met. For example, given the stated goals of the Copyright Alerts System are to (1) educate consumers about the importance of copyright protection and (2) help them find better ways to enjoy digital content, the effectiveness could appropriately be defined as (1) decrease in consumer sharing of copyright infringing files; and (2) increase in consumer accessing of legal digital content – ideally measured relative to a “control” or *what they would have been in the absence of the initiative*. The latter clause is important because the given metrics may increase or decrease due to other factors; correlation is not causation. Research that best assesses the effectiveness of the initiative should isolate the specific effects of the initiative from other environmental effects.

2. What type of data would be particularly useful for measuring effectiveness of voluntary initiatives aimed at reducing infringement and what would that data show?

The data used to measure the effectiveness of the initiative should also correlate to the goals of the initiative, and should measure whether the goals of the initiative have been met. In the case of “supply” focused initiatives, the measures can involve quantifying changes in supply, and also, potentially, corresponding changes in demand. In the case of “demand” focused initiative, the focus would be on changes in demand for infringing content, and/or potentially changes in demand for legal content. In the CAS example above, the data collected could involve the number of consumers sharing infringing files, the number of infringing files shared, bandwidth consumed by infringement, as well as the number of consumers accessing legal digital content, and/or the amount of legal digital content being accessed, or some derivation. Given the ideal is to measure these metrics relative to a “control” or *what they would have been in the absence of the initiative*, where possible data should be analyzed in areas that lend themselves to this comparison, such as pre- and post-implementation data, data for other non-affected but comparable jurisdictions, etc. The nature of this data will depend on the initiative.

3. If the data is not readily available, in what ways could it be obtained?

¹⁸ See NGPC Resolution, June 25, 2013, <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.c> .

The availability of the data, and the ways it could be obtained, will be highly dependent on the nature of the metrics being tracked. By its nature, illicit behavior is often hard to measure, but various approaches can be employed including surveys, panel measurement, direct measurement in some cases, and sampling techniques. When evaluating measurement studies, the nature and quality of the available data should be assessed. PTO should solicit comments and input from industry and other subject matter experts regarding the accuracy and thoroughness of these studies.

4. Are there particular impediments to measuring effectiveness, at this time or in general, and if so, what are they?

The main impediments in general tend to be the availability of data and the existence of the necessary conditions in the market to isolate the effects of the initiative in question (*i.e.*, a randomized or a natural experiment). Where there are a number of different initiatives and conditions affecting the studied universe, identifying the causal effects of a particular initiative can be challenging and an imperfect process.

5. What mechanisms should be employed to assist in measuring the effectiveness of voluntary initiatives?

As stated above, various approaches can be employed to obtain data, including surveys, panel measurement, direct measurement in some cases, and sampling techniques. Standard statistical and econometric techniques can then be performed to analyze the data.

6. Is there existing data regarding efficacy of particular practices, processes or methodologies for voluntary initiatives, and if so, what is it and what does it show?

While not specifically focused on voluntary initiatives, there is data regarding the efficacy of similar initiatives such as:

- Notice-sending programs to file sharers: “The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France.”¹⁹
- Closure of websites providing major infringing content: “Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales.”²⁰

An example of a voluntary initiative that has been found to *not* be as effective as intended:

- Search engine algorithm adjustment to take into account the level of infringement notices that a site has received: “Six Months Later – A Report Card on Google’s Demotion of Pirate Sites.”²¹

¹⁹ See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240

²⁰ See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229349

²¹ See <http://76.74.24.142/3CF95E01-3836-E6CD-A470-1C2B89DE9723.pdf>

The MPAA appreciates this opportunity to provide our views in response to the Federal Register Notice. We look forward to providing further input and working with the PTO going forward.

Respectfully submitted,

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PUBLIC SUBMISSION

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Comment On: PTO-C-2013-0036-0002

Voluntary Best Practices Study; Extension of Comment Period

Document: PTO-C-2013-0036-DRAFT-0016

Comment on FR Doc # 2013-17166

Submitter Information

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Submitter's Representative: Gina G. Woodworth

Organization: The Internet Association

General Comment

See attached file(s)

Attachments

The Internet Association's Comments Re PTO Voluntary Best Practices Study_8.21.13

United States Patent and Trademark Office

Voluntary Best Practices Study

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Submitted by: The Internet Association

August 21, 2013

The Internet Association submits the following comment in response to the United States Patent and Trademark Office’s (USPTO) request for comments to inform its “Voluntary Best Practices Study.” The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies and their global community of users.¹ We are dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.

The USPTO in the above-captioned docket has invited input from interested parties on the processes, data metrics, and methodologies that could be used to assess the effectiveness of cooperative agreements and other voluntary initiatives to reduce infringement.² This data gathering stems from the Administration’s policy of encouraging the private sector to develop

¹ The Internet Association’s members include Airbnb, Amazon.com, AOL, eBay, Expedia, Facebook, Gilt, Google, IAC, LinkedIn, Monster Worldwide, Path, Practice Fusion, Rackspace, reddit, salesforce.com, SurveyMonkey, TripAdvisor, Yahoo!, and Zynga.

² USPTO Request for Comments, 78 Fed. Reg. 119 at 37210 (June 20, 2013) (“USPTO Notice”).

and implement cooperative voluntary initiatives to reduce infringement that are practical and effective.³ In its 2013 Joint Strategic Plan, the Intellectual Property Enforcement Coordinator (IPEC) noted that a number of voluntary, multi-stakeholder initiatives have commenced in recent years and encouraged a “voluntary, non-regulatory approach to combating online infringement.”⁴ As part of that effort, the IPEC directed the USPTO to solicit input and initiate a process to assess the effectiveness of voluntary initiatives.⁵

The Internet Association member companies participate in several of the voluntary initiatives cited in the 2013 *Joint Strategic Plan*, such as the development of best practices to withdraw payment services for sites selling counterfeit and infringing goods⁶ and the more recent White House initiative on best practices by advertising networks to reduce the flow of advertising revenue to operators of sites engaged in online infringement.⁷

³ U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT (June 2013), *available at* <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipecc-joint-strategic-plan.pdf> at 37.

⁴ *Id.* at 36.

⁵ *Id.* at 37.

⁶ *Id.* at 36.

⁷ OFFICE OF MANAGEMENT AND BUDGET, COMING TOGETHER TO COMBAT ONLINE PIRACY AND COUNTERFEITING (July 15, 2013), *available at* <http://www.whitehouse.gov/blog/2013/07/15/coming-together-combat-online-piracy-and-counterfeiting>.

While willing to engage in these voluntary initiatives, the Internet Association and its member companies encourage the USPTO to set aside the present inquiry. Below we discuss the reasons for our request, namely:

- The USPTO Notice focuses on the single issue of enforcement. This narrow focus ignores the reality that a host of industry practices, marketplace realities, consumer behavioral dynamics, Internet adoption, and statutory changes likely have a larger collective effect on the trends of online infringement.
- The National Academy of Sciences recently made the exact point in its recent publication, *Copyright in the Digital Era: Building Evidence for Policy*,⁸ that policymakers' singular focus on enforcement is taking place without the benefit of basic information about how the copyright system works today.
- Consequently, if the USPTO continues with this inquiry despite the lack of necessary information upon which to make conclusions about copyright policy, it must recognize that any metrics it receives about the incidences and effectiveness of voluntary enforcement efforts will paint an incomplete and ultimately unsatisfactory picture of the appropriateness of voluntary enforcement efforts relative to the trends in online infringement.

⁸ NATIONAL ACADEMY OF SCIENCES, *COPYRIGHT IN THE DIGITAL ERA: BUILDING EVIDENCE FOR POLICY* (2013) [hereinafter *COPYRIGHT IN THE DIGITAL ERA*], available at <http://www.ip-watch.org/weblog/wp-content/uploads/2013/05/NRC-Copyright-in-the-Digital-Era-FINAL-Apr-2013.pdf>.

We recommend that the USPTO recalibrate its evaluation of copyright policy by setting aside this data-gathering project in favor of a more comprehensive examination of the copyright ecosystem. In addition, the USPTO should explore ways to partner with and encourage participation from a wider group of stakeholders and experts in developing this examination.

I. There Is a Demonstrated Need for Better Data On the Entire Copyright System, Not Just Enforcement.

In 2000, the Computer Science and Telecommunications Board of the National Academies of Sciences recommended that

[r]esearch should be conducted to characterize the economic impacts of copyright. Such research might consider, among other things, the impact of network effects in information industries and how digital networks are changing transaction costs. . . . Research should be initiated to better assess the social and economic impacts of illegal commercial copying and how they interact with private noncommercial copying for personal use.⁹

In *Copyright in the Digital Era*, the National Academy of Sciences (NAS) observed that “in the intervening 13 years, only very modest progress” on those questions has been made.¹⁰ As a consequence, the debate over the relationship between digital technologies and copyright protection “is poorly informed by independent empirical research.”¹¹ Accordingly, the NAS

⁹ NATIONAL ACADEMY OF SCIENCES, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000), available at http://www.nap.edu/openbook.php?record_id=9601&page=1 at 227.

¹⁰ *COPYRIGHT IN THE DIGITAL ERA* at *x*.

¹¹ *Id* at 1.

called for comprehensive research to explore a number of factors, including the (i) incentive calculus for various actors in the copyright system, (ii) impact of the costs of voluntary copyright transactions, (iii) enforcement costs and benefits, and (iv) the balance between existing exclusive rights and limitations and exceptions to those rights.¹²

The NAS noted that while the government and private entities have released studies on the contribution of certain “copyright-affected industries” to employment and GDP growth, “these data do not tell us anything specific about the role that copyright plays in generating these assets nor about the impact of any particular copyright policy choices”¹³ Even with respect to the specific issue of infringement, the NAS study observed that data on the effect of infringing copying are incomplete. Missing from the analysis is data regarding the impact of unpaid copies on sales of copyrighted works, the nature and magnitude of sales displacement caused by infringing distribution, and user welfare effects.¹⁴ The Department of Commerce’s *Green Paper* acknowledges this gap and observes that “increasing amounts of data are being amassed from objective sources,” on costs associated with infringement.¹⁵ The *Green Paper* similarly

¹² *Id.* at 10.

¹³ *Id.* at 21.

¹⁴ *Id.* at 31-32. See also U.S. GOVERNMENT ACCOUNTABILITY OFFICE, OBSERVATIONS ON EFFORTS TO QUANTIFY THE EFFECTS OF COUNTERFEIT AND PIRATED GOODS, at 27 (Apr. 2010), available at <http://www.gao.gov/new.items/d10423.pdf> (finding that it is “difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole.”).

¹⁵ U.S. DEP’T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (July 2013) [hereinafter *COPYRIGHT GREEN PAPER*], available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> at 40 n. 207.

acknowledges that traditional markets for physical products are shrinking due in part to the rise of digital goods but does not attempt to quantify that impact or compare it to losses in those markets resulting from infringement.¹⁶

On balance, the NAS study concludes that “the overall picture that emerges from research is still ambiguous, patchy, and in some respects contradictory. There is inconclusive evidence of how infringing copying and distribution affects social welfare or what kind of copyright regime would redress the problem without excessive unintended consequences.”¹⁷

Focusing exclusively on “the processes, data metrics, and methodologies that could be used to assess the effectiveness of cooperative agreements and other voluntary initiatives to reduce infringement,”¹⁸ will be incomplete. It neglects, for example, the need to collect data on the effect of copyright-related transaction costs and related market failures on both the market for copyrighted works and resulting infringement.¹⁹ Moreover, such a focus fails to account for copyright’s role in a larger inquiry about our existing legal framework’s ability to encourage creativity and innovation: “Copyright needs to be seen as part of a larger policy environment related to creativity and innovation, an environment that includes other mechanisms that may

¹⁶ *Id* at 41.

¹⁷ *Id.* at 33.

¹⁸ USPTO Request for Comments, 78 Fed. Reg. 119 at 37210 (June 20, 2013) (“USPTO Notice”).

¹⁹ See COPYRIGHT IN THE DIGITAL ERA at 38.

serve as complements or even alternatives for copyright’s particular mechanism of promoting creativity.”²⁰ It is for this reason that the NAS study urges policymakers not to limit cross-cultural comparisons of copyright systems to enforcement questions.²¹

II. Any Inquiry into Enforcement Initiatives Must Include an Analysis of Efforts to Make Content More Available and Accessible

The link between online infringement and affordable alternatives is beyond question. A recent study by Ipsos, a Norwegian research organization, found that the introduction of legal alternatives to infringement for online content like Spotify and Netflix was followed by dramatic reductions in online infringement of music and videos – 80% and 50%, respectively.²² The Ipsos study is only the most recent iteration of a well-documented relationship between infringement and availability of legal alternatives. A 2008 “Digital Entertainment Survey” noted that the perceived lack of choice in legal sites contributes to online infringement.²³ Nearly two

²⁰ *Id.* at 42.

²¹ *Id.* at 43.

²² Sophie Curtis, *Spotify and Netflix curb music and film piracy*, (July 8, 2013), <http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>. See also Matt Schruers, *The Search Fixation: Infringement, Search Results, and Online Content* (2013) [hereinafter *The Search Fixation*], [http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000821/CCIA_TheSearchFixation%20\(2\).pdf](http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000821/CCIA_TheSearchFixation%20(2).pdf) at 5.

²³ Entertainment Media Research, *2008 Digital Entertainment Survey* (2008), <http://www.arretsuriimages.net/media/library/s127/id12678/original.pdf> at 209.

out of three infringers claim that they would pay for legal downloads if the content they wanted was available.²⁴

Availability and market access of these legal alternatives are under-examined phenomena when compared to other sources and solutions for infringement. As the Social Science Research Council's 2011 report on "Media Piracy in Emerging Economies" observed, much of the source of overseas infringement reduces to a problem with local access to a market for affordable copyrighted works. Unfortunately, this problem receives insufficient attention, if any, in deliberations over how to address infringement. "The centrality of pricing problems to this dynamic is obvious, yet strikingly absent from policy discussions."²⁵

This dynamic also results in a regrettable first-mover problem with respect to infringement of certain digital goods. As the Senate Judiciary Committee noted in its deliberations over the Digital Millennium Copyright Act, "copyright owners will hesitate to make their works readily available without reasonable assurance that they will be protected against massive piracy."²⁶ This understandable reluctance overlooks that the refusal to make available a legal alternative for access to copyright works online incents individuals to engage in online infringement, which is then cited by rights holders as a reason for refusing to make those

²⁴ *Id.*

²⁵ Social Science Research Council, *Media Piracy in Emerging Economies* (2011), available at <http://piracy.americanassembly.org/wp-content/uploads/2011/06/MPEE-PDF-1.0.4.pdf> at iii.

²⁶ S. REP. NO. 105-190 at 8 (1998); *See also* COPYRIGHT GREEN PAPER at 16.

works available. Any measured study of voluntary initiatives must take account of this feedback loop and seek to disrupt it. The *Green Paper*'s assertion that "the answer to the machine is in the machine"²⁷ is only partially correct. The answer to the machine is in the marketplace, where the relationship between infringement and the market for legitimate goods can be more nuanced than it may appear.

III. Any Inquiry Must Account for the Limitations on Conclusions that Can Be Drawn from both Objective and Subjective Measures of Effectiveness, and Give Them Time to Work.

A. The Limitations of Metrics.

If the USPTO decides to move forward with its present inquiry, any proposal of metrics for evaluating the effectiveness of voluntary initiatives to reduce infringement should recognize the inherent limitations on conclusions one may draw from those metrics. As noted in the NAS study, a full understanding of the digital economy will require a collection of additional data that currently do not exist and, in some cases, may not be quantitative or even quantifiable.²⁸

Accordingly, a strictly numerical assessment of cooperative agreements or other voluntary initiatives will tell only a limited story about that initiative's effectiveness in reducing infringement and impact on the overall copyright system.

²⁷ COPYRIGHT GREEN PAPER at 16 (quoting Charles Clark, *The Future of Copyright in the Digital Environment* (Hugenholtz, ed. (1996))).

²⁸ COPYRIGHT IN THE DIGITAL ERA at 59.

Further, any proposal or assessment of metrics should recognize that empirical data related to online infringement and enforcement can lead to many different and possible conflicting conclusions. It is unclear, for example, what the available data tells us about the notice-and-takedown regime beyond the fact that it is being put to use. Moreover, it is facile to deploy this data on either side of an argument over the effectiveness of our current copyright regime in addressing infringement. The rise in the number of URL removal requests received from copyright owners could be construed as an overall increase in online infringement, an increase in automation and efficiency of notice-and-takedown systems, neither, or both. The threshold for any metric or other assessment for cooperative agreements or other voluntary initiatives to reduce infringement should be “does this information advance cooperation throughout the copyright system or simply provide fodder to reinforce existing arguments that lapse into familiar patterns?”

B. Voluntary Initiatives Should Be Given Time and Room to Evolve.

The way that users interact with copyright works in the digital environment rapidly and constantly evolves. For many years, peer-to-peer (P2P) traffic was viewed as both the primary method of online infringement and a primary contributor to broadband congestion. Between 2009 and 2010 alone, however, P2P traffic’s proportional share of Internet traffic plummeted from 38% to 25%.²⁹ A study by the research firm NPD Group similarly found that P2P music

²⁹ Karl Bode, *Cisco: Average Connection Generates 14.9 GM Monthly While video consumption grows and overall P2P impact slows*, DSL REPORTS (Oct. 27, 2010) available at <http://www.dslreports.com/shownews/111109>.

file sharing declined significantly in 2012, driven in large part by increased use of free music streaming services.³⁰

As the migration away from P2P services show, the way that users interact with content on the Internet evolves quickly. Accordingly, voluntary initiatives must be given time to work and room to evolve before their efficacy is evaluated. It is unfortunate, for example, that the Motion Picture Association of America offered a same-day dismissal of the White House Intellectual Property Enforcement Coordinator's and the Interactive Advertising Bureau's joint announcement of Best Practices for Ad Networks To Address Piracy and Counterfeiting.³¹ This swift criticism overlooks that cooperative agreements and voluntary initiatives to address infringement must be iterative, flexible, and backed by reasonable expectations. For example, only 15% of traffic to alleged "rogue sites" in 2011 was referred by search results.³² Expectations of the efficacy of search-based responses to infringement must be calibrated accordingly. Further, search-based initiatives to address infringement can work only if there is

³⁰ The NPD Group, *Music File Sharing Declined Significantly in 2012*, <https://www.npd.com/wps/portal/npd/us/news/press-releases/the-mpaas-statement-on-ipecs-release-of-best-practices-for-advertising-networks> (last visited Aug. 13, 2013).

³¹ See Press Release, Motion Picture Association of America, *MPAA's Statement on IPEC's Release of Best Practices for Advertising Networks (July 15, 2013)*, <http://www.boxoffice.com/news/2013-07-15-mpaas-statement-on-ipecs-release-of-best-practices-for-advertising-networks> (“[A]n incremental step forward that addresses only a narrow subset of the problem and places a disproportionate amount of the burden on rights holders is not sufficient.”).

³² *The Search Fixation* at 2.

cooperation from rightsholders in search engine optimization. “[A] lawful commercial site is unlikely to appear in organic search results for a query including ‘download’ or ‘mp3’ if those terms do not actually appear in the indexed pages of the site.”³³ By any measure, voluntary initiatives must be able to adapt to technological change and enlist the participation of multiple stakeholders in the digital environment.

An example of where these concepts are evolving can be seen with the Copyright Alert System announced in July 2011 by several ISPs and major record labels and movie studios.³⁴ As originally conceived, this “six-strikes” response to infringement over P2P networks involved notice to ISPs, escalating alerts to their subscribers, and the imposition of possible mitigation measures at the ISP’s discretion.³⁵ Recently, Comcast has adapted its response to infringement over P2P networks by sending subscribers a pop-up notification of where they may rent or buy a legal copy of the copyright work they are attempting to view illegally.³⁶ Although Comcast’s

³³ *Id* at 5.

³⁴ See Recording Industry Association of America, *Music, Movie, TV and Broadband Leaders Team to Curb Content Theft* (July 7, 2011) available at http://www.riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=7&news_year_filter=2011&id=2DDC3887-A4D5-8D41-649D-6E4F7C5225A5 (July 7, 2011).

³⁵ Center for Copyright Information, Memorandum of Understanding, Copyright Alert System, at § 4 (July 6, 2011), available at <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>.

efforts are separate from those of the Copyright Alert System participants, they may prove more effective in both reducing infringement and growing the legitimate market for copyrighted works. This type of innovation should be encouraged and the USPTO should be careful not to assess voluntary initiatives by rigid criteria that would hamstring it.

IV. A Comprehensive Review of the Ecosystem Should Be a Multi-Agency, Multi-Stakeholder Effort.

The Department of Commerce's recent *Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy* was a collaborative effort led by the USPTO and NTIA.³⁷ Given that copyright policy is an inter-agency issue, both of these agencies should be substantially involved in any inquiry into cooperative agreements and voluntary initiatives to reduce infringement. As the NAS study observes, copyright occupies a prominent but not exclusive role in a larger policy environment. Particularly with respect to the intersection of copyright and digital technology, the Administration's principal advisor on telecommunications and information policy should have a prominent role in that larger discussion. The Internet Association encourages the USPTO to consult the individuals and entities who contributed to the NAS study and others who have expertise in the digital space. Further, The Internet Association recommends the NAS study to policymakers and suggests that such a comprehensive exploration

³⁶ See Andrew Wallenstein, *Comcast Developing Anti-Piracy Alternative to 'Six Strikes' (Exclusive)* (Aug. 5, 2013), <http://variety.com/2013/digital/news/comcast-developing-anti-piracy-alternative-to-six-strikes-exclusive-1200572790/>.

³⁷ COPYRIGHT GREEN PAPER at *iv*.

is appropriate *prior to* asking the question in the above-captioned docket about the effectiveness of voluntary initiatives to reduce infringement. The government also should partner with academic research institutions to explore various aspects of this discussion.

Conclusion

Cooperative agreements and voluntary initiatives undeniably play an important role in reducing infringement and promoting the overall health of the copyright system. But a meaningful examination of the copyright system requires more of an in-depth and balanced inquiry than that possible by the limited questions posed here. Moreover, an inquiry focused exclusively on enforcement practices without addressing basic, threshold gaps in information about the copyright system as a whole may lead to skewed and ultimately counterproductive policy. The Internet Association encourages the USPTO to contribute to the NAS's efforts to set the table for a fully informed discussion of copyright in the digital environment before focusing on the limited set of questions posed in this proceeding.

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PUBLIC SUBMISSION

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Docket: PTO-C-2013-0036

Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0002

Voluntary Best Practices Study; Extension of Comment Period

Document: PTO-C-2013-0036-DRAFT-0017

Comment on FR Doc # 2013-17166

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General Comment

See attached file(s)

Attachments

AAP Comments on Voluntary Measures PTO_2013_0036



August 21, 2013

United States Patent & Trademark Office
600 Dulany Street
Alexandria, VA 22314

RE: Notice of Inquiry—Voluntary Best Practices Study - PTO-2013-0036

To Under Secretary of Commerce Rea:

Pursuant to the Notice of Inquiry (“NOI”) published in the Federal Register on June 20, 2013 (78 Fed.Reg. 37,210), I submit these comments on behalf of the Association of American Publishers (“AAP”) regarding the U.S. Patent & Trademark Office’s (“PTO”) interest in the “processes, data metrics, and methodologies that could be used to assess the effectiveness of cooperative agreements and other voluntary initiatives to reduce infringement.”

AAP represents nearly 300 publishers, ranging from major commercial book and journal publishers to small non-profit, university, and scholarly presses. Reliable protection and enforcement of copyright are crucial to the publishing industry, and thus AAP supports the Administration’s exploration of new mechanisms to address copyright infringements through private voluntary initiatives in addition to law enforcement and copyright awareness measures.

The diversity of AAP’s membership encourages the organization to be pragmatic in suggesting workable enforcement models that: (1) are practicable for our smaller members; and (2) are scalable for our larger members that distribute works around the world. In today’s digital environment, copyrighted works can be copied, uploaded, and shared with anyone with an Internet connection in a matter of seconds with a few simple keystrokes. Thus, various types of websites have developed to allow individuals [-] to store, search, and share infringing content on a massive scale.¹ However, many of AAP’s smaller publishers do not have the resources to engage in the ongoing monitoring and takedown notification process required by the DMCA.

The persistence and volume of online piracy represent a serious gap in meaningful copyright protection in the digital environment and a diversion of resources from core creative endeavors. As such, online piracy significantly threatens the continued viability of all types of publishers and copyright-based industries as well as the U.S. economy and exports, not to mention our society and culture in immeasurable ways. Therefore, AAP believes that the efficacy, efficiency and practicability of voluntary private-sector approaches are critical to

¹ There are a variety of major sources of infringing files, such as 1) host sites, 2) sites which systematically link to the hosts, 3) sites facilitating file-sharing via peer-to-peer networks, and 4) websites which are storefronts selling individual unit copies of pirated works in digital format.

stemming the rising tide of digital piracy. Without such efforts society will undoubtedly be substantially harmed as creativity, the provision of quality, peer-reviewed information and thinking, and the professional and well-edited presentation of stories, information, and instruction erode away.

Publishers applaud the work of the White House Office of the Intellectual Property Enforcement Coordinator (IPEC) for continually assessing the threat of intellectual property theft to the U.S. economy, identifying ways to improve the government’s capabilities for combating such theft, and for bringing together stakeholders from all of the various segments of the intellectual property ecosystem to create innovative solutions for curtailing piracy and counterfeiting. Furthermore, AAP was pleased to see in IPEC’s 2013 Joint Strategic Plan that PTO will start evaluating the effectiveness of voluntary anti-piracy initiatives. Below, AAP provides an overview of our recommendations, based on input received² from our members, regarding such initiatives and issues related to evaluating their effectiveness.

Publishing Industry Recommendations

1. How should “effectiveness” of cooperative voluntary initiatives be defined?

“Effectiveness” in the context of voluntary anti-piracy initiatives should be defined as achieving the objectives of the initiative and fostering a healthier online environment for intellectual property to flourish.

For example, e-book piracy websites’ business models are often based on the sale of advertising space on their websites rather than on the sale of individual unit copies of the infringements (although the latter does happen as well). As of July 15, 2013, the IPEC announced that the Interactive Advertising Bureau and top ad networks (Google, Yahoo!, 24/7 Media, etc) have committed to a set of best practices aimed at “reducing the flow of ad revenue to operators of [web]sites engaged in significant piracy and counterfeiting.”³ To accomplish this goal, these best practices stipulate that ad networks can remove ads from web pages featuring infringing content or remove the site from the ad network completely. Recognizing that there is no silver bullet when it comes to stemming online piracy, it is critical that these best practices be widely implemented by advertisers and their placement services in order to reduce incentives to operate dedicated online piracy websites.

Effectiveness of this initiative should be measured by the extent to which rights holders and ad networks can build mutual trust and create a notice and removal process that: (1) operates in a timely manner; (2) requires reasonable time, effort, and expense for both copyright holders and ad networks; and, at a minimum, (3) results in the complete removal of notorious piracy sites from ad networks and the removal of ads from clearly infringing content pages, such as those containing content which the copyright owner has identified as not authorized for distribution on the site.

However, AAP is concerned that the effectiveness of this initiative may already be undermined by the complexity of the requirements copyright owners must comply with in sending valid notices to ad networks. Specifically, notices must contain: (1) the specific URLs of the alleged infringements (clearly identifying the “specific products or materials and their location on the website”); (2) the identity, location and contact information for the website; (3) further evidence of infringement, e.g., through screenshots; and (4) a copy of a cease & desist letter or takedown notice previously sent to the website as well as a description of action undertaken by the website.⁴

² AAP notes that we do not represent all publishers in the U.S. but that our comment is a reflection of the feedback we received from our members.

³ Best Practice Guidelines to Address Piracy and Counterfeiting, July 2013 (available at <http://www.2013ippractices.com/>) (last visited, Aug. 21, 2013).

⁴ See *Id.* at Appendix A.

The goal of the Ad Network Best Practices is to “discourage or prevent, to the extent possible, websites that are principally dedicated to selling counterfeit goods or engaging in copyright piracy and have no substantial non-infringing uses from participating in the Ad Network.” Requiring specific URLs for each “specific product or material,” instead of a representative list of the content items being infringed, for sites that contain multiple infringements (as would be the case for a site “principally dedicated to...engaging in copyright piracy”) is inefficient and unnecessary, particularly when the copyright owner is also required to provide the ad network with previously submitted, DMCA-compliant, takedown requests regarding the same content. One of the most important characteristics of private, voluntary initiatives is that their terms are more easily modified than statutory requirements. As such, we hope that as a result of PTO’s review of the effectiveness of voluntary initiatives, such as the Ad Network Best Practices, stakeholders will be encouraged to take steps to modify procedures that are found to inhibit the initiative’s effectiveness in curtailing online piracy.

It should also be noted that respect for privacy, due process, and freedom of speech are critical to maintaining a creative Internet-economy, and such concerns can coexist with truly effective anti-piracy efforts. Technologies are readily available and already voluntarily employed by some legitimate websites to curb the prevalence of infringing content.⁵ Similarly, where technology can be used by ad networks to ensure that when a rights holder identifies a particular work that is not legitimately available for free, ads supporting any page containing that work, on a website shown to be “principally dedicated to ...engaging in copyright piracy,” should be disabled, instead of requiring continuous searches and unique notices from the copyright owner for each page containing the same underlying work.

As noted by the IPEC, reducing ad revenue flowing to websites which steal intellectual property will “protect[] and, in fact, further encourage the innovation made possible by an open Internet.” Moreover, encouraging innovation is essential to providing the sustainable intellectual property ecosystem required by our Constitution, which directs Congress “to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Art. 1 §8 cl. 8, U.S. CONST. A truly effective voluntary initiative will support the letter and the spirit of this mandate.

2. What type of data would be particularly useful for measuring effectiveness of voluntary initiatives aimed at reducing infringement and what would that data show?

The data needed to measure the effectiveness of each initiative will vary, but AAP makes the following suggestions based on our experience working to combat online piracy of books and journals:

- Publishers will be better able to gauge piracy activity and industry losses, and to improve how they allocate antipiracy resources, if ISPs provide data disclosing how many downloads have been made of the infringing files detected on their servers.
- With respect to content hosting sites, publishers are able to obtain counts of numbers of infringements found and takedown notices sent by third-party piracy monitoring firms. However, publishers do not have data on the number of times each infringing file has been downloaded.⁶ If this data were available, and verifiable, rights holders could ascertain whether particular anti-piracy initiatives were reducing traffic to infringing material, as well as have a better ability to try to measure losses due to online piracy of their titles.

⁵ For example, to AAP’s knowledge, Wattpad and Scribd both use upload filters, which are described in more detail in Section 6.

⁶ This information used to be provided by the infringing sites until a study by Contributor (an anti-piracy monitoring firm) released in January 2010 indicated dramatic numbers of downloads with respect to the 913 titles on which it collected this information: an average of approximately 10,000 downloads of each individual title.

Publishers would also be better able to allocate resources and assess the effectiveness of voluntary measures to remove infringing content if service providers confirmed receipt of such notices, whether they are sent pursuant to the provisions of the DMCA, as part of the Ad Network Best Practices, or otherwise.

- Efforts to encourage ISPs and cyberlockers to share information about repeat infringers also would be welcome, to the extent that implementing such a policy would be permissible under law. For example, some ISPs and cyberlockers have voluntarily adopted repeat infringer policies whereby users the ISP has identified as having uploaded and distributed infringing files on multiple occasions are barred from using the service. However, rights holders are dependent on ISPs and cyberlockers putting in place and enforcing these repeat infringer policies.

Currently, there is little if any transparency as to: (a) the number of users barred from services; (b) the volume of warning notices sent to users before punitive steps are taken (if ever); (c) whether a repeat infringer, once identified and barred, can regain access to service under a new user ID; and (d) whether ISPs with repeat infringer policies are even tracking whether users upload and distribute infringing content. This lack of transparency coupled with the very limited ability of rights holders to ascertain infringer IP addresses results in an inability to assess repeat infringer policies or to develop relevant best practices. Without more transparency, rights holders will continue to spend hundreds of thousands of dollars annually on third-party piracy monitoring services and sending millions of take down notices,⁷ which could be significantly lessened if enforcement of repeat infringer policies could be verified, thus providing greater incentive for ISPs to enforce such policies.

- Additional information useful to publishers that would help measure the effectiveness of voluntary measures would be titles-based reports on the number of blocked or removed infringements. Having this information could help prioritize and target enforcement efforts.
- Further cooperation and transparency from domain name registrars regarding enforcement of their terms and conditions (specifically, terms that prohibit domain names that are registered through their services from being used for purposes that infringe third-party rights) would also assist rights holders.

3. If the data is not readily available, in what ways could it be obtained?

Much of the data is either held or obtainable by certain entities in the online ecosystem, i.e., the ad networks, ISPs, search engines, cyberlocker operators, etc. However, as explained above, there is currently little transparency provided by these entities regarding anti-piracy measures. The Administration may be in the best position to encourage all entities within the ecosystem to reasonably share data, as allowed by law, to facilitate more efficient, accurate and effective efforts by content owners to reduce online piracy.

4. Are there particular impediments to measuring effectiveness, at this time or in general, and if so, what are they?

While there is difficulty in ascertaining a precise loss value due to piracy or the specific causal relationship between an enforcement initiative and sale of legitimate content, the volume of infringing material found online is sufficient to establish that content owners face a severe problem and that meaningful

⁷ As one example of the sheer volume of notices that must be sent to make any impact on piracy, see Google's Transparency Report on requests for removal of links to infringing material (<http://www.google.com/transparencyreport/removals/copyright/>), which shows that Google receives *millions* of takedown requests each month, for hundreds of thousands of specific URLs, by thousands of copyright owners.

cooperation between private sector stakeholders is necessary to aid rights holders in combating large-scale online infringement.

That said, currently it is usually not possible to determine how many times a file that has been uploaded to a cyberlocker has been downloaded.⁸ This is a key piece of data which, although not conclusive, would better enable content owners to evaluate the impacts of online piracy on legitimate markets for their works. For example, a content owner might be able to usefully compare illegal download rates with legitimate sales trends, and on that basis reach certain conclusions regarding the impact of the availability of the infringing files on legal sales (after factoring in any other variables which may have impacted sales rates during the relevant time period). Additional useful data which service providers could provide to content owners would include, on a title-specific basis wherever applicable, numbers of infringement notifications sent to infringing subscribers, numbers of times an infringing upload was blocked or removed by voluntary preventive technical measures, outcomes of investigations by payment processors or advertising placement services into allegedly infringing sites or pages, and numbers of infringing subscribers whose service has been suspended or terminated due to repeat infringing activity. Another critical data set that for which there is little in-depth information is the purchasing behavior of illegal downloaders. This information would better enable rights holders to evaluate the impacts of infringement, but such information has also been difficult to obtain.

Establishing the effectiveness of any anti-piracy initiative will likely prove challenging, but could be significantly improved by encouraging service providers to be more transparent in providing relevant data. Lastly, although measuring effectiveness in terms of sales impacts is important, it is also critical to evaluate and recognize effectiveness in terms of promoting respect for copyright, as well as supporting the creative efforts of copyright owners by upholding their ability to control the use of their works as prescribed by the Copyright Act.

6. Is there existing data regarding efficacy of particular practices, processes or methodologies for voluntary initiatives, and if so, what is it and what does it show?

Filtering

As anecdotal examples, two popular file-hosting sites – Scribd.com and Wattpad.com – have deployed technical filters which reportedly have achieved dramatic drops in the number of infringements appearing on the sites, in turn reducing the numbers of instances where publishers need to send takedown notices to the site operators. (Scribd uses a database of full and partial texts of works which the publishers have flagged as copyright protected and not authorized to be shared, against which its filter checks the content of all files users attempt to upload to the service. Wattpad’s system checks the uploads against a database which identifies publishers’ products by author name, publisher and imprint name, and the title of the product.) These examples show that filtering technologies can prevent clearly-identifiable or previously-identified infringing content from appearing and *reappearing*⁹ on websites. However, such technologies have yet to be adopted by most host sites despite publishers’ vocal advocacy for having websites adopt these reasonable and responsible measures.

Repeat Infringer Policies

The Copyright Alert System (CAS), launched in 2013, is a voluntary initiative between 5 major ISPs and a number of movie and recording studios to promote copyright awareness to help reduce online piracy occurring

⁸ See supra, n. 6.

⁹ An effective anti-piracy initiative should ensure that material identified as infringing does not reappear on the same site. The reappearance of the same infringing content only means additional time and money spent by the rights holder and the site operator to identify, notify, and take action to remove the infringement—an inefficient use of resources where technology is currently available and used to prevent this exact situation.

through P2P networks. Preliminary data on its effectiveness is not yet available. However, the governments of France and South Korea have been testing out repeat infringer laws with content companies, ISPs, and others to develop frameworks whereby such infringers are discouraged from infringing activities by “graduated” enforcement steps, depending on how many times they have been warned about their infringing conduct and have nevertheless continued to engage in it. Evidence of the effectiveness of these graduated enforcement strategies, at least in the early stages of their launch, is highlighted in Michael Smith’s 2012 study “*The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France.*” The results of his study show that “increased consumer awareness of HADOPI (the French graduated response law) caused iTunes song and album sales to increase by 22.5% and 25% respectively...and [that] the observed sales increase [was] much larger in genres that, prior to HADOPI, experienced high piracy levels (e.g., Rap and Hip Hop) than for less pirated genres (e.g., Christian music, classical, and jazz).”¹⁰

Conclusion

AAP looks forward to continued engagement with the PTO, IPEC and stakeholders to further explore ways to make combating copyright piracy more efficient and effective.

Sincerely,

Ed McCoyd, Esq.
Executive Director for Digital, Environmental & Accessibility Affairs
Association of American Publishers

¹⁰ Danaher, Smith, Telang and Chen, “*The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*” (2012) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240&download=yes).

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Voluntary Best Practices Study; Extension of Comment Period

Document: PTO-C-2013-0036-DRAFT-0018

Comment on FR Doc # 2013-17166

Submitter Information

Name: Anonymous Anonymous

Address: United States,

Submitter's Representative: Matthew Schruers

Organization: Computer & Communications Industry Association (CCIA)

General Comment

Please find attached written comments of the Computer & Communications Industry Association (CCIA) in response to the Office's request for comment on the Voluntary Best Practices Study (PTO-2013-0036).

Attachments

CCIA Voluntary Practices

Before the
United States Patent & Trademark Office
Department of Commerce
Washington, DC

In re

Request of the United States Patent and
Trademark Office for Public Comments:
Voluntary Best Practices Study

Dkt. No. PTO-C-2013-0036

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the U.S. Patent & Trademark Office (USPTO) and published in the Federal Register at 78 Fed. Reg. 37,210 (June 20, 2013), the Computer & Communications Industry Association (CCIA) submits the following comments.¹

I. On the Merits of Government Evaluation

Consistent with the IP Enforcement Coordinator's (IPEC) 2013 Joint Strategic Plan (JSP), the USPTO has solicited input on processes, metrics, and methodologies that may be employed to assess the effectiveness of cooperative agreements and other initiatives to reduce infringement. The JSP provided no indication of the basis for this directive; rather, it proceeded from the unexamined premise that the U.S. Government should be evaluating unregulated, private sector action in the first place. This proposal itself deserves additional consideration. Depending on the nature of the evaluation, industry stakeholders may perceive government assessments as a form of soft regulation. Should government evaluation be perceived as imposing regulatory compliance burdens, it will deter participation in "voluntary best practices," particularly if policymakers should characterize one given effort as superior to another, toward meeting some yet-unstated metric. Such evaluation may also be perceived as setting a minimum bar of regulatory compliance necessary for market entry. Given that new entrants will be unable to deploy multimillion-dollar content and brand protection programs similar to those that larger

¹ CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. CCIA members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A list of CCIA members is available at <http://www.ccianet.org/members>.

online brands have constructed, the perception of a regulatory hurdle for starting new online businesses may have the unintended effect of impeding new entrants and consolidating the existing online marketplace.

II. *Defining the Scope of Review: The Need for Lawful Alternatives*

The voluntary practices policy discussion has been largely restricted to creating new processes, procedures, and programs aimed at directly preventing online infringement. The conversation and this inquiry should be broadened to take into account rights-holder initiatives to license and deploy comprehensive, legitimate avenues for purchase of goods, content, and services, particularly online.

The IPEC JSP reflected an unduly narrow focus, identifying various service-provider initiatives in which rights-holders may (or may not) participate. Preventing infringement is not the overarching purpose of intellectual property statutes. “[T]he monopoly privileges that Congress has authorized, while ‘intended to motivate the creative activity of authors and inventors by the provision of a special reward,’ are limited in nature and must ultimately serve the public good.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994); accord *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 546 (1985). In short, IP is a means to an end: promoting invention and creativity activity, which itself fosters the broader goal of improving public welfare. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Bonito Boats Inc. v. Thunder Craft Boats Inc.*, 489 U.S. 141, 146 (1989). Stemming infringement alone will not achieve these goals; policy action must ultimately foster the sale of goods, content, and services.

Beyond the established industry practice of DMCA compliance, other voluntary initiatives have included efforts by broadband providers, payment processors, advertisers, and numerous online platforms. To date, however, there has been insufficient attention paid to initiatives aimed at indirectly preventing infringement by increasing lawful content options for online users. The result is that recent years have witnessed the creation of numerous new “sticks,” *i.e.*, inter-industry programs deployed against infringers, with limited progress toward accompanying inter-industry “carrot” initiatives to draw the public to lawful products and services. Such “carrots” could include best practices for windowing releases, to move works to digital distribution platforms sooner. The exclusive theatrical release window for movies is a substantial motivator of online piracy. While rights-holder constituencies often point to a large volume of licensed services, many services are denied access to sought-after works, and the

selective withholding of certain high-profile artists or works often means that the content which users seek is not available on any platform. USPTO could also voluntarily facilitate conversations on harmonizing licensing practices, to reduce transaction costs and encourage new services to enter the market. Other best practices could include something as simple as optimizing the online presence of rights-holders and content delivery services to maximize the online visibility of lawful content offerings.² A recent rumored Comcast proposal, which would attempt to direct users engaging in unauthorized downloading toward lawful content offerings, received some media attention.³ The design of such a program, or similar programs, may be an appropriate subject here, but it could not be effectively implemented without broad participation from rights-holders across various industries. The JSP acknowledges this, in part, saying that “[r]ightholders have a critical role to play. Voluntary initiatives will be most effective and efficient if all stakeholders are working together cooperatively. Consequently, we will pursue a set of best practices for rightholders that are using the voluntary initiatives created by service providers.”⁴

Thus, best practices should extend beyond participation in piracy-prevention programs to include the facilitation of successful lawful mechanisms for accessing content. For example, recent research indicates that the introduction of Spotify into the Netherlands and Sweden substantially decreased unlawful music downloads in those countries, whereas it still remains quite prevalent in Italy, where Spotify only just launched.⁵ A study released by Norwegian firm Ipsos MMI found that a 50% reduction in video piracy and 80% reduction in music piracy followed the introduction of Netflix and Spotify into that country.⁶

By contrast, reducing consumers’ options for lawfully accessing content (presumably, with the aim of securing greater licensing revenues from various windows or content outlets) appears to lead to increased online piracy. For example, in 2011 commentators observed a

² Matthew Schruers, *The Search Fixation: Infringement, Search Results, and Online Content*, CCIA (2013), at [http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000821/CCIA_TheSearchFixation%20\(2\).pdf](http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000821/CCIA_TheSearchFixation%20(2).pdf).

³ Andrew Wallenstein, *Comcast Developing Anti-Piracy Alternative to ‘Six Strikes’*, *Variety*, Aug. 5, 2013, available at <http://variety.com/2013/digital/news/comcast-developing-anti-piracy-alternative-to-six-strikes-exclusive-1200572790>.

⁴ U.S. Intellectual Property Enforcement Coordinator, *2013 Joint Strategic Plan on Intellectual Property Enforcement* (2013), at 36, available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf>.

⁵ Will Page, *Adventures in the Netherlands*, Spotify, July 17, 2013, available at <http://press.spotify.com/uk/2013/07/17/adventures-in-netherlands>.

⁶ Sophie Curtis, *Spotify and Netflix Curb Music and Film Piracy*, *The Telegraph*, July 18, 2013, at <http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>.

marked increase in downloading of Fox television programming when that network began delaying shows' release on the Hulu platform,⁷ and more recently, the Washington Post observed that "online piracy of [CBS's 'Under the Dome'] had risen by more than a third where viewers had lost access to CBS" during the Time Warner/CBS retransmission fee dispute.⁸ The converse effect – consumers opting for legal avenues when they are available and infringing when they are not – has been observed overseas. A 2012 study found that piracy had a limited effect on U.S. box office revenues, in contrast to international releases. Because there is often a release window between U.S. and international releases, many consumers do not have a legal avenue with which to view films during their initial release period, and instead, turn to piracy.⁹ Findings of this nature suggest that voluntary initiatives, focused on increasing access to content, through new services and platforms, are a necessary strategy for mitigating infringement.

This review should therefore consider to what extent content availability can be increased, and licensing agreements may be facilitated, in order to provide consumers with more options.

III. *Measuring Effectiveness of Voluntary Initiatives*

Various obstacles confront attempts to measure the effectiveness of any anti-piracy initiative. First, as noted above, government evaluation of an initiative's efficacy, whether that measure is to reduce infringement or maximize lawful sales, may be perceived as a form of soft regulatory action that could deter experimentation with innovative new ways of deterring unlawful activities and encouraging lawful transactions. Additionally, information necessary to competently assess the costs and benefits of various initiatives may be non-public.

Second, measuring the impact of piracy has always posed modeling and data-gathering problems, and absent natural experiments, changes in the quantity of infringement cannot be associated with particular policies with any precision.¹⁰ As the USPTO recently noted, GAO observed in 2010 and again in Congressional testimony last month that estimating the economic

⁷ Ernesto, *Fox's 8-Day Delay on Hulu Triggers Piracy Surge*, TorrentFreak, Aug. 22, 2011, at <http://torrentfreak.com/foxs-8-day-delay-on-hulu-triggers-piracy-surge-110822>.

⁸ Brian Fung, *How CBS Sparked More Online Piracy – of its Own Show*, Wash. Post, Aug. 8, 2013, at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/08/how-cbs-sparked-more-online-piracy-of-its-own-show>.

⁹ Brett Danaher & Joel Waldfogel, *Reel Piracy: The Effect of Online Film Piracy on International Box Office Sales* (2012), available at <http://ssrn.com/abstract=1986299>.

¹⁰ Even quantifying allegedly infringing Internet traffic gives rise to ambiguities. Data volume, for example, is a poor metric for measuring infringement since video represents one of the most data-intensive file formats. While data volume may be an attractive metric because it provides a basis for sensational claims, the disproportionately larger size of video files skews empirical observations.

impact of IP infringement is “extremely difficult,” due in part to the fact that loss estimates “involve assumptions such as the rate at which consumers would substitute counterfeit for legitimate products, which can have enormous impacts on the resulting estimates.”¹¹ As a result, it is “difficult, if not impossible, to quantify the economy-wide impacts.”¹²

Ultimately, the effectiveness of any practice should be measured by its capacity to induce lawful transactions. “Evidence from the founding, moreover, suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science.” *Golan v. Holder*, 132 S. Ct. 873, 888 (2012). For example, preventing infringements that do not substitute for lawful sales, *e.g.*, because the work is not available on the market, are unlikely to increase remuneration to rights-holders. Policy must therefore prioritize the creation of legitimate avenues for sale.

Assessments of the efficacy of a particular voluntary program should also take into account false positives. That is, it is not costless when a voluntary measure is abused in a manner that penalizes non-infringing users, services, or content. Intentional misuse of the DMCA, and certain third-party providers who produce high-volume, low-accuracy DMCA takedowns detract from the value of DMCA compliance by restricting access to lawful content. Although numerous anecdotes of DMCA abuse may be found,¹³ a proper empirical assessment of the costs of misuse would require greater transparency in notices submitted by rights-holders and their designated agents. Nevertheless, a complete evaluation of any voluntary best practice must account for costs associated with abuse of that practice by interested third parties.

IV. Conclusion

Setting aside the merits of evaluating the efficacy of voluntary practices, the USPTO may play a role encouraging parties to share information. CCIA supports the Administration’s policy of building a data-driven government; as the National Research Council recently noted, U.S.

¹¹ U.S. Dep’t of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (2013), at 8 n.27, available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (citing GAO, *infra*).

¹² Loren Yager, *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, Government Accountability Office, GAO-10-423 (2010), available at <http://www.gao.gov/assets/310/303057.pdf>; Susan E. Offutt, *Insights Gained from Efforts to Quantify the Effects of Counterfeit and Pirated Goods in the U.S. Economy*, Government Accountability Office, GAO-13-762T (2013), available at <http://www.gao.gov/assets/660/655781.pdf>.

¹³ Matthew Schruers, *This Post Is No Longer Available Due To... (Why DMCA Abuse Occurs)*, Disruptive Competition Project, Aug. 14, 2013, at <http://www.project-disco.org/intellectual-property/081413-this-post-is-no-longer-available-due-to-why-dmca-abuse-occurs>.

copyright policy debates “are poorly informed by objective data and empirical research.”¹⁴ This is one area in the copyright policy space where objective information could be gathered.

Respectfully submitted,

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August 21, 2013

¹⁴ National Research Council, *Copyright in the Digital Era: Building Evidence for Policy* (2013) at ix, available at http://www.nap.edu/catalog.php?record_id=14686.

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Comment on FR Doc # 2013-17166

Submitter Information

Name: Mitchell Stoltz

Organization: Electronic Frontier Foundation

General Comment

See attached file(s)

Attachments

EFF Comments on Voluntary Best Practices

**BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE
DEPARTMENT OF COMMERCE**

Docket No. PTO-C-2013-0036

**COMMENTS OF THE ELECTRONIC FRONTIER FOUNDATION ON A VOLUNTARY
BEST PRACTICES STUDY**

The Electronic Frontier Foundation (EFF)¹ applauds the Patent and Trademark Office's commitment to data-driven policymaking. The question asked in the PTO's June 20, 2013 request for comment is an important one: how should the effectiveness of so-called "cooperative voluntary initiatives" for copyright and trademark enforcement be defined? The answer is that "effective" enforcement of copyright and trademark laws, whether through government resources or private agreements, must promote the balance of public and private interests that those laws embody. If the PTO evaluates private agreements meant to reduce copyright and trademark infringement, it should consider how well such agreements serve the ultimate goals of those statutes, which are not to "reduce infringement" but to promote knowledge, grow the arts, and protect consumers.

So-called voluntary initiatives such as the "Copyright Alert System" and the recent agreement among Web advertising networks are not entirely voluntary - the federal government has taken an active role in promoting, encouraging, and shaping them. [CITES]. American tax dollars, and the active attention of federal officials, led in part to these agreements coming to pass. And this encouragement and attention from policymakers carries an implied threat of future regulation if "voluntary" agreements don't occur.

Because the federal government is deeply involved in these initiatives, the government should measure their effectiveness by the same standards it applies to public policy, including fealty to Constitutional due process, respect for freedom of speech, promoting consumer choice and competition, and a broad view to the health of our dynamic economy.

For copyright enforcement in particular, the PTO should evaluate private initiatives by looking at how they contribute to the *creation* and *availability* of creative and educational works. The PTO should avoid looking solely or primarily to the *volume of infringement*, which says little about the impact of enforcement policies on the arts or the economy.

¹ EFF is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents more than 21,000 contributing members. On behalf of its members, EFF promotes the sound development of copyright law as a balanced legal regime that fosters creativity, innovation, and the spread of knowledge.

Question 1: Defining Effectiveness

The purpose of copyright law is “to Promote the Progress of Science.”² Copyright’s ultimate purpose is the public good, not private monetary gain. According to the Supreme Court, copyright “reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”³ Monetizing the proliferation of copies of creative works is a means to that end, not an end in itself. Accordingly, the PTO should measure the effectiveness of private copyright enforcement by looking at how well it furthers the arts. Effectiveness should be defined in terms of leading to the creation of more literature, audiovisual work, music, photography, software, etc., as well as creating a broader audience for those arts. This should be the primary measure of success of any copyright enforcement effort; indeed of any federal copyright policy.

U.S. copyright and trademark law incorporate other values and goals, as well. The laws incorporate, and are constrained by, the First Amendment’s protection of free speech.⁴ The fair use provisions of copyright and trademark law are part of this First Amendment protection. These doctrines, and the court cases interpreting them, make clear that overbroad and heavy-handed enforcement of intellectual property rights can and does chill free expression. The U.S. Intellectual Property Enforcement Coordinator’s current strategic plan states the Administration’s policy that “[e]nforcement approaches should not discourage authors from building appropriately upon the works of others.”⁵

Finally, like all of U.S. law, copyright and trademark enforcement must provide due process; that is, assurance that people are not deprived of rights or property without a fair opportunity to present defenses and have disputes evaluated by a neutral arbiter. Because private enforcement initiatives are being promoted as an alternative to litigation and regulation, and because the federal government is actively promoting these initiatives, they cannot be considered effective without considering whether those subject to enforcement have a full and fair process for challenging an accusation. The IP Enforcement Coordinator has

² US. Const. Art. 1. Sec. 8.

³ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (“the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement. . . . the monopoly privileges that Congress has authorized . . . are limited in nature and must ultimately serve the public good.”).

⁴ *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 812 (9th Cir. 2003).

⁵ 2013 Joint Strategic Plan on Intellectual Property Enforcement at 18 (“2013 Strategic Plan”); *available at* <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf>.

stated on several occasions that “it is critical that [IP enforcement] be undertaken in a manner that is consistent with all applicable laws and with the Administration’s broader Internet policy principles emphasizing privacy, free speech, competition, and due process.”⁶ Measuring the effectiveness of private IP enforcement must include measuring how well such enforcement provides for due process.

Question 2: Types of Data That Will Be Useful For Measuring Effectiveness

The PTO should attempt to measure the effect of private copyright enforcement on the progress of the arts and learning. The PTO should attempt to correlate the presence of private enforcement agreements, such as the recent agreements among Internet service providers and Web advertising networks, with the growth (or decline) of creative works being made available in the relevant media. For example, a pair of reports issued last year entitled “The Sky Is Rising” tracked the growth of output in the video, book publishing, music, and video game markets in the U.S. and Europe.⁷ That data, or similar data, could show the growth of content and revenues in particular media with and without agreements like the “Copyright Alert System.”⁸

Measurements of the volume of infringement should be used secondarily, if at all. The presence of infringement does not necessarily correlate with market harm. In particular, the PTO should be wary of using statistics about the volume of Digital Millennium Copyright Act takedown notices target at a given medium or type of content – the data provided in transparency reports by several major Internet platforms. DMCA notices represent only accusations of copyright infringement. They are commonly generated by highly automated processes that produce many false or mistaken identifications of infringing content.⁹ In addition, a small number of entertainment conglomerates, trade associations, and third-party service providers generate a large percentage of takedown notices.¹⁰ Thus, the overall statistics about how many notices issue over time and which platforms and content types are targeted are influenced heavily by the business decisions of a small number of companies, making them unrepresentative and subject to manipulation.¹¹

⁶ 2013 Strategic Plan at 35-36.

⁷ <http://www.techdirt.com/skyisrising/>; <http://www.techdirt.com/skyisrising2/>.

⁸ For trademark law, the PTO should seek to measure the effect of private initiatives on the value of brands and consumers’ confidence in the products that they buy.

⁹ See, e.g., “Disney v. Hotfile,” <https://www.eff.org/pt-br/cases/disney-v-hotfile>.

¹⁰ For example, according to Google’s Transparency Report, for the month ending August 21, 2013, out of 17,218,369 URLs requested to be removed from Google Search using DMCA notices, 10,521,532 or 61% were requested by the top five reporting organizations, BPI Ltd, Degban, the Recording Industry Association of America, MarkMonitor AntiPiracy, and Fox Group Legal.

<http://www.google.com/transparencyreport/removals/copyright/> (accessed Aug. 21, 2013).

¹¹ For example, the volume of DMCA notices sent to Google increased tenfold in the months after the tabling of the Internet blacklist bills SOPA and PIPA, which would

In addition to measuring the effectiveness of private enforcement agreements at promoting statutory goals, the PTO should measure their effectiveness at protecting free speech and providing fair and robust process for those accused of infringement (or facilitating infringement). As these values are primarily non-economic and difficult to quantify, the PTO should look to independent expert analysis. This analysis should include scrutiny of the notification and appeal procedures created by the private enforcement agreements.

The PTO should also look at the monetary costs of private enforcement agreements, including whether such agreements contribute to price increases or degraded service for the customers of the services who implement the agreement. The PTO should also look at whether the services who implement an agreement continue to provide meaningful choices to consumers in terms of policies and approaches; that is, to ensure that such agreements do not lead to an anticompetitive homogenization of consumer choices.

Question 4: Impediments to Measuring Effectiveness

Because copyright and trademark law have multiple policy objectives, no single figure or type of data can measure the effectiveness of enforcement programs. Moreover, only some of the policy objectives are economic in nature. Comparing, for example, the impact of a private enforcement regime on artists' revenues against the societal cost of such enforcement mechanisms being used carelessly or maliciously is obviously an apples-to-oranges comparison. But both must factor into an evaluation of effectiveness.

Regarding economic data, the PTO should avoid using the assumptions that the Government Accountability Office criticized in its 2010 report on the economic impact of "piracy," and its August 2013 comments on industrial espionage.¹² The GAO noted that "[e]fforts to estimate losses [caused by infringement] involve assumptions such as the rate at which consumers would substitute counterfeit for legitimate products, which can have enormous impacts on the resulting estimates,"

have created new mechanisms for blocking Internet content, suggesting that the volume of such notices may have been deliberately reduced while major copyright holders sought an alternative to the DMCA. See Techdirt, "Funny How Copyright Holders Only Ramped Up Google DMCA Takedowns After SOPA Failed" (Dec. 13, 2012), <https://www.techdirt.com/articles/20121212/22445321369/funny-how-copyright-holders-only-ramped-up-google-dmca-takedowns-after-sopa-failed.shtml>.

¹² U.S. Government Accountability Office, "Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods" (April 2010), *available at* <http://www.gao.gov/new.items/d10423.pdf>; U.S. Government Accountability Office, "Insights Gained from Efforts to Quantify the Effects of Counterfeit and Pirated Goods in the U.S. Economy," (July 2013) ("GAO 2013 Testimony"), *available at* <http://www.gao.gov/assets/660/655781.pdf>.

and that “no single method can be used to develop estimates.”¹³ Existing studies that seek to measure the effects of infringement often “rely excessively on fragmentary and anecdotal information” and treat “unsubstantiated opinions” as fact, reported the GAO.¹⁴

Conclusion

EFF thanks the PTO for this opportunity to comment on this effort towards data-driven policymaking. EFF urges the PTO to consider the full spectrum of rights, constituents, and interests behind intellectual property law when evaluating private enforcement, and to hold these private but government-championed initiatives to the same standards as governmental programs and policy.

Respectfully submitted,

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¹³ GAO 2013 Testimony at 7.

¹⁴ *Id.* at 8.

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Submitter Information

Name: Anonymous Anonymous

Address: United States,

Submitter's Representative: Terry Hart

Organization: Copyright Alliance

General Comment

See attached file(s)

Attachments

Copyright Alliance USPTO Voluntary Best Practice Comment



copyright alliance

Connecting creators · Protecting creative work

August 21, 2013

United States Patent and Trademark Office
Docket No. PTO-C-2013-0036
Voluntary Best Practices Study

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of creators across the range of creative industries and at all levels. The Copyright Alliance's membership includes individual artists and creators, creative union workers, small businesses in the creative industry, and the organizations and corporations that support and invest in creativity.

The Copyright Alliance was pleased to see the Intellectual Property Enforcement Coordinator's (IPEC) 2013 Joint Strategic Plan reiterate the federal government's continued commitment to voluntary initiatives that reduce online intellectual property infringement. We also welcomed IPEC's announcement that the USPTO would begin to evaluate the effectiveness of such initiatives. Thus we appreciate the opportunity to assist in that evaluation. As an organization that advocates on behalf of creators in a wide array of subject matter and whose membership is composed of diverse entities, the Copyright Alliance is well-positioned to offer high-level discussion concerning the interests of the broader creative community.

The Copyright Alliance enthusiastically supports the use of voluntary initiatives to provide more effective avenues to address copyright infringement without the need for legislation. When such initiatives work well, they can reduce and equitably apportion the burden which would otherwise be placed on all stakeholders. Early signs suggest existing initiatives are having a positive effect on reducing infringement and educating users about legal alternatives. However, to date, most initiatives have focused mainly on the audiovisual and music sectors. We therefore encourage the expansion of such initiatives, or the creation of additional best practices that extend to other affected communities of creators and innovators.

As it studies the effectiveness of voluntary initiatives, the USPTO should keep the following principles in mind. First, initiatives should strive to be as open as practical to diverse sectors of creators and creative works. Initiatives should also strive to reach all needed participants in the online ecosystem; some notably important participants, such as search engines, remain unaccounted for. Data should always be placed in the proper context; for one, copyright provides vital non-economic benefits to creators that are just as important as the economic benefits, and second, many of the indicators of a successful copyright framework are qualitative and subjective rather than quantitative and objective.

Below, the Copyright Alliance provides additional answers to some of the USPTO's more specific questions.

1. How should "effectiveness" of cooperative voluntary initiatives be defined?

First, effectiveness should be measured holistically rather than by relying on a single metric. It is certainly important that initiatives are judged by their stated goal, whether that is mitigating infringement or reducing the ability to derive revenues from infringement. At the same time, effective initiatives should encourage legal alternatives. The definition of effectiveness should consider, for example, if the initiative facilitates awareness of and drives demand toward legitimate sources of expressive works.

Second, care should be taken not to rely solely on economic metrics, since a working copyright framework provides non-economic benefits that are as, if not more, important yet difficult to quantify. These might include, for example, the quality of works being produced or the ability of creators to pursue careers in creative sectors.

Special attention should be placed on examining the viability of cooperative mechanisms for individual creators and small businesses. Remedies remain ineffective if they are out of the reach of these vital constituents. Such creators often lack the resources to seek judicial remedies or market leverage. Similarly, an initiative cannot be considered effective if the burden of action falls primarily on the creator; everyone in the online ecosystem has a role to play in creating a fair and sustainable marketplace.

The recently announced Best Practices for Ad Networks to Address Piracy and Counterfeiting illustrate this point well.¹ Although the Practices are a welcome step in the right direction, we believe they would have benefited from the inclusion of creators — particularly individuals and small businesses — in the drafting process. For example, inclusion of the individual artist perspective in the discussion would have made clear that certain aspects of the procedure created by the Best Practices, such as the requirement for providing detailed data tracing information in order for a notice to be deemed effective, are burdensome for and beyond the reach of these creators, who may not have a working knowledge of technology practices that would be required by the procedures. More effective solutions for the full range of interested parties might be developed with broader participation of affected stakeholders.

Along with considering what a specific initiative does when defining effectiveness, the USPTO should consider what it *doesn't* do. Initiatives may contain notable gaps; for example, the Copyright Alert System only monitors P2P filesharing but not infringement occurring through cyberlockers or streaming piracy.² Similarly, the Best Practices for Ad Networks only addresses display ads, not video and mobile ads (the latter of which constitute a growth sector in advertising spending), and it only applies to

¹ Available at <http://2013ippractices.com>.

² See Copyright Alert System, Final Memorandum of Understanding (July 6, 2011), available at <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>.

ad networks, not ad exchanges and other major participants in the online advertising sphere.³ Keeping such factors in mind when examining an initiative should not suggest that the initiative is ineffective, but may be an indication that if the first initiative has been worthwhile, it is worth examining how it can be adapted and expanded to address additional challenges.

Finally, a definition of “effectiveness” should consider how closely the duties prescribed align with existing legal duties. Initiatives that spell out duties that are no more than what online actors should already be doing under existing law are little more than window-dressing. The goal of these initiatives should be to provide mechanisms that allow stakeholders to streamline their performance of existing legal duties and avoid unnecessary costs and inefficiencies that would come from enforcement of such obligations through judicial or administrative mechanisms. Effective best practices would be designed to make it as easy as possible for creators to file effective notices of infringement, and for other stakeholders to efficiently address them.

2. What type of data would be particularly useful for measuring effectiveness of voluntary initiatives aimed at reducing infringement and what would that data show?

Along with more obvious types of data, the awareness of voluntary initiatives that are available to all creators should be considered when measuring their effectiveness. An initiative may provide useful mechanisms for protecting creative works online, but it is of little use if it remains unknown to those who would find it most useful. Some initiatives may be effective in theory but remain underutilized due to lack of promotion.

3. If the data is not readily available, in what ways could it be obtained?

Echoing our comments in the Intellectual Property Enforcement Coordinator’s development of a new Joint Strategic Plan on Intellectual Property Enforcement,⁴ the Copyright Alliance recommends that the Administration is well placed to help insure that information is developed and disseminated appropriately through any cooperative efforts. The U.S. Government would act as a neutral arbiter who can facilitate a transparent process that also respects individual and commercial privacy interests. In addition, the Administration could look beyond the traditional IP agencies, such as the USPTO or the Copyright Office, for useful data. For example, the Small Business Association may be able to provide useful data since many involved in creating copyrighted works are small and medium businesses.

³ Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting, <http://2013ippactices.com/> (last visited August, 14, 2013) (stating “[t]he term [‘]Ad Networks[‘] encompasses only services whose primary business is to broker for compensation the placement of website display advertisements and does not include services which are ad-serving platforms or ad exchanges”).

⁴ Letter from Sandra Aistars, Executive Director, to Victoria Espinel, United States Intellectual Property Enforcement Coordinator (Aug. 10, 2012) *available at* http://copyrightalliance.org/sites/default/files/sites/all/files/u8/ipecc_-_letter_081012.pdf.

6. *Is there existing data regarding efficacy of particular practices, processes or methodologies for voluntary initiatives, and if so, what is it and what does it show?*

The USC Annenberg Lab Ad Transparency Report provides the top ten advertising networks that appear on illicit file sharing sites every month.⁵ The Report highlights the continuing problem of ad revenue financing infringing sites, despite the adoption of best practice initiatives for ad placement services.

The American Consumer Institute recently released a survey of consumer attitudes toward intellectual property.⁶ The study found that 69% of Internet users supported ISPs voluntarily restricting access to sites involved in online infringement, while 76% of Internet users preferred to be notified by ISPs in the event they had mistakenly downloaded infringing content. These results demonstrate that a majority of the public supports the use of voluntary initiatives.

The USPTO may also find it useful to examine cooperative initiatives that address harmful online activities besides copyright infringement, such as illicit pharmaceutical sales,⁷ spam,⁸ or botnets.⁹ While it is important to take into consideration the specific characteristics of each type of harm, it may prove helpful to look into these initiatives to determine effective mechanisms and identify additional mechanisms that may be employed.

⁵ See USC Annenberg Innovation Lab, *Online Advertising Transparency Report*, <http://www.annenberglab.com/projects/ad-piracy-report-0>.

⁶ Erwin A. Blackstone, et al., *Intellectual Property: Facts and Consumer Opinions on Counterfeit and Pirated Goods*, The American Consumer Institute Center for Citizen Research (July 25, 2013), <http://www.theamericanconsumer.org/wp-content/uploads/2013/07/Final-IP-Study-w-Cover.pdf>.

⁷ See, e.g., the Verified Internet Pharmacy Practice Sites program, available at <http://vipps.nabp.net>.

⁸ See, e.g., the Spamhaus Project, available at <http://www.spamhaus.org/organization/>.

⁹ See, e.g., U.S. Anti-Bot Code of Conduct (ABCs) for Internet Service Providers (ISPs), available at http://www.maawg.org/system/files/20120322%20WG7%20Final%20Report%20for%20CSRIC%20III_5.pdf.

Respectfully submitted,

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PUBLIC SUBMISSION

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Request of the U.S. Patent and Trademark Office for Public Comments: Voluntary Best Practices Study

Comment On: PTO-C-2013-0036-0002

Voluntary Best Practices Study; Extension of Comment Period

Document: PTO-C-2013-0036-DRAFT-0021

Comment on FR Doc # 2013-17166

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General Comment

Submission of the Consumer Electronics Association

Attachments

CEA comments-PTO-voluntary-8-21-13



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USPTO
Docket Number PTO-2013-0036
Voluntary Best Practices Study

Submission of the Consumer Electronics Association

The Consumer Electronics Association (“CEA”) is pleased to submit these comments in response to the inquiry of the U.S. Patent and Trademark Office (“PTO”) with respect to Voluntary Best Practices, as discussed in the 2013 Joint Strategic Plan for Intellectual Property Enforcement (“Strategic Plan”), as released by IPEC. CEA is the principal U.S. trade association of the consumer electronics and information technologies industries, with more than 2,000 member companies. CEA believes that the Administration’s priorities should be shaped by our national objectives in restoring and maintaining a robust economy through private sector innovation and initiative.

The cooperative programs outlined in the IPEC Plan, on which the PTO seeks comment, are successful private sector initiatives. They exemplify positive alternatives to government sanctions and have generally avoided the negative consequences of official actions as contemplated or pursued here and abroad. These initiatives properly focus on counterfeiting and other gross violations of intellectual property, rather than on any “gray,” debatable areas of law.

The common characteristic of the initiatives listed at paragraph 22 of the Strategic Plan is that they collect data and identify standards of practice jointly, but leave implementation to the discretion and initiative of individual companies. This model is sound because it comports with competition policy, and because it does not seek to invoke or interpret existing legislation, or to become a model for any new legislation or for any international agreement whose terms might later be imposed on U.S. companies or on U.S. law.

CEA has long urged and supported aggressive action against counterfeits. Counterfeits destroy lives and property. Counterfeit electronics and software, like counterfeit drugs, present serious economic and safety problems for government and private users alike. Counterfeits can include devices made by unauthorized manufacturers as copies of legitimate products, or defective products from legitimate manufacturers that are sold by third parties rather than destroyed. Counterfeiting also occurs at the component level, when bogus components, or used or defective components re-sold as new, are incorporated into products.

The programs reviewed in the Joint Strategic Plan are targeted and structured with these considerations in mind. The focus on payment mechanism and advertising are in accordance with data about the way individuals likely connect to and exploit sites that are established for the purpose of providing counterfeit or infringing products for profit.

Effectiveness. To maintain the credibility of and support for voluntary programs, it is vital that they continue to avoid any imposition on competition, and that they neither rely on nor lead to legal sanction.

As pan-industry exercises, these programs involve competitors taking parallel steps that are to the disadvantage of other commercial (albeit potentially infringing) interests. It would not be acceptable legally, and would diminish their credibility, if their actions could plausibly be interpreted as a “group boycott.” By leaving individual implementation decisions to each company, these programs have avoided such claims.

Voluntary efforts to “police” content carry the risk of creating counter-productive legal expectations in a variety of circumstances. The Supreme Court has suggested that failure to implement a “voluntary” measure, while not in itself illegal, may be one potential hallmark of liability for inducing infringement.^[1] Voluntary measures might also be taken up in treaty negotiations, in which private sector experts are precluded from sharing their experience or insights, and inappropriately converted to conduct mandates. In either case, the purpose and rationale for a voluntary program is defeated and is likely to be distorted. If this occurs, further and beneficial private sector initiatives are likely to be discouraged.

Types and Collection of Data. CEA agrees with the focus on payment systems and advertising. Those who commercially exploit the works of others must rely on one or the other.^[2] Concentration on registries or search functions is likely to

^[1] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 and n. 12.

^[2] Interesting data in this respect is collected in a 2012 British study by BAE Detica, *The Six Business Models of Copyright Infringement*, jointly sponsored by the music industry group PRS for Music and Google UK. See, www.prsformusic.com/aboutus/policyandresearch/researchandconomics/Documents/TheSixBusinessModelsofCopyrightInfringement.pdf.

be overly inclusive and less proximate to intentions and actions that are clearly illegal. This would undermine the credibility of, and consumer toleration for, these programs.

Data Analysis and Review. Where the data concentration is on consumer behavior, rather than on commercial exploitation, caution is advisable. Hence, the voluntary ISP program, undertaken with motion picture and music studios, focuses initially on interaction and warning rather than on sanction.^[3] Simple warnings have been shown to be effective in moving consumers away from purportedly infringing conduct.^[4]

A benefit of these step-by-step, non-sanction programs is that they allow for interim data analysis and adjustment on voluntary, individual company bases. Third parties, including public interest groups, are given an opportunity to review examples and data.^[5] This feedback helps the focus, as well as the credibility, of future efforts.

The rapid development of innovative tools by the private sector in this space further demonstrates that the PTO should avoid endorsing a government-led, one-size-fits-all approach and instead allow large and startup companies to innovate, develop, and refine their approaches as their businesses and technologies mature.

CEA appreciates this opportunity to provide its views.

Respectfully submitted,



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^[3] See, <http://www.copyrightinformation.org/resources-faq/copyright-alert-system-fags/>.

^[4] See, Department of Commerce, NTIA Internet Policy Task Force, Docket No. 100910448-0448-01, Comments of the Internet Commerce Coalition, Dec. 10, 2010; <http://www.ntia.doc.gov/files/ntia/comments/100910448-0448-01/attachments/ICC-NTIA%20Copyright%20NoI%20Comments.DOC>; "E-mail warnings deter Canadians from illegal file sharing," CBC News, Feb. 15, 2007, <http://www.cbc.ca/news/story/2007/02/14/software-warnings.html>.

^[5] There are also measures by which consumers can request review and arbitration. See, <http://www.copyrightinformation.org/resources-faq/independent-review-fags/>.

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Comment On: PTO-C-2013-0036-0002

Voluntary Best Practices Study; Extension of Comment Period

Document: PTO-C-2013-0036-DRAFT-0022

Comment on FR Doc # 2013-17166

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General Comment

Comments of Google Inc.: Voluntary Best Practices Study PTO-2013-0036:

Attachments

Google Inc. (8.21.13 PTO Comments) (1)



August 21, 2013

The Honorable Teresa Stanek Rea
Acting Under Secretary of Commerce for Intellectual Property and
Acting Director of the United States Patent and Trademark Office
United States Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

Re: Comments: Voluntary Best Practices Study
PTO-2013-0036 (June 14, 2013)

Dear Acting Under Secretary Rea:

Google Inc. (“Google”) appreciates the opportunity to submit comments in connection with the United States Patent and Trademark Office (the “Office”) Request for Comments: *Voluntary Best Practices Study*, 78 Fed. Reg. 119 (the “Request”). We share the Office’s concern with online piracy and counterfeiting, and its interest in “developing and implementing cooperative, voluntary initiatives that are practical, effective, and consistent with due process, free speech, privacy of users and competition.”¹ We are therefore pleased both to describe some of the measures Google has taken to combat these problems and to comment on the data that would be useful in measuring the effectiveness of these and other initiatives.

Google has made extraordinary efforts to combat online copyright infringement and the sale of counterfeit goods. But Google and its peers – no matter how extensive their efforts – cannot solve these complex problems. Counterfeiters and pirates have countless ways to get their goods into consumers’ hands, via the Internet and otherwise, and multiple methods to realize profits from doing so. To the extent bad actors are dedicated to using the Internet for illegal purposes, criminal law enforcement must play a role. Policymakers also have a responsibility to engage the international community, including foreign governments, to address the problem of counterfeiters and pirate sites abroad.

The greatest opportunities for further progress on reducing counterfeiting and piracy through voluntary action are on the supply side – content producers making their content broadly available on the Internet in an attractive and timely manner to reduce copyright infringement – and the financing side – reducing the sources of revenue supporting counterfeiting and piracy enterprises via smart, effective “follow-the-money” strategies. Any efforts to measure the impact of voluntary efforts to prevent piracy and counterfeiting need to include the generation of more information and data for understanding and measuring the supply-side and financing issues that drive piracy and counterfeiting.

¹ Request at 37210.



1. Google's Voluntary Measures to Combat Counterfeiting and Piracy Online

Advertising

Google has developed a series of sophisticated tools to combat those who sell counterfeit goods or infringe copyrights online. One of Google's main tools is a machine-learning system that examines thousands of data signals to analyze every single advertisement and advertiser account on Google's AdWords platform, which displays advertisements alongside Google's search results. This system learns from past instances of fraud and abuse; the more data the system has about past activity, the better it is about predicting abuse in the future.

This automated system has identified common data signals associated with the online operations of counterfeiters; sites displaying these data signals are routed to manual reviewers, so that Google may block any advertisements for those sites. To backstop our proactive detection tools, Google also offers a user-friendly reporting interface so that we can quickly react to feedback from brand owners about the sale of counterfeit goods online.

The data confirms that counterfeiters are having a difficult time evading Google's detection systems. In fact, our automated systems are able to detect nearly 99% of the advertising accounts that are terminated for counterfeiting. This means that Google's automated system is successful in detecting nearly all of the advertisers attempting to use its AdWords platform to sell counterfeit goods. As a result, Google receives complaints about counterfeiting with respect to less than 0.1% of advertisers. Additionally, while Google's tools for identifying counterfeiters continue to improve, the number of accounts identified and shut down for violating Google's counterfeiting policies declined from approximately 150,000 in 2011 to approximately 80,000 in 2012, suggesting that counterfeiters are giving up on attempting to use our advertising platform to drive traffic to their sites.

Google has made similar progress in helping cut off advertising revenue flowing to pirate sites. More than 2 million web publishers use our AdSense service to earn revenue by running ads on their sites. Google has always prohibited publishers from using AdSense to sell advertising on pages that contain unlawful content, and Google proactively monitors AdSense publishers with automated systems to detect potential copyright infringement; suspect sites are sent for manual review. Google also provides an easy reporting tool for content owners, and quickly processes any complaints that are logged through this tool. Google blacklists pages from receiving any Google advertising after they have been identified. In 2012, Google disabled advertisements from running on 46,000 sites for violating our copyright policies, and the vast majority of these violations were detected and addressed by Google before we were notified by rightsholders.

Google supplements its efforts to combat rogue sites by working with industry groups such as the International AntiCounterfeiting Coalition and the International Trademark Association. In July 2013, Google worked with the White House's Office of the U.S. Intellectual Property



Enforcement Coordinator and other leading ad networks to participate in Best Practices and Guidelines for Ad Networks to Address Piracy and Counterfeiting.² Under these best practices, ad networks will maintain and post policies prohibiting websites that are principally dedicated to selling counterfeit goods or engaging in copyright piracy from participating in the ad network's advertising programs.³ By working across the industry, these best practices should help reduce the financial incentives for pirate sites by cutting off their revenue supply while maintaining a healthy Internet and promoting innovation. Of course, in this dynamic marketplace, every ad network is configured differently and implementation will vary, which means that it will likely be difficult to craft one-size-fits-all industry-wide metrics for success. Google was also among the first companies to certify compliance with the Interactive Advertising Bureau's ("IAB's") Quality Assurance Certification program, which requires a set of standardized steps to enhance buyer control over the placement of advertising.⁴ Now, hundreds of media and technology companies are working collaboratively to reduce the financing to websites that are attempting to generate advertising revenue by engaging in illegal activity.

Search

Google also takes measures to combat copyright infringement online in the operation of its search engine. Data available through Google's Trends site indicates that for the overwhelming majority of queries relating to popular music artists and movie titles, the top Google search results point to legitimate online sources including official artist or movie websites and online retailers.⁵ Data also indicates that search engines do not drive a significant portion of the traffic to pirate sites. Users are much more likely to access a pirate site directly, from social media, or from a link on another website, than from a search engine's results.⁶ For the relatively rare queries that return more problematic search results, Google is already in discussions with content owners to develop search engine optimization ("SEO") strategies for their authorized online content distributors.

² Susan Molinari, Ad Networks Agree on Industry Best Practices to Combat Piracy and Counterfeiting, Google Public Policy Blog, (July 15, 2013), available at <http://googlepublicpolicy.blogspot.com/2013/07/ad-networks-agree-on-industry-best.html#!/2013/07/ad-networks-agree-on-industry-best.html>.

³ Best Practices Guidelines for Ad Networks to Address Piracy and Counterfeiting, available at <http://www.2013ippractices.com/bestpracticesguidelinesforadnetworkstoaddresspiracyandcounterfeiting.html>.

⁴ IAB, Quality Assurance Guidelines (QAG) Version 2.0 (July 25, 2013), available at <http://www.iab.net/media/file/QualityAssuranceGuidelines7252013.pdf>.

⁵ Matt Schruers, The Search Fixation: Infringement, Search Results, and Online Content (Aug. 5, 2013), available at [http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/00000000821/CCIA_TheSearchFixation%20\(2\).pdf](http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/00000000821/CCIA_TheSearchFixation%20(2).pdf).

⁶ BAE Systems Detica, The six business models for copyright infringement: A data-driven study of websites considered to be infringing copyright (June 27, 2012), available at http://www.baesystemsdetica.com/uploads/resources/The_six_business_models_for_copyright_infringement1.pdf.



When material that infringes copyright does appear in search results, the Digital Millennium Copyright Act (“DMCA”) provides the legal framework for apportioning responsibilities between rightsholders and online service providers. Google has voluntarily gone above and beyond the requirements of the DMCA in order to make that framework work efficiently. For example, Google is an industry leader in making takedown submissions simple for copyright owners and responses speedy. This is no small matter, given the scale at which Google operates.

Google currently receives DMCA takedown notices for more than 15 million URLs each month. From December 2011 to November 2012, Google removed from search results 97.5% of all URLs specified in those requests, with an average turnaround time of less than 6 hours. Google has also created the Trusted Copyright Removal Program for Web Search (“TCRP”), which streamlines the notice process by allowing rightsholders with a proven track record to submit large volumes of URLs on a daily basis. By the end of 2012, Google’s TCRP partners were responsible for 95% of the URLs submitted during the year.

YouTube

Google makes further efforts to defeat online piracy through tools available on its YouTube platform. YouTube’s most important such tool is its Content ID system, which analyzes every video uploaded to YouTube against millions of fingerprints corresponding to copyrighted works. Once identified, copyright owners can opt to block, track the performance of, or monetize any videos identified containing their content, depending on their preference. Google has invested more than 50,000 engineering hours in Content ID and over 4,000 partners currently use this service, including major broadcasters, movie studios, and record labels. Many choose to monetize rather than remove from YouTube their copyrighted works, generating hundreds of millions of dollars for the music industry alone. Indeed, underscoring the progress industry can make when technology platforms are afforded the ability to innovate and build systems over time, more than one million partner channels are now making money from their YouTube videos. YouTube has also established strict community guidelines prohibiting videos that violate federal law or incite illegal activity.⁷ Rightsholders can report infringing videos by submitting a DMCA takedown notice using a simple public web form on the YouTube site. Rightsholders can also submit easy-to-use complaint forms online about videos that violate YouTube’s policies prohibiting the sale or promotion of counterfeit goods.

Finally, Google combats online piracy by providing legitimate online alternatives to piracy. As explained in more detail below, the most effective way to combat online piracy is to develop legal alternatives that meet the demand for popular content. Every time a music fan chooses Google Play, Music All Access, or YouTube over an unauthorized music site to listen to music, the legitimate revenue earned by Google is a victory against pirate sites. These Google services generate hundreds of millions of dollars in royalties each year for the content industry.

⁷ http://www.youtube.com/t/community_guidelines.



2. *Offering Legitimate Online Services to Meet Consumer Demand Reduces Piracy*

Piracy thrives when consumer demand goes unmet by legitimate supply. Online services like Spotify, Netflix, and iTunes have demonstrated that the most effective way to combat piracy on the web is to offer attractive legal alternatives to consumers. Although copyright infringement remains a challenge, there are clear signs that new, legal services are the most effective way to reduce piracy and meet the changing demands of consumers. The data confirms this.

Recent studies demonstrate that the availability of legitimate alternatives to piracy reduces the prevalence of illegal downloading:

- A study by The NPD Group found that 40% of consumers in the United States who had illegally downloaded music in 2011 reported that they had stopped or downloaded less music from illegal networks.⁸ Nearly half of those who stopped or curtailed file-sharing cited the use of legitimate streaming services as their primary reason for their change of behavior.⁹
- A survey commissioned by the Swedish music industry shows that the number of people who downloaded music illegally in Sweden fell by more than 25% between 2009 and 2011, largely as a result of the greater availability of legal services.¹⁰ In 2012, music sales in Sweden grew by 20%.¹¹
- Studies show that piracy rates in the Netherlands have repeatedly fallen over the past four years.¹² In 2012, revenue for digital music in the Netherlands grew by 66%.¹³
- An academic study of NBC's temporary withdrawal from the iTunes Store revealed an immediate uptick in infringing activity, suggesting that consumers prefer a legitimate online source (even where it requires payment) over illegal sources.¹⁴ More

⁸ <https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-music-file-sharing-declined-significantly-in-2012/>

⁹ *Id.*

¹⁰ Adventures in the Netherlands: Spotify, Piracy and the new Dutch Experience (2013), available at <http://press.spotify.com/us/2013/07/17/adventures-in-netherlands/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Brett Dannaher, Michael D. Smith et al., *Converting Pirates Without Cannibalizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy* (March 3, 2010), available at <http://ssrn.com/abstract=1381827>.



recent reports suggest the same phenomenon is being observed in markets where CBS has been pulled from cable system lineups.¹⁵

These positive results demonstrate that supply-based initiatives, focused on making lawfully available to consumers the content that they want, are a crucial part of voluntary industry-led efforts to fight online piracy.

These results also suggest that it would be useful to collect data on trends in the consumption of pirated material. This includes the types of media being pirated (such as music, video, and gaming), the methods of consumption (desktop computer, tablet, smartphone, and so forth), and the specific content most likely to be pirated (such as older movie and TV titles or new movies and TV shows not yet available online). By identifying the precise areas where consumer behavior is suggesting there is a shortfall in the supply of digital media, rightsholders and distributors can work together to meet the demand of users with new online services that users will prefer to the pirate sites.

3. More Data is Needed to Understand the Business of Piracy

Measuring the success of voluntary initiatives requires an examination of the business models that allow websites dedicated to piracy to exist. At their core, pirate sites are commercial ventures that use a variety of changing strategies to generate revenue unlawfully. Based on extensive efforts by Google and other leaders in the advertising industry, pirate sites have an increasingly difficult time advertising via mainstream ad networks. To clamp down further on these sites, additional study is needed to understand the methods used by pirate sites to sell advertising or process payments directly from users.

The Detica study funded by Google and PRS for Music (the largest collecting society in the UK) is perhaps the most detailed, data-focused study of sites accused of piracy on the market, providing a quantitative and objective analysis of these sites.¹⁶ It found that while pirate sites have many different financial models (such as subscriptions, membership, donations, and pay per use), the largest and fastest growing sites rely on advertising.¹⁷ The Detica study concluded that these sites already are being excluded from top-tier mainstream ad networks such as Google's AdSense network.¹⁸ Google remains committed to continuing its efforts to keep these sites out of its advertising services and has been working with other industry leaders to raise standards for the ad network community.

¹⁵ THE WASHINGTON POST, How CBS sparked more online piracy – of its own show (Aug. 8, 2013), available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/08/how-cbs-sparked-more-online-piracy-of-its-own-show/>.

¹⁶ BAE Systems Detica, The six business models for copyright infringement: A data-driven study of websites considered to be infringing copyright (June 27, 2012), available at http://www.baesystemsdetica.com/uploads/resources/The_six_business_models_for_copyright_infringement1.pdf.

¹⁷ *Id.*

¹⁸ *Id.*



To assess the effectiveness of voluntary measures in combating sites reliant on advertising, stakeholders could compile data identifying the ad networks responsible for placing the most advertisements on pirate sites in addition to the advertising placed by the site itself. Such data would spotlight the ad networks that pirate sites are using in order to place advertising alongside infringing content. This could also shed light on the mechanisms being used by pirate sites to evade technical measures meant to exclude them from ad networks. It would also be helpful to understand whether the value of advertising inventory being shown on rogue sites is changing over time. For example, even if rogue sites continue to feature advertising, it should be counted as a success if the profit margins of these sites are squeezed as they are driven from mainstream ad networks to less lucrative alternatives.

To date, there is only limited information available on the ad networks supporting pirate sites. The Detica study revealed that 86% of advertisements on the sampled sites did not display the Ad Choices logo, suggesting that the advertisers do not associate themselves with the online advertising self-regulation scheme administered by the IAB.¹⁹ This means that voluntary, industry-led efforts to apply self-regulatory principles have already had some success in relegating infringers to lower quality ad networks that generate lower revenues for pirate site operators.

In addition to the one-time snapshot provided by the Detica study, the USC Annenberg Innovation Lab produces monthly lists of the ad networks it identifies as placing the highest number of advertisements on pirate sites.²⁰ The Annenberg reports are a positive first step, but additional research would be useful to shine a light on the ad networks that fund the worst copyright infringers on the Internet, and to measure the revenue likely generated from such networks for the pirate sites. In particular, additional research featuring peer-reviewed methodologies and regularly refreshed, transparent datasets would help to push understanding forward. This would allow an assessment of the extent to which pirate sites are being driven to lower-value ad networks.

It is important in gathering such data to be rigorous about what is a “pirate” site. Research (and enforcement efforts) should focus on the clear cut cases – sites that are in the business of distributing obviously infringing content without permission. There is an enormous amount of copyrighted material, rightsholders make many choices about how to distribute that content, and third parties sometimes may lawfully use copyrighted material without permission of the rightsholder (*e.g.*, implied license). In addition, the DMCA expressly grants “safe harbor” legal protections to qualifying online hosting and information tools providers; sites that qualify for those protections cannot fairly be characterized as “pirate” or “rogue” sites. Data that failed to account for this complexity, and that treated *any* site with *any* arguably offending content on *any*

¹⁹ *Id.*

²⁰ <http://www.annenberglab.com/projects/ad-piracy-report-0>.



of its pages as a pirate site would provide a distorted picture, and would not be useful in assessing the effectiveness of efforts to combat piracy.

The business models of pirate sites constantly evolve, so it also would be useful to continue gathering data – like that gathered in the Detica study – identifying how these models have changed over time. Such data can both suggest whether voluntary measures are working (the pirate site’s need to change may be driven by the effect of such measures in crimping profits) and help identify new strategies for combatting pirate sites, including additional means to cut off their funding.

4. *Important Considerations in Fighting Counterfeiting and Piracy Online*

In combating piracy and counterfeiting online, caution should be taken to ensure that any proposed solutions are not overbroad, do not target innocent sites, and do not inhibit the free exchange of ideas. There are 60 trillion addresses on the web and only an infinitesimal portion are unlawful. Nearly every paragraph of text, photograph, video, sound recording, or piece of software is potentially protected by intellectual property law, and illegal sites that are shut down can easily sprout back up under a new URL. Online intermediaries cannot block every single piece of infringing material from their platforms, and overbroad attempts could have the unintended consequence of cutting off access to legitimate content.

Solutions to these challenges also need to guard against the problem of abusive takedown requests. Any efforts to combat piracy must consider the demonstrated potential for rightsholders to use takedown notices as a pretext for censorship or to hinder legitimate competition in the marketplace. Likewise, any solutions to counterfeiting online need to be mindful of the potential for overzealous brand owners seeking to block the sale of authentic goods in an effort to gain a distribution advantage. For this reason, robust counter-notification procedures are necessary to combat bogus takedown requests.

Fundamentally, the most important way to combat rogue sites is to attack them directly. Law enforcement is a critical component in fighting counterfeiting and piracy, as is increased cooperation between governments given the transnational nature of these challenges.²¹ Where counterfeiting and piracy have proliferated, policymakers should utilize diplomatic and multilateral channels to increase enforcement and encourage legitimate offerings. Smart and effective use of existing legal enforcement measures by rightsholders, brand owners, and government actors to target criminal behavior is essential in complementing the voluntary initiatives that are being pursued in the private sector to reduce the online presence of counterfeiting and piracy operations.

* * *

²¹ Organization for Economic Cooperation and Development, Magnitude of counterfeiting and piracy of tangible products: an update (November 2009), available at <http://www.oecd.org/industry/ind/44088872.pdf>.



Google appreciates the opportunity to share its perspective and experience, and we look forward to continued engagement on these topics.

Sincerely,

A handwritten signature in black ink, appearing to read "Pablo L. Chavez".

Pablo L. Chavez
Director of Public Policy
Google Inc.

Introduction

MarkMonitor welcomes the opportunity to comment to the United States Patent and Trademark Office regarding the 2013 Joint Strategic Plan on Intellectual Property Enforcement¹.

Comments

MarkMonitor is the world leader in enterprise brand protection, using an SaaS delivery model to provide an advanced technology and expertise that protects the revenues and reputations of the world's leading brands. In the digital world, brands face new risks due to the web's anonymity, global reach and shifting consumption patterns for digital content, goods and services.

The report highlights many concerns of brand owners regarding unprecedented levels of online counterfeiting, cybersquatting, fraud and privacy concerns. MarkMonitor has, over the past few years, developed many methods by which to measure the level of infringement that exists in the virtual and physical worlds. MarkMonitor has also developed tools by which to measure the levels of success that our various tools have had in addressing the concerns of brand owners.

Please find, below, links to our Brand Jacking Index ® and our most recent MarkMonitor ® Shopping Report that will help demonstrate how to effectively use metrics to determine both the scope of the problem presented by online brand infringement and the success of existing tools to approach various solutions.

<https://www.markmonitor.com/resources/brandjacking-index.php>

https://www.markmonitor.com/download/report/MarkMonitor_Shopping_Report-2012.pdf

Respectfully Submitted,

/s/

Kiran Malancharuvil
Internet Policy Counselor
MarkMonitor, Part of Thomson Reuters

¹ 2013 Joint Strategic Plan on Intellectual Property Enforcement, June 2013, at <https://www.federalregister.gov/articles/2013/06/20/2013-14702/request-of-the-united-states-patent-and-trademark-office-for-public-comments-voluntary-best>.