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AGENCY: United States Patent and Trademark Office, U.S. Department of Commerce; National Telecommunications and Information Administration, U.S. Department of Commerce.

COMMENT ON THE RELATIONSHIP BETWEEN ENTREPRENEURSHIP, INNOVATION, INTELLECTUAL PROPERTY AND ENFORCEMENT

This comment is submitted in response to your request for comments on the *Copyright Policy, Creativity and Innovation in the Digital Economy* Green Paper. I am both an entrepreneur who has built a successful media company over the past fifteen years, as well as someone who has studied, explored and published research concerning the very topic of your Green Paper over those same fifteen years. As a content creator myself, I have a very strong personal interest in the outcomes of this process. As an entrepreneur who has built a company, I have a very strong personal interest in making sure that this process does not stifle innovation. As a student of innovation and copyright policy, I have a very strong general interest in the wider impact of the end result of any process concerning copyright reform.

The end result of this process will have a significant impact on the ability of entrepreneurs, new innovators, creators and consumers alike. It can impact careers, culture and much more. Therefore, significant changes to the law should be taken with great care and with appropriate deference to support from empirical data. As the Green Paper makes clear, there are clear problems with the state of the law today, and changes are necessary. That said, I am greatly concerned that **over-enforcement** and the nature of existing enforcement efforts have created real and significant chilling effects for us and others hoping to create new businesses. Indeed, I believe that such efforts are actually **counterproductive** in that they interfere with the very innovations that could help respond to the challenges of widespread infringement.

My key thoughts are as follows:

1. The federal government should focus on **supporting innovation** over enforcement, as history has shown, repeatedly, that innovation is the best solution to new technological challenges, rather than increased IP enforcement.
2. The government must be careful to avoid the **chilling effects of greater enforcement's collateral damage**, which can create massive uncertainty and lead to the stifling of important innovation
3. Attempts to increase enforcement through legal changes like **SOPA & PIPA** or via secretive international trade agreements like **ACTA, TPP and TTIP** have significant consequences for innovative companies in the US. Disrupting existing technological and legal frameworks may have significant ripple effects throughout the economy.

Recommendations:

Support Innovation: Historically speaking the *only* long-term success stories in decreasing infringement have come from innovation and new services -- **not from enforcement**. Research from Adrian Johns¹ and

¹ "Piracy: The Intellectual Property Wars from Gutenberg to Gates" by Adrian Johns

Matt Mason² has highlighted the historical truth: infringement is not the result of general “lawlessness” among the population because of a lack of rules, education or enforcement, but the near inevitable result of changing technology enabling new forms of creativity and cultural sharing and distribution, which come into conflict with existing commercial infrastructure.

A perfect example of this can be found in Sweden, where both The Pirate Bay and Spotify were started. While infringement rates in Sweden were quite high, the introduction of Spotify has resulted directly in a significant and ongoing decline in infringement for music.³ Not only that, but it has resulted in demonstrable increases in **revenue**, such that Spotify is now the leading source of revenue for the record industry in Sweden, with sales increasing by an astounding 30% in the first half of 2012 alone⁴ and has shown to create significant growth⁵ in the sales of music as well, reversing long-term declines.

The track record of increased **legal enforcement** in Sweden shows the opposite result. When Sweden passed a strict new anti-piracy law, IPRED, there was a short-term dip in public file sharing, but a quick bounce-back as users found other ways to get the material they wanted.⁶ Furthermore, in other areas of content, such as software, where there was not an innovation along the lines of Spotify, research by industry has shown **absolutely no decline** in unauthorized use following the legal change.⁷ Thus, it seems clear that in the absence of new innovations, there is little to indicate greater enforcement decreases infringement. However, greater innovation does appear to have a significant impact.

The best strategy to reduce infringement is to enable new innovations, and help to break down the barriers (such as excessive licensing demands) to building these kinds of new services that help update these industries and provide new revenue streams. Our own research⁸ found a strong correlation between music revenue in a country with the number of authorized services in those countries.

Beware the chilling effects of greater enforcement: Over the last few years, we have seen increasing enforcement activities by the federal government, including the seizing of websites without due process, the shutting down of websites and businesses both in the US and abroad (sometimes without charges being filed) and even the incorrect closure of 84,000 websites due to excessive and poorly thought-out enforcement activities.⁹ In some cases, these businesses have been shut down for more than a year with

<http://press.uchicago.edu/ucp/books/book/chicago/P/bo8273977.html>

² “The Pirate’s Dilemma: How Youth Culture Reinvented Capitalism” by Matt Mason

<http://thepiratesdilemma.com/>

³ <http://www.scribd.com/doc/66658516/Musiksverige-Svenskarnas-Internet-Van-Or-Q2-20111>

⁴ Spotify Helps Swedish Music Sales Rise

<http://musically.com/2012/07/13/spotify-sweden-ifpi-figures/>

⁵ Spotify May Actually Be Reigniting Music Sales Growth

<http://bgr.com/2013/07/31/spotify-music-sales-impact/>

⁶ File Sharing Prospers Despite Tougher Laws

<http://torrentfreak.com/file-sharing-prospers-despite-tougher-laws-120522/>

⁷ BSA Global Software Piracy Study

<http://globalstudy.bsa.org/2011/>

⁸ Sky is Rising: Regional Study

<http://www.techdirt.com/skyisrising2/>

⁹ DHS Incorrectly Associates 84,000 Web Sites With Child Pornography

<http://www.zdnet.com/blog/security/dhs-incorrectly-associates-84000-web-sites-with-child-pornography/8200>

no legal recourse, only to later have the government admit it had made a mistake (in part by relying on promises of evidence from the entertainment industry that never arrived).¹⁰

Innovative startups often push the envelope when building disruptive new services that create massive new opportunities. Unfortunately, to existing players in the market, these innovations are often so disruptive that they react instinctively by insisting that they must be illegal, and framing them as such. Yet *every single time* this happens, the resulting disruptive innovation has created more opportunities and more businesses down the road.

The MPAA's Jack Valenti famously said that "the VCR is to the American film producer... as the Boston strangler is to the woman home alone."¹¹ Yet just **nine years** after the Supreme Court declared the VCR legal, and only **four years** after Valenti's comments, the home movie business surpassed the box office business in total revenue, and was largely credited with **saving**, not killing, the movie business¹².

If the federal government had jumped in and automatically declared the VCR illegal, and accused manufacturers of criminal activities, such a market would likely never have developed, and the movie industry would likely have never reached the heights that it did.

Excessive enforcement of innovative technologies can stifle new businesses and services, creating chilling effects. Already, popular legitimate cloud services have been shutting off tools and features to avoid facing similar surprise takedowns by the US government. It is difficult to innovate when the government is building up a reputation for completely shutting down businesses.

Don't disrupt the legal and technological frameworks that we know work today. While various parts of the DMCA have significant problems that could be fixed, the clear delineation of safe harbors means that innovators and entrepreneurs can develop services knowing that they are mostly safe from sudden legal attacks for how their users use the services. Those safe harbors, along with similar safe harbors in section 230 of the CDA, have been credited with fostering a significant amount of the innovation we see online today¹³ including useful new services that have helped content creators create, distribute, promote and monetize their works.

Unfortunately, some are calling for the removal or weakening of such safe harbors, believing that the service providers should bear the brunt of policing every action of their users. The inevitable result of such a change would mean many new and innovative services would never get off the ground, held back by significant potential liability (driven, in part, by disproportionate statutory damages rates for copyright infringement, in which a single act of infringement can lead to damages awards up to

¹⁰ Unsealed Court Records Confirm that RIAA Delays Were Behind Year-Long Seizure of Hip Hop Music Blog

<https://www.eff.org/deeplinks/2012/05/unsealed-court-records-confirm-riaa-delays-were-behind-year-long-seizure-hip-hop>

¹¹ House Judiciary Committee Testimony of Jack Valenti, 1982 <http://cryptome.org/hrcw-hear.htm>

¹² When You Let Incumbents Veto Innovation, You Get Less Innovation
<http://wisconsinlawreview.org/wlr-online-volume-2013-no-5>

¹³ "Intermediary Liability: Protecting Internet Platforms for Expression and Innovation"

<https://www.cdt.org/paper/intermediary-liability-protecting-internet-platforms-expression-and-innovation>

\$150,000).

Weakening these safe harbors would inevitably hinder the new innovations and services which the US economy needs today, and which can help the entertainment industry continue to create and thrive.

Similarly, we worry about attacks on the fundamental technical infrastructure of the internet, which we saw recently with the proposals in the US Congress for SOPA and PIPA which, among many other problematic sections, completely gutted key technological security measures (such as DNSSEC) which are important components in keeping the internet safe and secure.

While those issues were averted when a huge contingent of the public spoke out, I am equally worried about many of these policies coming back to cause problems through future legislation or via secretive international trade agreements, like ACTA and TPP, that are negotiated without input from the entrepreneurial community, and without any transparency. If any such efforts are to have legitimacy among innovators, they must be done in an open and transparent fashion, rather than negotiated in secret.

Stopping these constant attempts to use trade agreements and regulatory pressure to change the technological and legal framework under which we operate would help the entrepreneurial community focus on what we do best: innovating and creating the useful new services to help the economy grow, to improve the lives of the public and to offer new and more innovative ways to create, to consume, to distribute, to promote and to monetize content.

Given those stated concerns, I fear that the Green Paper's framing of the issues, as well as its possible solutions, start off on the wrong foot. While it does note the importance of "exceptions" to copyright, it still focuses on enforcement as the main mechanism for copyright policy. It also sets the framing as one where "balance" is needed, as if benefits to one area -- such as innovators -- automatically means losses to content creators.

This is clearly untrue. The innovations put forth by the entrepreneurial community have, throughout history and continuing to the present day, created many new opportunities for many more people to create, to promote, to distribute, to connect with fans and to monetize their work. This is why today we see more creative output than ever before in history (much of which is done without regard to copyright law) as well as more people making money from their creative output than ever before.

As such it is important to look for solutions that maximize both the ability of entrepreneurs to build innovative solutions, as well as for content creators to create, share, promote and monetize their works. These two things have never been in conflict, and framing it as such will ultimately lead to suboptimal policy.

Thank you for your diligent work on this important policy challenge.

Sincerely,

Michael Masnick
Founder & CEO, Floor64