

GIPC COMMENTS TO DOC ON DIGITAL COPYRIGHT ISSUES

For decades our copyright system has generated the jobs our economy needs and the creative products our consumers want. The goal of policymakers as they consider the future of our copyright system should be to ensure business and government continue to work to maximize the benefits for both consumers and job creators. This includes efforts to give consumers safe access to products through innovative services, investing in original creative content and new ways to deliver it, cooperative agreements to protect intellectual property (IP) amongst all of the relevant actors in the value chain, ensuring we have vibrant and modern rules globally, and enforcing those rules against the bad actors.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. These comments are submitted by the Chamber's Global Intellectual Property Center (GIPC), which represents a broad spectrum of intellectual property-intensive companies. The GIPC leads a worldwide effort to protect innovation and creativity by promoting strong intellectual property rights and norms around the world. The GIPC recognizes that these rights are vital to creating jobs, saving lives, advancing global economic growth, and generating breakthrough solutions to global challenges. The GIPC appreciates this opportunity to respond to this Notice of Inquiry (NOI).

Digital copyright issues are central to this nation's continuing ability to provide consumers here and around the world with innovative and creative content. Evolutions in technology have increased opportunities for access and business exponentially. And criminals have noticed an opportunity as well. We continue to be confronted with pervasive online copyright piracy, as well as trademark counterfeiting, with effects that are devastating to creators and innovators, destructive to business and entrepreneurship, and highly deleterious to the rule of law. One of the most obvious aspects of this problem involves the proliferation of sophisticated and technologically advanced criminal networks whose business models are premised on duping consumers and exploiting digital commerce to steal the intellectual property of others. While hardly the only example of online IP infringement, the high-volume activities of these sites contribute significantly to loss of jobs, economic damage, and threats to public health and safety.

Like brick-and-mortar markets before it, the online market will not thrive either in the absence of rules or in an atmosphere of overbearing government regulation. While it is thriving in many respects, the GIPC believes it can be even better. The choices we make today will help determine whether the Internet realizes its potential to create incentives for a diverse and robust bounty of legal and amazing content and services, or become a greater haven to those who seek to exploit works created by others. A proper role of government is to ensure compliance with the law

GIPC Comments (cont.)

online as well as offline. If cyberspace is, or if it appears to the public to be, a lawless place, it cannot possibly fulfill its economic, social, or cultural potential. Safety, freedom from fraud, and security of property and person are essential ingredients for a successful online marketplace.

I. The Goal of any Review of Copyright Issues should be to Maintain Copyright's Role of Promoting Jobs, Economic Growth, and Creativity

The fundamental understanding of the role of IP in the American legal system is articulated by the Constitution itself, which authorizes Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹ Although this passage is oft cited, it bears repeating yet again in an age when some claim, contrary to both history and logic, that IP hinders growth and development. The GIPC recognizes that IP drives innovation, whether in the context of copyrighted works, such as the stunning special effects of the latest Hollywood blockbuster, computer software that has become so realistic it is used to train our war fighters; or in the context of the patented products and services that provide greater flexibility and productivity-enhancing functionality through which these innovative works are used and enjoyed; or new medicines and medical treatments that help keep creators, innovators, and consumers healthy and productive.

Respect for IP is a universal good. The Founders of our country saw this so clearly that in explanation of the inclusion of the Copyright and Patent Clause in the then draft Constitution, they wrote:

"[t]he utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. "²

The final sentence of that passage deserves special attention. Although the nature of IP rights is to give legal and economic exclusivity largely to private entities, that system as a whole creates a public good. And the corollary necessarily is that infringement is harm not merely to the individual right holder, but to the public as a whole because it undermines the very basis of the system created by the Founders to promote the progress in creativity and innovation. In the long term, consumers do not benefit from infringement; they are harmed by it.

¹ U.S. Const. Art. I Sec. 8 Cl. 8

² Federalist No. 43.

GIPC Comments (cont.)

a. Copyright Creates Jobs

Several reports from a variety of sources provide objective evidence of the role of copyright, and intellectual property generally, as a major generator of jobs in the United States. One of the most relevant was produced by the USPTO itself, in cooperation with the Economics and Statistics Administration, on behalf of your parent agency, the U.S. Department of Commerce.³ While you are no doubt familiar with this report, it bears reminding that it found over 27 million jobs in the United States directly attributable to IP-intensive industries, and a total of 40 million jobs directly or indirectly attributable to IP-intensive industries.

With particular respect to copyright-intensive industries, a report commissioned by the International Intellectual Property Alliance reaffirms the continuing role of copyright as a major generator of jobs in the United States.⁴ Just the core copyright industries employ about 5.1 million people.

The GIPC has also commissioned research in this area. In a first-of-its-kind study, the GIPC report provides information on jobs in IP-intensive industries on a state-by-state basis for every state and the District of Columbia.⁵ For example, in the President's home state of Illinois, almost 3 million jobs are supported by IP-intensive industries. That is more than half of all the private sector jobs in the state.

b. Copyright Promotes Economic Growth

The jobs created and sustained by intellectual property and copyright generate and promote demonstrable economic growth.

The Commerce Department report found that IP-intensive industries contributed over \$5 trillion to the U.S. economy. The Siwek/IIPA report found that over \$1.6 trillion in output is attributable to copyright industries. And in Illinois alone, the GIPC study identified almost \$300 billion in output from IP-intensive industries.

Intellectual property industries are also of top importance to U.S. exports and our balance of trade. The Commerce Department study found that IP-intensive industries generate \$775 billion in exports, over 60% of U.S. exports. The Siwek study found that sales of U.S. copyright products in foreign markets reached \$134 billion, exceeding foreign sales of traditional U.S. industries like aircraft and automobiles. And the GIPC study shows that from Illinois alone, IP-intensive

³ Available at http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf.

⁴ Available at <http://www.iipa.com/pdf/2011CopyrightIndustriesReport.PDF>

⁵ Available at <http://www.theglobalipcenter.com/jobs-map/#>.

GIPC Comments (cont.)

industries account for over \$50 billion in exports, more than 70% of all exports from that state.

Some have propounded a study of industries that rely on fair use or other exceptions and limitations to copyright and treated its findings as though they prove copyright should be weaker. Of course, those are IP-intensive industries themselves, as the creative works they use would be less plentiful but for the protection of the Copyright Act in the first place. Some choose to view this as a conflict or tension; we see it as a virtuous cycle of creativity and innovation. Indeed, the vibrancy of sectors that rely on copyright to protect their creative works as well as of the sectors that make use of copyrighted works is evidence that the Copyright Act is already well balanced.

c. Copyright Promotes Creativity and Free Speech

The principles that the Founders articulated and wrote into the Constitution are equally applicable in the digital age. Indeed, in just the past few years the Supreme Court has articulated in unmistakable terms its ongoing understanding of the constitutional role of copyright as an engine of creativity and free speech. Indeed, the Court declared that, “[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”⁶ And the Court continued, “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”⁷

This constitutional vision was not realized immediately and took considerable effort. For the first century of American copyright law, we provided inadequate protection and, most egregiously, failed to provide protection to foreign works at all. It was thanks, at least in part, to some of the great early American scholars and authors that we made such significant progress. Noah Webster, of the ubiquitous dictionary bearing his name, has been referred to as the “Father of American copyright” for his work in the early years of the Republic to establish copyright laws in the new states, which were then included in the Constitution. And Samuel Clemens (also known as Mark Twain) agitated for copyright protection for foreign works so that American authors could compete abroad. These great minds saw the engine of creativity, culture, and freedom that copyright can and should be.

⁶ *Harper & Row Publishers, Inc. v. The Nation Enterprises*, 471 U.S. 539, 558 (1985).

⁷ *Id.* quoting *Mazer v. Stein*, 347 U.S. 201, 209 (1954).

GIPC Comments (cont.)

The legacy of Webster, Clemens, and many others is the innovative and economic success that Americans enjoy today. GIPC's IP Delivers program highlights the benefits of jobs, safety, innovation, and access by showing how IP affects people's contemporary daily lives and showcasing testimonials of creators and innovators from around the world. It is available at <http://www.ipdelivers.com>.

GIPC Comments

The economic, creative, and cultural success of the Copyright Act should be foremost in mind throughout any discussion of modern copyright issues. And the goal should be to promote a framework and environment that continues to promote the creation and dissemination of creative works that drives American jobs, exports and economic growth.

II. Discussion of Specific Issues

From the printing press to the Internet, copyright law has evolved in response to new developments in technology and the marketplace to remain a productive force for innovation. The result is that today the U.S. copyright system is a cornerstone of a vibrant creative economy that is unparalleled in the world, putting the United States on the leading edge of creativity, technological innovation and economic growth on the global stage. If our creative sector is to remain the envy of the world, our copyright system must ensure these public-interest purposes of copyright are not undercut through a diminution of meaningful and effective protection as a result of changes in either technology or policy.

As the Commerce Department proceeds in its consideration of digital copyright issues, it must remain mindful of the massive level of piracy online. Recent studies have reaffirmed what even casual observers must clearly see and have provided some specifics that shock even the jaded. A recent study by research firm Net Names found that nearly a quarter of Internet bandwidth is consumed by infringing digital content and that over 430 million Internet users regularly pirate content.⁸ If copyright is to continue to serve its constitutional purpose, copyright owners must have viable means of addressing and meaningfully reducing this level of infringement.

The GIPC urges the Commerce Department to consider that when rules are written or applied in such a way that it encourages users to engineer around them it creates inefficiency, uncertainty, and unfairness. If our system allows services to be designed so that even large-scale commercial use of copyrighted works can go completely unlicensed and uncompensated, the market is not functioning properly. So too, if pirates can find a space where they facilitate massive unauthorized use

⁸ Available at: <http://www.netnames.com/services/online-brand-protection/digital-piracy-protection>.

GIPC Comments (cont.)

without recourse to the copyright owner, the market is distorted. At the end of the process, success is an approach that works for creators and provides commercially reasonable rules online, continuing to promote the innovation and jobs across sectors that we described above.

- a. Establishing a multistakeholder dialogue on improving the operation of the notice and takedown system for removing infringing content from the Internet under the Digital Millennium Copyright Act (DMCA)

When it was enacted, the touchstone of section 512 was cooperation between ISPs and copyright owners.⁹ It was a system designed so that they would work together to identify, remove, and resolve infringing material and claims. In some cases, that has worked as expected. To be sure, there are burdens to operate this system. The massive amount of pirated material online means that copyright owners have to be incredibly diligent and vigilant in tracking down the illegal uses of their works, particularly when “take down” does not mean “stay down,” and infringing files or links thereto are quickly re-uploaded. While this presents unworkable burdens on all copyright owners, its effect on independent creators and SME’s are particularly onerous. On the ISP side, the massive amount of infringing material online translates into a tremendous volume of takedown notices, which they must process expeditiously.

Cooperative arrangements have also sprung up among good faith, responsible businesses across different business sectors to supplement section 512. Perhaps the most directly relevant is the Copyright Alert System. After years of negotiations between major ISPs and copyright owners, an agreement was reached to provide an educational system of informing Internet users when their actions appear to have run afoul of the copyright law. This light-touch approach is not aimed at enforcement actions, but rather at increasing awareness. It is based on the belief that many people will change their behavior after they learn more. And it allows more flexibility than section 512 alone, for example in the context of peer-to-peer infringement, which section 512 does little to address. Operated by the Center for Copyright Information,¹⁰ the Copyright Alert System is overseen by privacy and copyright user advocates.

Another example of responsible actors engaging in cooperative efforts to ensure effective protection of copyright and an environment in which legitimate user-generated creativity can thrive is the agreement on a set of User Generated Content (UGC) Principles.¹¹ That agreement reflects shared objectives on the part of leading content providers and UGC site operators to the elimination of infringing content in

⁹ See S. Rep. No. 105-190 at 40 (1998).

¹⁰ <http://www.copyrightinformation.org/the-copyright-alert-system/>.

¹¹ <http://www.ugcprinciples.com>

GIPC Comments (cont.)

the UGC environment, the encouragement of uploads of legitimate user-generated content, the accommodation of fair use, and the protection of user privacy. And it reflects a determination that these objectives could be better met through cooperative implementation of commercially reasonable and effective content identification and filtering technologies than they would otherwise be through the notice-and-takedown approach embodied in section 512 alone. This sort of innovative, cooperative approach is exactly the kind of activity section 512 was intended to promote.

Another important development in voluntary arrangements is the International Anti-Counterfeiting Coalition (IACC) payment provider portal.¹² While not a complete solution, companies have long-recognized that the flow of money to websites devoted to piracy and/or counterfeiting is one tool towards disrupting their illegal business models. As a result of discussions facilitated by former Intellectual Property Enforcement Coordinator Victoria Espinel, an agreement was reached on a system to provide information to payment processors, enabling them to make informed decisions about to whom they will continue to provide services. With participation by major credit card and money transfer companies, as well as thousands of other brand owners, the IACC portal has already resulted in thousands of terminated accounts in the less than two years since its launch.

Another effort is the Association of National Advertisers and American Association of Advertising Agencies (ANA/4As) advertising best practices.¹³ Many piracy sites do not sell products, but rather support their illegal operations through advertising revenue. It has become clear over time that many advertisers are not aware that their ads are being placed on such sites. The ANA/4As best practices principles recognize the need for cross-sector efforts of the business community to address this problem. They are an important start, although pirate sites continue to flourish with money generated from advertising, and much more work is required to remove the ability of pirate sites to receive advertising revenue, and to make cooperative efforts more proactive.

For the most part, section 512 has not worked as well as was hoped at the time of its drafting. For example, sites flooded with pirated material may remove the specific link or file complained of in a particular takedown notice, but leave unaddressed multiple other postings of that same work. Further, even the same poster as was the subject of a takedown notice may repost the same material, and some sites will allow that to remain unaddressed unless or until they receive another takedown notice from the copyright owner. This undermines the effectiveness of section 512, increases the burden on copyright owners, and, if not addressed, is used as a shield for bad faith actors.

¹² <http://www.iacc.org/payment-processor-portal.html>.

¹³ http://www.aaaa.org/news/bulletins/Pages/mmpirate_053112.aspx.

GIPC Comments (cont.)

Section 512 has proven largely ineffective in addressing piracy on foreign sites, such as the notorious Pirate Bay. Of course, this is in no small part due to the jurisdictional limits of U.S. law; ISPs and websites operating outside the United States are beyond the jurisdiction of our law enforcement. But when those sites are stealing U.S. works, and especially when the sites are clearly aimed at an American audience, that is a matter of concern. What success has been achieved by the private sector in this regard is through other countries adopting a notice and takedown model, often through a free trade agreement with the United States. This has given American copyright owners some recourse under local laws. It also helped create an environment where notice and takedown is an internationally accepted standard, and thus improved voluntary cooperation even where notice and takedown is not the law.

But many notorious foreign sites continue to ignore these efforts. Even more dangerously, many sites that were created and operated for the purpose of distributing infringing content and would be illegal in the US under the standards articulated by the Supreme Court in *Grokster* seek, and frequently enjoy, safe harbors merely by taking down infringing content when they are notified by the copyright owner. This is not a sustainable model for expanding a legitimate online content marketplace.

Alongside necessary legal reforms, business-to-business arrangements can supplement the law, adapt more quickly than legislation to a changing marketplace, and build trust between copyright owners, intermediaries, and consumers.¹⁴ Some good work is being done and it makes a difference. We look forward to even more progress in this area and more need to join the conversation. As they have done before, government officials can help convene all the key participants for discussions that lead to new cooperative arrangements and government can continue to watch existing agreements to help ensure they are implemented effectively.

- b. The appropriate role for the government, if any, is to help improve the online licensing environment, including access to comprehensive databases of rights information

We begin the discussion of online licensing by noting that already there is an incredible volume of creative works easily available to consumers through lawful means and across every sector of copyright industries. Software of all stripes is

¹⁴ See “The Role of Voluntary Agreements in the U.S Intellectual Property System,” Hearing before the House Subcommittee on Courts, Intellectual Property, and the Internet, Testimony of Cary Sherman (Sept. 18, 2013), available at http://judiciary.house.gov/hearings/113th/09182013_02/091813%20Testimony%20of%20Cary%20Sherman.pdf.

GIPC Comments (cont.)

available via download without ever leaving one's home, and in the case of phone and tablet "apps," a multitude of software serving an incredible variety of functions and tastes is available for free. Photos and other images are easily available for download at low prices from institutions like Getty Images or the Copyright Clearance Center (CCC). CCC also facilitates online licensing of literary works, and increasingly consumers are using tablets to download e-books from one or more of the legal outlets. Online gaming has never been more popular, as demonstrated by the massively multiplayer online game (MMOG) craze. Music has been legally available for download for a long time through services like iTunes and through a variety of streaming services. With over 30 million songs available across 60 different services, the industry has provided a guide to help consumers navigate and choose the best service for them, <http://www.whymusicmatters.com>. And for television and movies, Netflix and Hulu are just the tip of the iceberg. Here, too, the industry has provided a service to help consumers locate lawful access to the shows and movies they love, <http://www.wheretowatch.org>.

As great as this modern digital cornucopia is, government can help provide even more. For example, improved information and search functions for registrations with the Copyright Office could help connect potential licensees with copyright owners, including works which might currently be classified by some as "orphan" works. Of course, databases and other steps must respect the rights of copyright owners (even those not presently identified). If done right, this can help create useful tools to maximize productive uses of copyright works and increase licensing income to copyright owners. If done wrong, this could trample rights and become yet another controversial and negative influence on creativity.

c. Other issues

The remaining issues should be considered in light of the principles set forth above. For example, statutory damages have been part of the U.S. Copyright Law since its first enactment in 1790 and are a critical part of enforcement and deterrence. If some statutory damages calculations seem surprisingly large, it is only a reflection of the massive levels of infringement.

The first sale doctrine and fair use are appropriately respected and important, but contemplation of any expansion of the traditional application of these exceptions should consider the practical consequences in light of current technology and marketplace realities. Educating consumers about what is, and what is not, fair use would be an appropriate first step. Moreover, before there is consideration of expanding the first sale doctrine, there should be a discussion of resolving the anomalous outcome of the Supreme Court's recent ruling in *Wiley & Sons Publishing*

GIPC Comments (cont.)

v. Kirtsaeng,¹⁵ which effectively read out of the law Congress' enactment of an importation right in the 1976 Copyright Act.

III. Conclusion

Digital copyright issues are critical issues in sustaining America's competitive edge. The GIPC supports the Commerce Department's work to advance a system that is good for job creating innovators and for consumers. These issues must be considered within the framework of the constitutional goal of promoting creativity and ensuring an environment that works as well for authors in the future as it did in the past. And care must be taken to avoid policies that could negatively affect the millions of jobs, billions of dollars of exports, and trillions of dollars of domestic output that are generated by our creative industries. The GIPC appreciates this opportunity to submit our views and comments and looks forward to working with you as this process progresses.

¹⁵ March 19, 2013.