

**Before the**  
**PATENT AND TRADEMARK OFFICE AND**  
**THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION,**  
**U.S. DEPARTMENT OF COMMERCE**  
**Washington, DC**

In the Matter of )  
The Inquiry on Copyright Policy, Creativity, )  
And Innovation in the Internet Economy )  
Docket No. 130927852–3852–01 )

**COMMENTS OF**  
**THE INFORMATION TECHNOLOGY AND**  
**INNOVATION FOUNDATION**

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<sup>1</sup> ITIF is a nonprofit, non-partisan public policy think tank committed to articulating and advancing a pro-productivity, pro-innovation and pro-technology public policy agenda internationally, in Washington and in the states. Through its research, policy proposals, and commentary, ITIF is working to advance and support public policies that boost innovation, e-transformation and productivity.

## Introduction

The Information Technology and Innovation Foundation (ITIF) is pleased to submit these comments in response to the Department of Commerce Internet Policy Task Force's Request for Comment on copyright policy issues critical to economic growth, job creation, and cultural development. In these comments, ITIF addresses the appropriate calibration of statutory damages in the contexts of individual file sharers and of secondary liability for large-scale infringement; whether and how the government can facilitate the further development of a robust online licensing environment; and the utility of establishing a multi-stakeholder 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).

The content industry, consisting of those engaged in the production of creative works such as music, movies, television programs, software, video games, books, photos, and periodicals, have been radically transformed by the Internet. The Internet has made the global distribution of content easier than ever and created many new opportunities for consumers to legally access content in a wide variety of formats. Unfortunately, while the content industry has come to embrace the digital revolution, content producers and others in the industry have suffered from widespread copyright infringement whereby users gain access to their content without providing fair compensation.

According to the 2013 report "Sizing the Piracy Universe" by Dr. David Price, three key regions—North America, Europe, and Asia-Pacific—consumed 95 percent of all bandwidth used on the Internet, and in these three regions, absolute infringing bandwidth use increased by more than 150 percent between 2010 and 2012, from 3,690 petabytes to 9,567 petabytes.<sup>1</sup> This figure represents 23.8 percent of the total bandwidth used by all Internet users, residential and commercial, in these three regions.<sup>2</sup> In addition, 327 million unique Internet users explicitly sought infringing content during January 2013.<sup>3</sup> This figure increased by 9.9 percent in the fifteen months from November 2011 and represents 25.9 percent of the total Internet user population in these three regions.<sup>4</sup> Finally, 13.9 billion page views were recorded on websites focused on piracy in January 2013. This figure increased by 9.8 percent in the fifteen months following November 2011.<sup>5</sup>

Widespread piracy seriously harms the artists, both the famous and struggling, who create content, as well as the technicians—sound engineers, editors, set designers, software and game programmers—who produce it. Piracy limits the ability of content producers to create legitimate business models for selling digital content. As the saying goes, "It's hard to compete with free." While many companies have rallied to the challenge and created compelling businesses to sell content legally, on the whole, illegal content still remains widely available and commonplace.

This has significant negative impacts on U.S. international competitiveness. As Secretary of Commerce Penny Pritzker said herself, "copyright intensive industries contributed 5.1 million jobs and grew by 46.3 percent between 1990 and 2011, outpacing other IP-intensive industries as well as non-IP intensive ones. This vital contribution is a tribute to the Founders' vision in providing for the protection of creative works."<sup>6</sup> In addition, the Department of Commerce's own Bureau of Economic Analysis finds that the investment in films, television shows, literature and music produced by the entertainment industry was approximately \$75.6 billion in 2013.<sup>7</sup> Piracy also hurts law-abiding consumers who must pay higher prices for content to compensate for the costs of piracy.

## **Preserve Statutory Damages for Large-Scale Infringement**

In virtually all areas of law enforcement, police powers are used to enforce the law, including protecting property rights. And this is no different with regard to protecting intellectual property rights. However, while the state should be a central player in stopping infringement, the content industry also has an important role to play, particularly in bringing copyright infringement cases against individuals and businesses. Content producers have used legal means to shut down organizations that facilitate illegal file sharing. Major illegal file sharing enterprises, from Napster and Grokster to MegaUpload and isoHunt, have been rightly shut down by court order following lengthy and expensive lawsuits by industry groups such as the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA). These groups have also brought suit against individuals engaged in illegal file-sharing activities in the past, including pursuing cases against some particularly egregious violations of the law.<sup>8</sup>

However, because of the expenses, complexity, and time involved in bringing these cases to trial, it is not feasible for the private sector to bring a large number of cases against violators. For example, with regards to direct infringement by Internet users, pursuing lawsuits against individuals is an expensive process and does not scale well to the millions of users on the Internet who choose to download copyrighted content illegally. Instead, it is better to have a system so that in cases where copyright owners successfully defend their rights, the awarded damages are severe enough to discourage others from engaging in similar activity. At the same time, Congress and the Courts should provide enough clarity in the law so that legal activities, whether it is fair use by individuals or new business models by the private sector, are not discouraged for fear of running afoul of the law. Given that many cases of online infringement involve egregious violations of the law (e.g., copying and making available a large number of protected works and ignoring cease and desist letters), striking this balance is not as difficult as some might suggest.

The U.S. government should also work to ensure its trade partners maintain similarly sufficient legal standards to penalize online infringement. Organizations supporting the unauthorized distribution of digital content have located themselves in countries where weaker laws or weaker enforcement protect them from criminal and civil lawsuits for copyright infringement. For example, the Pirate Bay operated for many years in Sweden before authorities began criminal prosecution of the individuals involved in the website's operations. Digital piracy, both online and for physical media, is especially high in countries like China and Russia which generally have less protection for intellectual property. For these nations, piracy is a way to get content from developed nations without paying (and to enable those hosting pirate sites to make money), thereby improving their trade surplus. Therefore, continued effort is needed to strengthen trade agreement rules on intellectual property and ensure cooperation between countries to respond to online piracy. International treaties and trade agreements such as the World Intellectual Property Organization (WIPO) Copyright Treaty and the Anti-Counterfeiting Trade Agreement can help facilitate enforcement of intellectual property rights and ensure appropriately high damages serve as a disincentive to illegal file sharing activities worldwide.

Unfortunately, some organizations claim to be in favor of copyright enforcement (usually when they are arguing that it is an alternative to other enforcement provisions they are opposing), but when it comes time to actually drafting legislation or regulations, these organizations criticize proposals as being too tough on infringers.<sup>9</sup> Other critics of stronger enforcement of intellectual property online claim that increased enforcement efforts will harm the Internet and negatively impact the Internet ecosystem. These

claims seem to assume that unauthorized use of digital content is the bedrock of the Internet economy, an assertion not backed up by any evidence. There are many ways to use the Internet that do not infringe on copyrights, such as interpersonal communication, shopping, social networking, online learning, and legally accessing digital content. These uses will continue to grow regardless of the steps taken to limit unlawful behavior.

## **Allow the Private Sector to Freely Negotiate Online Licensing**

As noted earlier, the last few years have seen an unprecedented amount of growth in the market for legal consumer access to online digital content. To take just one example, the market for digital video content has seen new levels of innovation and experimentation, with so many options—Netflix, Hulu, Amazon, iTunes, Google Play, YouTube, Vudu, HBO Go, Dish Online, Crackle, etc.—that consumers have more choice today in video programming than ever before. Businesses are experimenting with different business models and technologies to deliver consumers video content on a variety of devices and at different price points resulting in a high degree of competition. Both ISPs and over-the-top providers deliver video on a variety of formats including traditional programming, on-demand, and “on the go” options. Similar success stories can be seen in other areas of digital content, including music, books, and games.<sup>10</sup>

These ongoing successes suggest that, at least for now, the government should continue to allow the private sector to take the lead on licensing agreements unless specific marketplace failures or distortions can be identified. One area where policy intervention is necessary is in music licensing where the current rate-setting standard varies by platform (e.g. terrestrial radio versus internet radio) and the type of royalties that each platform must pay (e.g. terrestrial radio does not pay a performance royalty for sound recordings).

ITIF has previously proposed two changes to remedy this situation.<sup>11</sup> First, Congress should uniformly apply the performance copyright for sound recordings to all broadcasts. The current system discriminates against non-terrestrial music services by imposing a performance copyright on sound recordings for all non-terrestrial radio broadcasts. Second, Congress should replace the broken system for setting royalty rates for the statutory license with a dynamic, market-driven rate-setting system. Just as a popular band can charge more for tickets to its concert than an unpopular band, so too should musicians be able to license their music at different rates. To this end, Congress should mandate that the Library of Congress, in partnership with SoundExchange, create an electronic database of all sound recordings and allow copyright owners to determine the statutory license rate for each of their works. The database would allow copyright owners to specify separate royalty rates for different types of music services, both by type of technology (e.g., terrestrial, satellite, cable, Internet) and by status (e.g., commercial and non-commercial). In addition, Congress should ensure that royalties do not apply if copyright owners choose not to specify a rate. This policy would allow only those copyright owners who want to charge royalties to specify rates, which would be published online in an electronically accessible format for music services to access.

These changes would address both the fairness and competitiveness criteria while preserving the benefits of a statutory license (i.e., reduced transaction costs). Reforming the royalty rate system would make all platforms subject to the same types of royalties and process for setting their rates. In addition, the creation

of a national database of sound recordings with corresponding performance royalty fees would allow copyright holders to set music royalty fees at competitive market rates while still allowing music services to benefit from a statutory license. Music services could make decisions about what music to play based, in part, on the published rate of particular songs, and they would no longer be subject to an artificial royalty fee that values all music equally. Copyright owners would be able to adjust fees to meet their promotional needs and, if they desire, provide reduced pricing for noncommercial music services such as non-profit college radio stations. A separate fee schedule for non-commercial music services would also allow consumers to continue to benefit from non-commercial broadcasts, while allowing copyright owners to obtain fair-market value from commercial music services.

Another area where the government may be able to facilitate more licensing for digital content is overseas. Content owners may be reluctant to license content in countries with weak intellectual property laws or poor enforcement. The government should work to persuade these countries to bring their domestic copyright protection and enforcement mechanisms up to international norms and demonstrate the positive consumer and economic benefits, such as new services and businesses, resulting from such an environment.

In addition, both geographic-restrictions on content and windowing (i.e. releasing content in certain formats at different times, such as a theatrical release versus DVD release,) are critical components of a robust global digital content ecosystem. If providers of digital content are required to charge the same price for the same content regardless of where or when it is being sold, they will likely only increase prices in markets where per-capita incomes are lower, thereby increasing piracy and reducing access to legal content. Likewise, if providers are required to make content available to all markets at the same time (or in all formats) they may likely end up having to charge more for the content.

### **A Multi-Stakeholder Dialogue on DMCA Takedowns Could Yield Benefits**

Cooperation between all of the various stakeholders in the Internet ecosystem is critical to have effective protection of digital copyrights. The DMCA takedown provisions provide a balance that provides websites hosting content immunity from liability for infringement claims as long as they have a process for taking down infringing content and do not actively encourage infringement, while at the same time providing copyright owners a mechanism for getting infringing content removed from the Internet. As the methods and means by which online infringement evolves, cooperation between stakeholders will be necessary to ensure that responses are appropriate, effective, and efficient. Such cooperation has been useful in the past. For example, Google voluntarily agreed to improve its tools for handling DMCA takedown requests so that it could reliably respond within 24 hours.<sup>12</sup> In addition, Google has voluntarily worked to implement a content identification system so that copyright owners can permit user-generated content containing their copyrighted materials to remain on the site while also receiving compensation. For example, musicians can get part of the ad revenue from fan-made videos that use their songs as a soundtrack. The content identification system also adds links so that YouTube users can purchase the music legally.

The government may have an important role to play as a convener of a multi-stakeholder forum to facilitate additional progress in this area and encourage cooperation on efforts to reduce online infringement. Additional efforts, such as standardizing and automating take-down requests and

processing, could result in efficiency savings for all parties and faster response times, which will ultimately translate into better experiences and prices for consumers. Such efforts may also make copyright infringement more difficult and less profitable, which will further discourage this type of illegal activity. However, in convening such multi-stakeholder groups, government should focus more on ensuring that such processes make progress and less on ensuring that every possible stakeholder be represented, for the reality is that some stakeholders in the public interest community have little or no interest in finding solutions, other than ones that give consumers free access to digital content without compensating copyright owners.

## **Conclusion**

Online piracy is a threat to the economic welfare of the United States, and more can, and should, be done by the government and others in the Internet ecosystem to limit unauthorized use of copyrighted content. Given the importance of copyright to the U.S. economy and the serious impact of piracy, ITIF applauds the Task Force for investigating how it can help ensure this vital industry thrives in the digital era and how it can partner with the private sector to achieve these ends.

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