

Before the
U.S. DEPARTMENT OF COMMERCE
Office of the Secretary; National Telecommunications and Information
Administration; International Trade Administration; National Institute of
Standards and Technology

In the Matter of)
)
Global Free Flow of Information) Docket No. 100921457-0457-01
On the Internet)
)

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance hereby submits its comments in the above captioned proceeding.¹ We are a nonprofit, nonpartisan 501(c)(4) educational organization dedicated to promoting copyright as an engine for creativity, jobs, and growth. The Copyright Alliance also has created the Copyright Alliance Education Foundation, a nonprofit, nonpartisan 501(c)(3) educational organization dedicated to providing free curricula on copyright and digital citizenship to educators and students in the U.S. K-12 education system. The Copyright Alliance is a membership organization comprised of individual artists and institutions, including guilds and unions, corporations, trade associations, and sports leagues. Our members come from a full range of creative industries including musical composition, music publishing, performing rights organizations and sound recordings; book, magazine and newspaper publishing; business

¹ See Federal Register, Vol. 75, No. 188, Wednesday, September 29, 2010, pp. 60068-60073 -- <http://edocket.access.gpo.gov/2010/2010-24385.htm> .

and entertainment software; visual arts, including illustration, graphic arts and photography; and motion pictures and broadcasting.²

INTRODUCTION

In this proceeding, the U.S. Department of Commerce has initiated a Notice of Inquiry (“NOI”) as part of its Internet Policy Task Force examination of key policy issues related to the Internet. We applaud the Department for seeking information on the important topic of the free flow of information on the Internet.³

There is no real conflict between copyright and the free flow of information on the Internet. To the contrary, as U.S. Supreme Court Justice Sandra Day O’Connor wrote, “it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.”⁴ She also made clear that copyright should not be subsumed in the name of greater distribution of valued works: “It is fundamentally at odds with the scheme of copyright to

² Members of the Copyright Alliance include the American Federation of Musicians; American Federation of Television & Radio Artists; American Intellectual Property Law Association; American Photographic Artists; American Society of Composers, Authors and Publishers; American Society of Media Photographers; Association of American Publishers; Association of Independent Music Publishers; AT&T; Broadcast Music, Inc.; Business Software Alliance; CBS Corporation; Church Music Publishers Association; Directors Guild of America; Entertainment Software Association; Graphic Artists Guild; Magazine Publishers of America; Motion Picture Association of America; National Association for Stock Car Auto Racing (NASCAR); National Association of Broadcasters; National Collegiate Athletic Association; National Music Publishers' Association; National Basketball Association Properties, Inc.; NBC Universal; News Corporation; Newspaper Association of America; Picture Archive Council of America; PPL and VPL; Professional Photographers of America; Professional School Photographers Association; Recording Industry Association of America; Reed Elsevier; SESAC; Software & Information Industry Association; Sony Pictures Entertainment; Time Warner; Universal Music Group; Viacom; The Walt Disney Company; and Writers Guild of America, West.

³ Copyright Alliance member Entertainment Software Association is not participating in this filing.

⁴ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985). O’Connor was joined in the decision by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist and Stevens.

accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright, and injures author and public alike.”⁵

It is also worth noting that copyright is included in the Universal Declaration of Human Rights, which calls for the protection of interests “resulting from any scientific, literary or artistic production of which he is the author.”⁶ This is in keeping with a broad consensus across the world – demonstrated through treaties, pacts and laws -- that it is important to respect and reward creative expression.

DISCUSSION

We strongly support the public policy goal of ensuring the free flow of information across the Internet. Such a public policy goal is fully compatible with ensuring the rights of copyright owners online. As the NOI recognizes, copyright industries play a critical role in the U.S. economy. For example, the NOI notes that business-to-business online commerce transactions accounted for more than \$3 trillion dollars in revenue for U.S. companies in 2007, an increase of more than 500 percent from 1999.⁷

Copyright industries are a significant contributor to those revenues, although our industries also are engaged in numerous business-to-government and business-to-consumer online commerce transactions, with new licensed offerings and business

⁵ Ibid.

⁶ See Article 27 of the Universal Declaration of Human Rights as adopted by the United Nations -- <http://www.unesco.org/education/information/50y/nfsunesco/doc/hum-rights.htm> .

⁷ U.S. Census Bureau, “E-Stats,” May 28, 2009.

models emerging almost daily.⁸ This dramatic innovation occurring in the production and distribution of copyrighted works is tied directly to the maintenance and future assurance of an online legal marketplace for such works.

The U.S. Department of Commerce last year hosted the introduction of a very important study on the copyright industries by the International Intellectual Property Alliance and economist Stephen E. Siwek⁹ which found that core copyright industries (including theatrical films, TV, DVDs, business and entertainment software, books, music and sound recordings) contributed 22.74% of U real economic growth in 2006-2007, and total copyright industries (including impacted industries such as distribution and retail) contributed 43.06% of U.S. growth.¹⁰ The study also found that the value-added of core copyright industries in 2007 was \$889.1 billion, more than 6% of U.S. gross domestic product (GDP), and the value of total copyright industries in 2007 was \$1.52 trillion, or 11.05% of U.S. GDP.¹¹ In 2008, newspapers, not included in the Siwek study, generated an additional \$48.5 million in paid circulation, \$38 billion in print and online advertising expenditures, and 335,780 jobs in the U.S. economy.¹²

U.S. Commerce Secretary Gary Locke welcomed the introduction of the Siwek study, calling copyright industries among the “critical drivers” of U.S. economic growth

⁸ The Copyright Alliance documents many of these new models and offerings on its blog -- <http://blog.copyrightalliance.org/category/in-syn%C2%A9/>.

⁹ See “Copyright Industries in the U.S. Economy: The 2003-2007 Report” prepared for the International Intellectual Property Alliance (IIPA) by Stephen E. Siwek of Economists Incorporated, 2009 (<http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>).

¹⁰ Ibid.

¹¹ Ibid.

¹² U.S. Bureau of Labor and Statistics, U.S. Department of Labor, May 2008 National Industry-Specific Occupational Employment and Wage Estimates, bls.gov; Newspaper Association of America, *Trends & Numbers, Total Paid Circulation* naa.org (2010); NAA Business Analysis and Research, *Advertising Expenditures*, naa.org (2010). See also Comments of Newspaper Association of America, *In the Matter of Coordination and Strategic Planning of the Federal Effort against Intellectual Property Infringement* (Mar. 24, 2010).

and job creation, while noting that “copyright industries are plagued by widespread counterfeiting... of both physical and online products.”¹³ This echoed remarks Secretary Locke gave earlier that year at a motion picture industry event, in which he said the federal government supported “cutting-edge solutions to Internet piracy,” adding: “The Commerce Department will be a partner to you in ensuring the protection of intellectual property.”¹⁴ Secretary Locke has made similar comments in other fora.¹⁵

The Copyright Alliance applauds the ways in which the U.S. Department of Commerce and the Obama Administration have recognized the critical importance of enforcing the rights of copyright owners with physical goods and online. We fully endorsed President Barack Obama’s call for strong IP enforcement earlier this year, when he said: “What’s more, we’re going to aggressively protect our intellectual property. Our single greatest asset is the innovation and the ingenuity and creativity of the American people. It is essential to our prosperity and it will only become more so in this century.”¹⁶

With Secretary Locke sitting just to his right, Vice President Joseph Biden, Jr., on June 22, 2010, focused on Internet infringement when announcing the Administration’s

¹³ See a summary of the event and Secretary Locke’s remarks here (<http://blog.copyrightalliance.org/2009/07/secretary-locke-endorses-latest-iipa-siwiek-copyright-contributions-study/>).

¹⁴ Remarks at the Business of Show Business 2 conference, April 21st, 2009. A summary of his remarks and the event are here (<http://blog.copyrightalliance.org/2009/04/live-from-business-of-show-business-2-piracy/>).

¹⁵ Among the highlights of Secretary Locke’s endorsement of strong intellectual property protection: 1) Locke addressing the Copyright Policy in the Internet Economy Symposium, Washington, D.C., July 1, 2010 (<http://www.commerce.gov/news/secretary-speeches/2010/07/01/remarks-copyright-policy-internet-economy-symposium>). 2) Locke in Los Angeles January 13, 2010, offering “Remarks to Entertainment Industry Officials on Protecting Intellectual Property,” (http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_008799). 3) Locke on December 15, 2009 “Commends European Union and Member State Ratification of WIPO Internet Intellectual Property Treaties” (http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_008732). 4) Locke on October 27, 2009 in Guangzhou, China offering “Remarks at International Forum on Innovation and Intellectual Property” (http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_008556).

¹⁶ See “Remarks by the President at the Export-Import Bank's Annual Conference,” at the Omni-Shoreham Hotel in Washington, D.C., March 11, 2010 (<http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>).

Joint Strategic Plan on Intellectual Property Enforcement: “Piracy is theft, clean and simple. It’s nothing but theft. It’s smash and grab.”¹⁷ Making clear that the Administration was focused on those profiting from infringement online, he said: “We’re going after the people. We’re going after the web sites.”¹⁸

President Obama has also voiced strong support for intellectual property protection and promotion (that “one of the problems that we have had is insufficient protection for intellectual property rights” and that we must “strengthen our intellectual property system”) along with other Administration leaders.¹⁹

¹⁷ Vice President Biden was joined by U.S. Commerce Secretary Gary Locke, U.S. Attorney General Eric Holder, U.S. Department of Homeland Security Secretary Janet Napolitano, U.S. Trade Representative Ron Kirk, and U.S. Intellectual Property Enforcement Coordinator Victoria Espinel at a White House introduction of the 2010 Joint Strategic Plan on Intellectual Property Enforcement. A video of the event is on the White House web site at <http://www.whitehouse.gov/blog/2010/06/22/releasing-joint-strategic-plan-combat-intellectual-property-theft> The plan can be found at http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf

¹⁸ Ibid.

¹⁹ Here are links to some of the positive Administration commentary on intellectual property rights: 1) President Obama addressing a Town Hall Meeting in Elyria, Ohio, January 22, 2010 (<http://www.whitehouse.gov/the-press-office/remarks-president-during-town-hall-meeting-elyria-ohio>). 2) President Obama speaking at the Forum on Jobs and Economic Growth, Washington, D.C., December 3, 2009 (<http://www.whitehouse.gov/issues/economy/jobsforum>). 3) President Obama speaking on “innovation and sustainable growth” at Hudson Valley Community College in Troy, New York, September 21, 2009 (<http://www.whitehouse.gov/the-press-office/remarks-president-innovation-and-sustainable-growth-hudson-valley-community-college>). 4) Vice President Biden February 15, 2010, in a statement endorsing the Department of Justice Task Force on Intellectual Property created by U.S. Attorney General Eric Holder (http://www.toplawyernews.com/TopLegalNews/IntellectualPropertyRights/id_102817/). 5) Attorney General Holder speaking at the International Intellectual Property Summit in Hong Kong on October 18, 2010 (<http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101018.html>). 6) Attorney General Holder speaking at the Rio De Janeiro Prosecutor General’s Office in Rio De Janeiro February 24, 2010 (<http://www.justice.gov/ag/speeches/2010/ag-speech-100224.html>). 7) Attorney General Holder announcing the creation of the U.S. Department of Justice IP Task Force, Washington, D.C., February 12, 2010 (<http://www.justice.gov/opa/pr/2010/February/10-ag-137.html>). 8) U.S. Trade Representative Ron Kirk announcing the latest Special 301 Report on Intellectual Property on April 30, 2010 (<http://www.ustr.gov/about-us/press-office/press-releases/2010/april/ustr-releases-2010-special-301-report-intellectual-p>). 9) USTR Kirk speaking September 30, 2009, before the Global Intellectual Property Center Annual Summit in Washington, D.C. (<http://www.ustr.gov/about-us/press-office/speeches/transcripts/2009/september/remarks-ambassador-ron-kirk-global-intelle>). 10) USTR Kirk addressing the American Chamber of Commerce in Sao Paulo, Brazil, September 16, 2009 (<http://www.ustr.gov/about-us/press-office/speeches/transcripts/2009/september/remarks-ambassador-ron-kirk-american-chamb>). 11) David J. Kappos testifying at his nomination hearing to be U.S. Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office before the U.S. Senate Judiciary Committee July 29, 2009 (<http://judiciary.senate.gov/pdf/07-29->

The Copyright Alliance below will offer input on some of the queries posed in the Task Force NoI.

Types of Restrictions on the Free Flow of Information on the Internet

- *What types of restrictions are most readily accepted as legitimate by the business community?*

As was stated above, enforcement of copyright law does not impede the free flow of information but in fact facilitates that flow. The growth of online licensing models for the expression of that information – copyrighted works – can at times involve online access restrictions. These restrictions could be put in place by copyright owners or their licensed distributors, or by a government agency in its practice of online copyright enforcement and protection. The copyright community has seen success with various approaches that incorporate technological solutions within existing intellectual property law and the spirit of free information flow.

As such, a government can impose restrictions that target flagrant copyright infringement in which web site operators seek to profit from such infringement. One approach is to target the domain names of clearly criminal operators peddling copyrighted works without authorization. Earlier this year the U.S. Department of Homeland Security (DHS) seized the domain names of nine such rogue pirate sites,

[09KapposTestimony.pdf](http://www.gao.gov/new.items/d10219t.pdf)). 12) U.S. Government Accountability Office Director of International Affairs and Trade Loren Yager in testimony December 9, 2009 before the U.S. Committee on Oversight and Government Reform Subcommittee on Government Management, Organization, and Procurement (<http://www.gao.gov/new.items/d10219t.pdf>).

redirecting web traffic to a special DHS page informing visitors that the site was illegal and was no longer online.²⁰ These sites were not engaged in the “free flow of information,” but instead were illegal commercial enterprises engaged in massive online infringement.

- *Are the restrictions clearly linked to specific government objectives? Are the restrictions developed in a transparent manner?*

Steps taken by governments to ensure strong copyright protection by definition are “clearly linked to specific government objectives.” More than 160 nations are signatories to the Berne Convention for the Protection of Literary and Artistic Works, administered by WIPO.²¹ Under Berne and many other international treaties (including bilateral and multilateral treaties including the U.S. and its various trading partners), signatories are obligated to enforce intellectual property rights in their own borders, including online.

In the U.S., as has been stated repeatedly by Administration officials (see above), such enforcement is linked to industries contributing directly to U.S. economic and job growth. Intellectual property laws themselves stem from the Progress Clause of the U.S. Constitution, “To promote the Progress of Science and useful Arts, by securing for

²⁰ U.S. Immigration and Customs Enforcement (ICE) and the U.S. Attorney for the Southern District of New York coordinated the seizures. See more at <http://www.ice.gov/pi/nr/1006/100630losangeles.htm> .

²¹ Details on the Treaty can be found on the WIPO site at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html .

limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²²

Identifying Best Practices

- *Are there any best practices or baseline criteria for the development, articulation, and enforcement of policies restricting information flows that should be pursued by governments? For example, what are some best practices for governments to follow to secure their domestic Internet infrastructure, while minimizing restrictions on the free flow of information for their citizens?*

A safe and secure Internet is a priority for any society, and should be at the forefront of any policymaker’s agenda, in the U.S. or abroad. A safe online experience is not always found with sites peddling unlicensed copyrighted works, whether through streaming, download, copying or other means. The U.S. Federal Trade Commission has warned of the dangers of identity theft and other threats through consumer use of sites distributing unauthorized copyrighted works.²³

Taking proactive steps to ensure a healthy, legal marketplace for copyrighted works advances the societal interest of a safe Internet, which eases the free flow of information. Governments can begin by ensuring that their own agencies and employees

²² Article 1, Sec. 8, Clause 8, of the U.S. Constitution (<http://www.house.gov/house/Constitution/Constitution.html>).

²³ See “Widespread Data Breaches Uncovered by FTC Probe: FTC Warns of Improper Release of Sensitive Consumer Data on P2P File-Sharing Networks,” Federal Trade Commission alert from February 22, 2010. The FTC notified nearly 100 organizations that the private data of their organizations, employees and customers may have been compromised through data breaches caused by use of peer-to-peer file-sharing sites (<http://www.ftc.gov/opa/2010/02/p2palert.shtml>).

only interact with and make purchases from legal and licensed distributors of copyrighted works, a proposal found in the Joint Strategic Plan on Intellectual Property Enforcement issued recently by the U.S. Intellectual Property Enforcement Coordinator.²⁴

The Role of Internet Intermediaries

- *What is the impact of third party liability laws on businesses' abilities to operate in global markets? How do businesses approach these differing liability regimes?*

The Task Force is advised to review testimony from industry representatives at its joint NTIA-PTO event held at the Ronald Reagan International Trade Center on July 1st, 2010.²⁵ Several executives from third-party industries – such as Internet service providers, financial transaction processors, and online ad brokers – said uncertainty about the nature of certain sites and liability under U.S. law made it difficult to take pro-active steps to avoid facilitating infringement by rogue sites.

What is clear from the testimony of that event is that there needs to be encouragement for third parties to ensure they do not facilitate infringement of copyrighted works. What is also clear is that the U.S. government is in a strong position

²⁴ The full report is available on the White House web site at http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf. The very first proposed action item, found on page 7, is titled “Leading by Example,” and states: “First, the U.S. Government cannot effectively ask others to act if we will not act ourselves. To that end, the U.S. Government will lead by example and will work to ensure that the Federal government does not purchase or use infringing products.”

²⁵ USPTO-NTIA Symposium: Copyright Policy, Creativity & Innovation in the Internet Economy: <http://www.ntia.doc.gov/internetpolicytaskforce/copyright/copyrightsymposiumprogram.pdf>.

to encourage such action by third parties and create a more hospitable environment for such actions.²⁶

- *Are there specific principles or factors that governments should take into account when dealing with content restrictions and the intermediaries who might be in a good position to monitor postings and remove illegal or objectionable content?*

The U.S. government is committed to enforcement of U.S. intellectual property at home and abroad. It stands to reason that U.S. government take proactive steps to reduce subsidies illegal, infringing web sites are receiving from third-party industries such as ISPs, credit card companies and ad sellers.

As it has been doing, the U.S. Commerce Department, the USTR, and other government agencies can encourage our trading partners to enforce their own IP laws and shut down for-profit infringing web sites operating within their own borders, as well as work with third-party facilitators in their own countries to discourage their support of such sites, directly or indirectly.

RECOMMENDATION

In examining the important issue of the free flow of information on the Internet, it is critical that policymakers emphasize that the free flow of information is not equated

²⁶ For example, AT&T Legal Counsel Keith Epstein said the ISP wasn't comfortable deciding which sites it should block, but it would feel differently if it received a directive from the U.S. Department of Justice. Mr. Epstein spoke on the first panel of the Symposium, moderated by Arti Rai, Administrator for External Affairs with the USPTO. An archival webcast of the entire event can be found at <http://www.ntia.doc.gov/internetpolicytaskforce/copyright/webcast.html>.

with a flow of copyrighted works severed from the ownership rights attached to them.

Consumers the world over must be able to distinguish between legal and illegal services. Ensuring that IP protection is foremost in public policy both in the U.S. and with its trading partners fosters online markets for copyrighted works, fueling the U.S. economy and job growth and protecting consumers from identity theft and other dangers.

It is possible that foreign nations could take steps to disrupt the free flow of information for their own political ends and use intellectual property as a shield to hide their true intentions. This is of course not a reflection on the merits of the protection of copyrighted material online, but instead on the ill intent of the regimes themselves. There is absolutely no reason to believe that a regime acting against the free flow of information for its citizens would not do so in the absence of a framework for online IP protection.

The Copyright Alliance urges the Administration to emphasize this reality and denounce any effort by a foreign government to use IP protection in such a manner.

When copyrighted works are protected online, the free flow of information is facilitated. The U.S. government has many tools at its disposal to make this point and ensure that positive frameworks built to secure legal markets for copyrighted works are not perceived, wrongly, as a tool for suppressing dissent.

Respectfully submitted,

/s/ Patrick Ross

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