



November 15, 2010

The Honorable Gary Locke  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

Re: Global Free Flow of Information on the Internet, United States Department of Commerce (Federal Register Volume 75, Number 188, Docket number: 100921457-0457-01)

Dear Mr. Secretary:

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region. These comments are submitted by the Chamber's Global Intellectual Property Center (GIPC), which represents a broad spectrum of intellectual property-intensive companies, and leads the 750-member Coalition Against Counterfeiting and Piracy, the largest business coalition dedicated to fighting the growing threat of counterfeiting and piracy to the economy, jobs, and consumer health and safety. GIPC leads a world-wide effort to protect innovation and creativity by promoting strong intellectual property rights and norms around the world. We recognize that these rights are vital to creating jobs, saving lives, advancing global economic growth, and generating breakthrough solutions to global challenges. GIPC appreciates this opportunity to respond to the above-referenced Notice of Inquiry.

GIPC agrees with the statement in the NOI that "the free flow of information over the Internet is integral to economic growth and vibrancy, as well as to the promotion of democratic values that are essential to free markets and free societies."<sup>1</sup> It is beyond dispute that the Internet has transformed how people in many countries

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<sup>1</sup> 75 Fed. Reg. at 60068.

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do business, learn, play, and participate in self-government, and that this impact will be felt in even more societies as access to the Internet expands and improves.

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. A proper role of government is to ensure compliance with the law 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.

One dimension in which the potential of the Internet has already been compromised by unlawful behavior deals with the infringement of intellectual property (IP) rights. Trademark counterfeiting, patent infringement, and copyright piracy are pervasive online, 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 online sites whose business models are premised on the theft of the intellectual property of others. These “rogue sites” often appear legitimate to many consumers, but they do little but offer counterfeit goods and/or pirate versions of copyrighted movies, TV shows, musical recordings, videogames, e-books, and other works. While hardly the only example of online IP infringement, the high-volume activities of these sites contribute significantly to the loss of jobs, economic damage, and threats to public health and safety.

GIPC supports a number of strategies and tactics to combat online IP infringement effectively. S. 3804, the “Combating Online Infringement and Counterfeits Act,” is one example of an approach that seeks to address the worst of the worst online infringers, rogue sites. The bill would apply a strict test for identifying rogue sites and provide a set of remedies available when a Federal court, in response to an action filed by the U.S. Attorney General, is persuaded of the site’s dedication to counterfeiting and piracy. In our view, the bill is a balanced, appropriate, and much-needed step towards reducing online counterfeiting and piracy by narrowly focusing on the most open and notorious actors. GIPC supports S. 3804 and urges the Department of Commerce and the Administration to express its support as well. Clearly, the bill is not intended to impair the free flow of legitimate

information online. GIPC is committed to working with others in support of this bill with the goal of maximizing its effectiveness against rogue sites and maintaining the free flow of legitimate information.

Infringing content is not protected speech. Information that flows as an integral part of enterprises that fraudulently hawk counterfeit goods, or that traffic in pirated copyrighted materials, ought to be considered *misinformation*, not comparable to other information that flows on the Internet, and sound public policy should not treat them the same. Reasonable and well-designed efforts to disrupt such illicit activity and protect legitimate e-commerce and freedom of expression should not be deemed merely “acceptable”; instead, they should be recognized as *essential* to enabling the healthy development of online marketplaces and the fulfillment of the potential the Internet offers to businesses and consumers alike. U.S. government policies should support such initiatives, and our government should take the lead in designing and implementing effective national policies, with an eye toward improving globally coordinated approaches to these serious global problems.

We support efforts to combat online counterfeiting and piracy that can be carried out surgically, and in a way that minimizes the risk of undue interference with legitimate expressive or commercial activities on the Internet. Similarly, we deplore any effort to selectively use intellectual property laws as a tool for content-based stifling of speech. With these core principles in mind, GIPC responds to the NOI’s request for “best practices or baseline criteria for the development, articulation and enforcement of policies restricting information flows that should be pursued by governments.”<sup>2</sup>

Online IP protection mechanisms should be founded on an established global framework of norms defining illegal behavior.

National governments are on the strongest ground when they seek to enforce norms that are widely or even almost universally acknowledged, and that are relatively harmonized around the world. This surely describes the norms applicable to counterfeiting and piracy. Such activities are illegal – indeed, criminal – in virtually every country. All 153 countries adhering to the World Trade Organization are

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<sup>2</sup> 75 Fed. Reg. at 60071.

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required to provide criminal penalties against piracy and against counterfeiting when either is carried out on a commercial scale. While national implementations of these norms can and do differ, the basic framework is almost universally embraced, and the national laws are more alike than different.

Online IP protection mechanisms should be expeditious and nimble.

In the fight against online counterfeiting and piracy, creators and right holders too often face a foe that can rapidly shift online “identity” or cross borders to avoid enforcement. While staying a step ahead of such targets may be an unrealistic goal, it is critical that enforcement not fall too far behind. Once the existence and online whereabouts of online IP infringement have been established, it is critical to move quickly in imposing the needed remedies. Mechanisms should allow expeditious action to apply targeted remedies to clone sites that continue to infringe IP as they spring up with different domain names, hosting locations and connectivity providers.

Online IP protection mechanisms should be carried out with fairness and due process.

It is equally important that procedures to enforce IP online protect the legitimate interests of businesses and consumers on the Internet. Procedures should be fair, rulings about imposition of remedies or penalties should be made by impartial decision-makers and with due process; targeted entities and other affected parties should have a reasonable opportunity to be heard; strategic partners in the fight against online IP infringement should be protected from liability when they act to prevent infringements, and provision should be made for review of decisions based on new information, changed circumstances, or the interests of justice.

U.S. policy and law should encourage the protection of IP rights online. In order to effectively do so:

The U.S. should lead.

GIPC joins a host of other companies and business organizations in applauding legislative efforts to stop “rogue sites.” The Combating Online Infringement and Counterfeiting Act (COICA), S. 3804 provides a sound starting point for enhancing the legal tools to crack down on sites dedicated to piracy and counterfeiting. GIPC also commends the assertive work of federal law enforcement agencies in deploying

the authorities available under existing law. Last summer's "In Our Sites" takedowns of several prominent rogue sites provide a heartening example. Full funding for these critical law enforcement efforts, as well as full implementation of the 2008 PRO-IP Act, will keep the U.S. squarely on record as a leader in the global effort to combat online counterfeiting and piracy.

The international legal framework should be maintained and strengthened.

Building on the near-universal acceptance of the minimum global standards embodied in the WTO TRIPS agreement, as mentioned above, the U.S. should continue to encourage its trading partners to embrace meaningful IPR enforcement obligations, especially those applicable to the online environment. In this regard:

- Implementation of the Korea-US Free Trade Agreement, with its world-class IPR chapter, should be a top priority.
- The U.S. should build on the KORUS FTA (as well as the existing FTAs with Australia, Chile, Peru and Singapore) in negotiating the IPR provisions of the forthcoming Trans Pacific Partnership FTA, to ensure that all signatories are committed to strong obligations for online IPR enforcement that will help promote legitimate e-commerce and other flows of legitimate information.
- The Anti-Counterfeiting Trade Agreement (ACTA) will require its signatories to provide effective measures against online infringement, including remedies which constitute a deterrent to further infringements. It thus offers a good framework for further progress with like-minded countries that share our views about the importance of enforcement against counterfeiting and piracy to a healthy global economy.

Finally, public education efforts are critical. Businesses and consumers around the world have a vital stake in a safe, secure, and reliable online environment, free from fraud and inhospitable to activities that destroy jobs, undermine creativity and innovation, and threaten public health and safety. The public will support reasonable steps taken to advance these goals; but proactive advocacy is needed to dispel confusion and to respond to ill-informed critiques.

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We have an opportunity to work together toward the common goal of enhancing the free flow of legitimate information on the internet by implementing reasonable and balanced measures to reduce online IP infringement and thus promoting creativity and innovation as well as vibrant e-commerce. GIPC stands ready to work with the Department as it strives towards this laudable goal.

Sincerely,

A handwritten signature in black ink, reading "David T. Hirschmann". The signature is written in a cursive style with a large, stylized initial "D".

David T. Hirschmann  
President and Chief Executive Officer  
Global Intellectual Property Center