

BEFORE THE

OFFICE OF THE SECRETARY, U.S. DEPARTMENT OF COMMERCE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION,
U.S. DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE
NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY,
U.S. DEPARTMENT OF COMMERCE

Regarding:

Notice of Inquiry on “Global Free Flow of Information on the Internet”
75 Fed. Reg. 60068 (Sept. 29, 2010)
[Docket No. 100921457-0457-041]

RESPONSE OF CREATIVE COMMUNITY ORGANIZATIONS

The American Association of Independent Music (A2IM); American Federation of Musicians of the United States and Canada (AFM); American Federation of Television and Radio Artists (AFTRA); Directors Guild of America (DGA); International Alliance of Theatrical and Stage Employees (IATSE); Motion Picture Association of America (MPAA); National Music Publishers’ Association (NMPA); Recording Industry Association of America (RIAA); and Screen Actors Guild (SAG) (the “creative community organizations”) appreciate this opportunity to respond to the above-referenced Notice of Inquiry (NOI).

The creative community organizations represent the companies and people who make and disseminate American motion pictures, television programs, music, and other copyrighted works. The livelihoods of millions of creators and workers depend on the continued growth and vitality of these creative industries. Brief descriptions of each of the creative community organizations can be found at the end of this submission.

General Observations on the Free Flow of Information on the Internet

The NOI refers to the Internet as “an economic and social innovation motivated by the complementary goals of encouraging the free flow of goods and services and the commitment to freedom of expression.” NOI at 60070. The creative community organizations strongly support both of these “complementary goals,” and we agree that the Internet has enormous potential for advancing both of them. We want to bring the works that we create – music, sound recordings, movies, TV programming – to a wide array of audiences, and to do so using a wide variety of delivery media, including the Internet. Government policies that restrict the flow of information on the Internet could make it harder for us to reach these audiences when, where, and how they want to enjoy these creative works. Our businesses, crafts and livelihood depend upon full recognition of freedom of expression. The Internet has a powerful capacity to enable more and more creative voices to be heard; this serves to benefit both creators and consumers. Electronic

commerce is integral to the business models of the creative industries. In combination with other technological advances, the spread of Internet access around the world has lowered barriers to entry to the creative arena, allowing far more musicians, songwriters, filmmakers, and other artists to express themselves in a way that reaches broader and more diverse audiences, and that enables independent music and audiovisual artists to enter the marketplace.

These positive impacts for freedom of expression, and for a more diverse marketplace, could also be threatened if government restrictions on Internet activity are mistargeted or heavy-handed. For these reasons, we strongly support advocacy by the US government to encourage broad recognition of freedom of expression worldwide, and to oppose unfair and discriminatory government censorship, whether online or offline.

But none of this means we believe that the Internet can or should be a “law-free zone,” or that government rules for Internet-based information flows are never justified. To the contrary: for all its potential to promote creative expression and to bring the fruits of creativity to wider and more diverse audiences, the Internet also brings with it a serious, and increasingly realized, potential to facilitate and propagate lawless behavior, including through means that evade detection and that cross national boundaries. It is appropriate and indeed necessary for sovereign governments to forcefully address unlawful conduct on the Internet in order to protect vital national interests, even while safeguarding fundamental human rights of free expression.

Many examples could be given – and probably will be provided by other commenters – of justifiable government restrictions to combat evils ranging from child sexual exploitation to cybersecurity, and to protect consumers from fraud, misrepresentation, and intrusion. Without gainsaying any of these important interests, in this submission, we focus on one particular area – copyright protection – in which governments should be encouraged to adopt reasonable, prudent and enforceable rules in connection with Internet activities in order to protect their vital interests and those of their citizens.

Intervening in Internet Activity to Enforce Copyright

Copyright protection should be a leading objective for all governments in their approach to the Internet. Pervasive online copyright theft is undermining the livelihoods of creators, destroying jobs, curtailing economic growth, damaging cultural expressions, curbing cultural diversity, and undercutting freedom of expression in virtually every country. The great danger in this area is not that governments will do too much to intervene to counter and control online lawlessness, and to bring respect for the rule of law to the Internet; rather, the main danger is that they will do too little. If this occurs, the consequences will be devastating for creators, for those whose jobs depend on the creative process, for the fulfillment of international obligations, and ultimately for all Internet users, since they all benefit from a robust legitimate e-commerce marketplace in creative works.

The case for government action to combat online copyright theft is especially compelling. Any resulting restrictions must be evaluated on their own considerable merits. The refrain that they should be avoided because they may send governments hurtling down a “slippery slope”

toward other fields where intervention is less justified should be treated with great skepticism. Of course, there are close cases in which it is debatable whether or not a particular online transaction infringes copyright. But the main concern of the creative community organizations is not with borderline cases, but with the disturbingly common situation in which online theft is blatant and indisputable, and to which government intervention must be targeted.

There are three main reasons why governments should act to respond forcefully to online theft, and why the US government should strongly encourage them to do so:

1. Online theft is a threat to vital national interests. As more and more nations have come to realize pervasive online theft of copyrighted material is a clear and present threat to their economic security, jobs, and cultural development. In many ways, the current situation of creators and copyright industries in developing countries, as well as small and medium sized enterprises in all markets, most vividly demonstrates the problem. The Internet helps independent producers and artists with limited resources to reach global as well as local audiences. Online theft stifles or even silences these voices. It jeopardizes this democratization of cultural production, robs creators of these opportunities, decimates markets for local music, movies and the like, and makes it impossible for these creators to make a living, and for these small businesses to turn a profit or attract needed investment. Cultural diversity suffers, and economic development and employment are undermined. Conversely, when effective action is taken against online theft, it boosts national economies, creates jobs, promotes cultural creativity, and contributes to the healthy growth of a vibrant, consumer-friendly and culturally diverse online marketplace.

2. Massive online infringement is illegal (and usually criminal) in nearly all countries. While of course there are differences among the national laws on this subject, the degree of harmonization of legal regimes is greater in this area than in almost any other field for which government intervention in the Internet is sometimes sought. The more than 150 countries that are part of the World Trade Organization are already obligated to provide enforcement procedures that permit effective action against any act of copyright infringement, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements.¹ Indisputably this applies to offering unauthorized copies (downloads) or public performances (streaming) of high volumes of complete works, sound recordings, live telecasts, and audio-visual productions. Nearly 90 countries now adhere to the WIPO Internet Treaties, in which the substantive obligations of member states to outlaw online infringement are specified.² Because of the relatively high level of legal harmonization on this topic, the risk is relatively low that action on the national level to stanch flows of infringing material on the Internet will lead to frictions with the laws of other countries.

¹ World Trade Organization, Agreement on Trade Related Aspects of Intellectual Property (“TRIPS”), art. 41 (1994).

² Most recently, countries accounting for more than half of total global trade negotiated in the draft ACTA agreement a commitment to take “effective action” against “infringement of ... copyright or related rights over digital networks” ACTA Oct. 2 draft Art. 2.18.2., available at <http://www.ustr.gov/acta>.

3. Active governmental intervention to enforce copyright advances the cause of human rights. The right to protection of the “moral and material” benefits from creative activity is universally recognized as a human right.³ Surely the “material benefits” of creators are being seriously compromised when governments do not take effective action against online theft. In our own national constitutional tradition, copyright has long been recognized as the “engine of free expression.”⁴ Effective enforcement against massive online theft keeps that engine humming and churning out more (and more diverse) expressive material both online and offline. By contrast, failure to enforce the rule of law in this area robs creators of opportunities for expression, hampers investment and growth of legitimate services, and thus undermines free expression. Thus, stealing another’s expression through wholesale appropriation of copyrighted works not only falls completely outside the zone of protected speech; it actually stifles speech, by limiting incentives for producing and distributing original creative works.

For these and other reasons, encouraging other governments to take action to prevent use of the Internet for theft of copyrighted material, where feasible – and to detect and punish such uses where prevention has failed – should be a top priority when the U.S. government engages our foreign counterparts on Internet policy issues, whether in the context of trade negotiations or otherwise. It is fully possible for governments to develop policies that encourage the free flow of information and that also ensure effective copyright protection. By the same token, governments must take care that their pursuit of other legitimate policy objectives in the online environment does not provide a shield for criminal behavior and an obstacle to further creation and dissemination of expressive works. This should be a consideration, for instance, in designing online privacy rules, so that the vindication of this important interest also accommodates legitimate public and private sector enforcement efforts against online theft.

The Role Of Intermediaries

A significant portion of the NOI is given over to a discussion of “The Role of Internet Intermediaries,” and several questions are posed on that topic. The creative community organizations offer here the following comments on this important issue. We will discuss some of these topics in more detail, and with additional factual information, in our comments in response to the nearly contemporaneous NOI on “Copyright Policy, Creativity, and Innovation in the Internet Economy.”⁵

³ *See, e.g.*, Universal Declaration of Human Rights, art. 27, paragraph 2 (“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”); American Declaration of the Rights and Duties of Man of 1948, art. 13, para. 2 (“He [sic] likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.”)

⁴ *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 589 (1985).

⁵ Department of Commerce, Notice of Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 61419 (Oct. 5, 2010).

An effective effort against online theft will require the cooperative engagement of many entities that do business on the Internet – network operators or Internet service providers, of course, but also payment processors, advertising service providers, search engines, web hosting services, and other intermediaries. The services of legitimate businesses in all these categories are sometimes abused by customers to engage in online copyright theft. It stands to reason that these businesses also have critical and indispensable roles to play in combating online theft; they must be part of the solution. Our experience is that some of these intermediaries are willing to step up to this role, because they understand that it would be mutually beneficial, to the creative community as well as to themselves, to foster the healthy growth of e-commerce in copyrighted works. Unfortunately, too many of their counterparts do not yet share this view, and seem satisfied to turn a blind eye to these abuses of their services. This recalcitrance not only stymies the development of an effective, cooperative approach to the problem; it is also unfair to those companies with whom we have succeeded in having productive discussions about online copyright theft, since these companies worry that they may suffer a competitive disadvantage.

Let us be clear: We do not propose that intermediaries operate as “Internet police,” or that they should be responsible for monitoring and evaluating all content online. The goal is for intermediaries to take reasonable and appropriate steps to respond to use of their services for copyright theft, in an active partnership with content holders. It should be a goal of US policies to encourage and promote meaningful cooperation among right holders and intermediaries, within the US and internationally, in order to develop a vibrant, legitimate, and trusted online environment for consumers. To advance this goal, USG advocacy with other governments should focus on the following points:

A. Clear legal incentives. Indispensably, there must be clear legal doctrines in each country’s law spelling out when intermediaries can be held accountable for the infringing activities of their customers, clients, subscribers, etc. This is the *sine qua non* for effective legal incentives. The law should also clearly spell out what cooperative steps intermediaries must take in order to limit their potential exposure. The preconditions for such limitations should be what the intermediaries do to cooperate; action, not status, should be the touchstone.

Legal incentives will take different forms in different legal systems. The U.S. has taken the approach of distinguishing between intellectual property infringement and other wrongs, both in terms of liability doctrines and legal incentives to cooperation. For that reason, the broad immunities conferred on many Internet intermediaries under section 230 of the Communications Decency Act are inapplicable to claims regarding online copyright infringement.⁶ Legal regimes that use a more horizontal approach (e.g., treating copyright infringement issues the same way as defamation) have often encountered problems that U.S. law has managed to avoid. However, either approach can be effective.

But in all cases, the effectiveness of the legal incentives should be judged by their results in reducing levels of online copyright theft, and in providing space for the development of

⁶ See 47 U.S.C. 230 (e)(2).

legitimate online markets in copyrighted materials. Governments must ensure that the incentives are properly calibrated, and should be prepared to adjust them if they are not delivering the needed result: effective cooperation against online theft.

We believe the time for such adjustments has arrived in the US, because the current legal incentives, in practice, have fallen short of success in stimulating the needed cooperative efforts against online copyright theft. This will be spelled out in more detail in our response to the copyright NOI.⁷

B. Impediments to voluntary cooperation must be removed. The optimal outcome is a voluntary system in which the full range of right holders and service providers work together to detect and deal with online theft of copyrighted materials. Such arrangements can be far more nimble in adapting to technological and market changes, and far more adaptable to the particular needs of specific sectors and players, than any system imposed by government from the top down. Unfortunately, in some cases, even if legal incentives are in place in the copyright law to encourage this cooperation, they are countervailed by disincentives to cooperation arising from other areas of the law, ranging from competition law to telecom regulation to privacy and data protection. All such obstacles to cooperation should be carefully scrutinized, and minimized to the greatest extent possible, in order to focus efforts to join together to combat the pervasive economic, cultural, and law enforcement threat that online copyright theft represents. Similarly, our government, as well as those foreign governments with which it engages, should be very careful, as it develops new laws or regulatory policies in these and other related areas, to ensure that it is not creating any additional impediments to cross-industry cooperation.

C. Governments must lead. The NOI asks, “Are there alternatives to government-mandated restrictions on the flow of information on the Internet that can realize legitimate policy objectives?” From the perspective of the creative community organizations, the answer is clearly yes: as just noted, voluntary, cooperative arrangements are more flexible, responsive to technological change, more targeted to specific problem, and therefore are very much the preferred outcome. At the same time, in our years of experience in grappling with this issue in scores of national markets around the world, we have come to learn that government involvement and government leadership are essential. We have not seen significant progress in any market toward the development and implementation of effective cooperative efforts against online copyright theft without strong leadership from national governments.

⁷ We wish to note, however, that this “global free flow” NOI mischaracterizes the current U.S. legal regime under the DMCA in several respects. See NOI at 60072. First, it suggests that the only safe harbor available is for “qualified Internet intermediaries serving as ‘mere conduits’”. Second, it characterizes the safe harbor as a protection against “copyright infringement liability,” when in fact it is a remedial limitation. Third, it seems to state that “mere conduits” can claim the safe harbor only if they “comply with a ‘notice and takedown’ system.” Fourth, it implies that compliance with notice and takedown is the only requirement that an intermediary must meet in order to claim the safe harbor. None of these is an accurate statement of U.S. law. We recognize that the discussion of the DMCA in the NOI is meant to be merely illustrative, not exhaustive; but it is important that our engagement with other governments on these issues be grounded in a clear understanding of U.S. law.

In recent years, governments around the world have decided to make it a priority to respond to this threat to their vital national interests, and to drive toward a more effective response to online copyright theft. From France to New Zealand, from the United Kingdom to Taiwan, from Korea to Spain, national governments are bringing together the indispensable parties, including both the creative community and the “Internet intermediaries,” are pushing them to enhance the level of cooperative efforts, and, where necessary, are providing the legal framework for more effective action against this pervasive problem. It is not necessary to endorse the specifics of the solutions under development in any of these countries (and in others) to appreciate that this is a trend that the US government needs to understand, to support, and, in the manner consistent with our own national commitments and legal traditions, to emulate. Governments – including our own – can and should play a role in fostering both copyright protection and the free flow of lawful goods and services on the Internet.

Thank you for considering the views of the creative community organizations listed below.

Respectfully submitted,

American Association of Independent Music (A2IM)
American Federation of Musicians of the United States and Canada (AFM)
American Federation of Television and Radio Artists (AFTRA)
Directors Guild of America (DGA)
International Alliance of Theatrical and Stage Employees (IATSE)
Motion Picture Association of America (MPAA)
National Music Publishers’ Association (NMPA)
Recording Industry Association of America (RIAA)
Screen Actors Guild (SAG)

December 3, 2010

APPENDIX

DESCRIPTIONS OF CREATIVE COMMUNITY ORGANIZATIONS

1. American Association of Independent Music (A2IM)

A2IM is a not-for-profit trade organization serving the Independent music label community as a unified voice representing a sector that comprises over 30% of the music industry's market share in the United States (and almost 40% of SoundScan digital sales). The organization represents the Independents' interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community. A2IM is headquartered in New York City.

2. American Federation of Musicians of the United States and Canada (AFM)

The American Federation of Musicians of the United States and Canada (AFM) is the largest union in the world representing professional musicians, with over 80,000 members in the United States and Canada. Musicians represented by the AFM record music for sound recordings, movie sound tracks, commercials, and television and radio programming under industry-wide collective bargaining agreements. The AFM works to ensure that musicians not only receive fair wages and benefits, but also participate in the proceeds from the sale or other exploitation of their recorded performances in physical or digital formats, and have a voice in cultural and policy debates that affect them at home and abroad.

3. American Federation of Television and Radio Artists (AFTRA)

AFTRA members are the people who entertain and inform America and work as actors, singers, journalists, dancers, announcers, comedians, disc jockeys and other performers in television, radio, cable, sound recordings, music videos, commercials, audiobooks, non-broadcast industrials, interactive games and all formats of digital media. Founded in 1937, AFTRA today provides its more than 70,000 members nationally a forum for bargaining strong wages, benefits and working conditions and the tools and upward mobility to pursue their careers with security and dignity. From new art forms to new technology, AFTRA members embrace change in their work and craft to enhance 21st century American culture and society.

4. Directors Guild of America (DGA)

DGA was founded in 1936 to protect the economic and creative rights of Directors. Over the years, its membership has expanded to include the entire directorial team, including Unit Production Managers, Assistant Directors, Associate Directors, Stage Managers, and Production Associates. DGA's 14,600 members live and work throughout the U.S. and abroad, and are vital contributors to the production of feature films, television programs, documentary features, news and sports, commercials, and content made for the Internet and new media. DGA seeks to protect the legal, economic, and artistic rights of directorial teams, and advocates for their creative freedom.

5. International Alliance of Theatrical Stage Employees (IATSE)

IATSE is the labor union that represents technicians, artisans, and craftspersons in the entertainment industry, including live theater, motion picture and television production, and trade shows. IATSE was formed in 1893 and has over 110,000 members. Through its international organization and its autonomous local unions, IATSE seeks to represent every worker employed in its crafts and to help them obtain the kind of wages, benefits, and working conditions they need for themselves and their families.

6. Motion Picture Association of America (MPAA)

The Motion Picture Association of America, Inc. (MPAA) serves as the voice and advocate of the American motion picture, home video and television industries from its offices in Los Angeles and Washington, D.C. Its members include: The Walt Disney Studios; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; and Warner Bros. Entertainment Inc.

7. National Music Publishers' Association (NMPA)

Founded in 1917, the National Music Publishers' Association (NMPA) is the trade association representing over 2,500 American music publishers and their songwriting partners. The NMPA's mandate is to protect and advance the interests of music publishers and songwriters in matters relating to the domestic and global protection of music copyrights.

8. Recording Industry Association of America (RIAA)

The Recording Industry Association of America is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes our members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA® members create, manufacture and/or distribute approximately 85% of all legitimate sound recordings produced and sold in the United States.

In support of this mission, the RIAA works to protect intellectual property rights worldwide and the First Amendment rights of artists; conduct consumer industry and technical research; and monitor and review state and federal laws, regulations and policies. The RIAA® also certifies Gold®, Platinum®, Multi-Platinum™, and Diamond sales awards as well as Los Premios De Oro y Platino™, an award celebrating Latin music sales and its new Digital Sales award.

9. Screen Actors Guild (SAG)

SAG is the nation's largest labor union representing working actors. Established in 1933, SAG has a rich history in the American labor movement, from standing up to studios to break long-term engagement contracts in the 1940s, to fighting for artists' rights amid the digital revolution sweeping the entertainment industry in the 21st century. With 20 branches nationwide, SAG represents over 120,000 actors who work in film and digital motion pictures, television programs, commercials, video games, industrial shows, Internet, and all new media formats. SAG exists to enhance actors' working conditions, compensation, and benefits and to serve as a powerful unified voice on behalf of artists' rights.