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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.
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Re: Global Free Flow of Information on the Internet
75 Fed. Reg. 60068
Docket No. 100921457-0457-041

The MPAA appreciates the opportunity to offer comments on the Department of Commerce's Notice of Inquiry on the Global Free Flow of Information on the Internet. These comments should be understood as supplementing the comments submitted by the Creative Community Organizations, of which MPAA is a stakeholder, that focused on responding to the role of intermediaries.

The American motion picture and television industry is a major U.S. employer that supported 2.4 million jobs and over \$140 billion in total wages in 2008 in all 50 states. Over 296,000 jobs were in the core business of producing, marketing, manufacturing and distributing motion pictures and television shows, across every major occupational group. These include people employed in film and television production-related jobs on a free-lance basis, part time or full time at major studios, independent production companies, and core industry suppliers like film labs, special effects and digital studios, location services, and prop and wardrobe houses dedicated to the production industry, among others.

Another 453,000 jobs were in the related businesses that distribute motion pictures and television shows to consumers, including people employed at movie theaters, video retail and rental operations, television broadcasters, cable companies, and new dedicated online ventures. The industry also supports over a million indirect jobs in the thousands of companies that do business with the industry, such as caterers, dry cleaners, florists, and hardware and lumber suppliers, and retailers.

The American motion picture and television production industry remains one of the most highly competitive around the world. In 2008, the enduring value and appeal of U.S. entertainment around the world earned \$13.6 billion in audiovisual services exports, over 30 percent more than in 2004. Moreover, this industry is one of the few that consistently generates a positive balance of trade. In 2008, that surplus was \$11.7 billion, or seven percent of the total U.S. private-sector trade surplus in services.

The industry distributes its filmed entertainment to over 150 countries and in 2007, 46 percent of MPAA's member companies' revenue came from overseas. MPAA has a strong interest in the health and sustainability of these international markets and appreciates the US government's interest in examining the free flow of information on the Internet and "identifying policies that will advance economic growth and create jobs and opportunities for the American people".

Overview

The Internet is a powerful tool for disseminating information and its penetration and uptake has changed global commerce. MPAA member companies have taken full advantage of the opportunities presented by the Internet to offer consumers access to legitimate content and to respond to consumers' evolving consumption demands. Electronic commerce has truly become integral to the business models of MPAA member companies. At the same time, this medium has been exploited to foster global theft of MPAA members' content. Trade in stolen copyrighted content threatens the free flow of legitimate online commerce.

Intellectual property protection is the most effective incentive for the creation and widespread distribution of valuable content. To the extent that this incentive is weakened or undercut, the spectrum of information and entertainment products and services made available over digital networks, and the functionality of the networks themselves to end users, will shrink to the lower end of the value chain.

Enforcing the rule of law online is critical to fostering global trade in legitimate commerce and safeguarding the fundamental rights of artists and creators. As Secretary Clinton stated in her February 2010 Internet Freedom speech, "all societies recognize that free expression has its limits." As Secretary Clinton suggested, enforcing the rule of law online to enforce intellectual property rights must not be confused with restricting the freedom of expression or restricting the flow of information. Indeed, the enforcement of intellectual property rights fosters legitimate businesses' ability to produce and distribute content online.

US global economic competitiveness in the 21st century is dependent upon fostering legitimate online commerce. This demands that the US government work with trading partners to open and lock-in market access for e-commerce and to work with foreign governments to combat rampant online theft.

The Online Marketplace

MPAA member companies work with over 375 legitimate video-on-demand websites around the world, providing high quality full length films and television show to consumers. There are sites that cater to every manner of consumer viewing including ad-supported viewing, rental viewing, download to own, and subscription viewing. In the U.S., there are over 60 such sites, including sites offering on-demand catch-up of television shows whether by streaming or rental. There are also numerous social networking sites, such as Bebo, Gaia, and MySpace, and peer-to-peer companies such as Bittorrent.com and Vuze, which provide movies legitimately. Over the past several years, we have seen major developments like the launch of Hulu, a video streaming aggregator, which increased its user base by 11% in 2009 to host the second most video streams – 257 million streams in November 2009 alone – after YouTube.

Netflix announced recently that approximately 42% of its 11.1 million subscribers streamed at least one TV episode or movie in the third quarter of 2009 compared to only 22% in 2008. Long-term trends in video viewing from ComScore Video Metrix show that online videos viewed more than tripled between November 2007 and November 2009, while the number of unique video viewers increased to nearly 25%. The U.S. motion picture companies are continually seeking and launching exciting partnerships around the world. In November 2009, Sony launched its online PlayStation Video Store in France, Germany, Spain and the UK, providing High Definition films from MPAA studios and local studios for rental or download to own. Warner Bros launched an on-demand site in Japan, directly offering consumers Warner movies and TV shows for rent, download to own, viewing on PCs and mobile phones. And, in December 2009, Voddler launched in Sweden, offering Disney and Paramount films to customers of ISP Bredbandsbolaget for streaming on an ad-supported and rental basis.

On-demand, full-length television shows and films from the major studios are now being provided to consumers by all the major mobile operators. Apart from streaming to mobile devices, studios are also working to make content available to load onto those devices through SD flash memory cards similar to those used in digital cameras. These are sold pre-loaded, and may soon be used to download content from in-store kiosks.

Notwithstanding these exciting efforts to rapidly develop and roll-out new online business models, online theft of content continues to threaten the development of legitimate markets for electronic commerce. The Princeton Center for Information Technology Policy found that 99% of the files available on BitTorrent, the most popular peer-to-peer file sharing protocol, were found to be copyright infringing¹. By example, in 2009 there were 6.6 million illegal downloads of the TV show “Heroes”² and, as of May 2010, 10 million illegal downloads of the Academy

¹ Princeton Center for Information Technology Policy, “Census of Files Available via BitTorrent,” Ed Felten, January 2010.

² TorrentFreak.com, “Top 10 Most Pirated TV Shows of 2009,” December 31, 2009; Nielsen Media Research.

Award-winning movie “The Hurt Locker” from BitTorrent³. Peer-to-peer file sharing of stolen content is not the only challenge to legitimate online commerce and global trade. DtecNet found that 100,000 or more active links to infringing movie and TV shows are discovered daily on average across a sample of 500 websites, 16% pointing to streaming video and 84% pointing to direct download sites.

Barriers to Global Free Flows of Information

MPAA generally identifies barriers to the global free flow of information as falling into two buckets: market access barriers and intellectual property theft. The OECD 2008 Seoul Declaration recognizes these two critical and intertwined prongs⁴. Some examples of these barriers are discussed below.

Market access

In many important markets, intellectual property thieves have, effectively, a significant competitive advantage over MPAA member companies and other legitimate businesses; criminals operate unencumbered by quotas, duties, internal taxes, distribution restrictions, licensing requirements, and other government policies which impose costs on legitimate companies. Moreover, market access restrictions that limit the ability of MPAA members to enter markets have absolutely no effect on restricting the availability of pirate content in the online market: pirates freely supply the market without heed to or burdened by the policies applied to legitimate businesses. Indeed, one of the most effective tactics in fighting online intellectual property theft is ensuring market access for legitimate content and preventing the application of discriminatory policies to the online market.

MPAA member companies welcome the European Union’s goal of creating a single market to foster European economic and political unity. The Audio-Visual Media Services (AVMS) Directive widens the scope of the Television Without Frontiers Directive to cover audiovisual media services provided on-demand, including via the Internet. The AVMS Directive relies on a two-tiered approach to regulation with a set of basic obligations applying to all content delivery services (e.g. protection of minors and human dignity), and specific requirements that apply only to traditional broadcasting or to on-demand services. On-demand services are subject to a somewhat less restrictive provision, which does not set any strict content quota but still requires Member States to ensure that on-demand services encourage production of, and access to, European works.

The French government is encouraging regulation of the supply of VOD over the Internet through inter-industry agreements. These agreements may impose constraints such as a required release window, minimum pricing levels and artist remuneration, and investment requirements. MPAA prefers contractual freedom which will foster growth in this new medium. The

³ TorrentFreak.com, RentrakCorporation, Box Office Mojo.

⁴ The Seoul Declaration states governments agree that a shared challenge is “to ensure protection for intellectual property rights” and that governments should “Combine efforts to combat digital piracy with innovative approaches which provide creators and rights holders with incentives to create and disseminate works in a manner that is beneficial to creators, users and our economies as a whole.”

Government has recently provided more flexibility on release windows, but they nevertheless remain statutory.

In the Asia-Pacific region, Australia under the US-Australia FTA, reserved its right to impose an Internet quota. In India, a Ministry of Information and Broadcasting task force is reevaluating foreign investment limitations that implicate electronic commerce. India also imposes a services tax against the transfer of intellectual property rights. Under this new tax policy, an Indian distributor of foreign films would be liable to pay the 10.3 percent service tax on the amount they pay to the owners of the intellectual property which would raise the total amount of both central and state indirect taxes to between 30-60 percent, depending on the state. And, China has attempted to regulate and censor content online, issuing a notice in March 2009 that all foreign films, TV programming, and cartoons must be approved by SARFT for online delivery by websites and requiring that websites apply for permits.

It is critical that the US government work with trading partners to eliminate discriminatory barriers to legitimate online commerce and to affirm that discriminatory barriers will not be imposed in the future. The online market is exceptional for its ability to cut through some of the burdensome and antiquated discriminatory policies governments have imposed on traditional commerce. It is essential that governments do not burden the legitimate online marketplace with these same harmful policies.

Protection and Enforcement of Intellectual Property Rights

Online theft of intellectual property undermines legitimate electronic commerce and stifles the free flow of information and legitimate global commerce. The US government should work with and support trading partners efforts to proactively respond to online theft. Action to respond to online theft will boost national economies, create jobs, and foster a healthy and consumer-friendly online marketplace.

In Europe, the 2000 E-Commerce Directive provides a general legal framework for Internet services in the Internal Market. All EU countries have implemented the Directive, which establishes rules on commercial communications, establishment of service providers, electronic contracts, liability privileges for service providers (i.e. safe harbors similar to those in the DMCA), codes of conduct, out-of-court dispute settlements, and enforcement. The Directive fully recognizes the country-of-origin principle (though not with regard to copyright) and expressly requires Member States not to restrict the freedom to provide information society services from a company established in another Member State.

With respect to Internet Service Provider (ISP) liability, the Directive provides conditions on the limitation of liability of service providers (i.e. safe harbor) for hosting, mere conduit, and caching. Some countries have failed to implement these conditions correctly. Spain, in particular, failed to implement the constructive knowledge standard for hosting and inappropriately limited the means of obtaining knowledge of copyright infringement from the service provider. Moreover, Finland's Act, in contravention of the Directive, does not expressly require that the safe harbor criteria for caching and mere conduit to be cumulative. It also

provides a statutory notice and takedown procedure that is cumbersome for copyright holders and organizations acting on behalf of copyright holders. As a result, these countries' implementations create limitations on liability for service providers that go beyond what is allowed under the Directive and make it even more difficult to combat online content theft in the EU.

The EU Enforcement Directive establishes a community-wide minimum standard for civil procedures. Unfortunately, many Member States have not implemented correctly the "right of information" provision, a basic tool for the obtaining of information about infringers (e.g. Bulgaria, Finland, and Spain).

The EU Copyright Directive aims to harmonize and modernize copyright law in the digital age, implementing the 1996 WIPO Internet Treaties. Recognizing the challenges the digital age presents to the audiovisual industry in terms of securing the digital transmission of its copyright works, it is vital that Member States do not weaken the exclusive rights of reproduction and communication to the public (including the making available right) when implementing the Directive into national laws. Notably, the Directive contains an exception for digital private copying that, if implemented incorrectly, could violate the TRIPS/Berne 3-Step test. In some EU countries, the provisions regarding the private copy exception are too broad and could allow the making of copies for the benefit of third parties thereby contributing to the illegal transmission of works on the Internet. Specifically, the German private copy exception expressly permits the beneficiary of an exception to use a third party to make the copy, which is too broad. In the Netherlands, the private copy exception does not prohibit copying from illegal source, a clear violation of the three-step test enshrined in TRIPS Article 13.

The Directive also establishes legal protection for technological protection measures necessary for the protection of copyright material in the digital environment. However, this protection could be undermined by varied Member State intervention to regulate technological protection measures. Such intervention may not respect the TRIPS/Berne 3-step test and may require the modification of technological protection measures developed on the basis of inter-industry agreements and international standards. In the event that an important technological protection measure was excluded from legal protection under the Copyright Directive as implemented in certain Member States, the goal of harmonization and uniform legal protection of technological protection measures across the EU would be seriously jeopardized.

At the national level, some countries fail to provide appropriate measures for the legal protection of technological protection measures. They do not provide adequate sanctions against the act of circumvention and preparatory acts facilitating circumvention (this is the case in Germany and Luxembourg). Some (Finland, Sweden) do not provide adequate protection against the acts of circumvention. Other countries (Belgium, United Kingdom, Spain and France) establish a broad power for national authorities to intervene and dictate to rights holders how to make their works available. Germany fails to provide appropriate sanctions against the act of circumvention and preparatory acts facilitating circumvention.

The Copyright Directive requires the provision of injunctions against intermediaries whose services are used by a third party to infringe copyright even where an intermediary's activities may be exempt from liability under the Copyright Directive. This provision recognizes that service providers are often best placed to bring infringing activities to an end – regardless of whether the service provider in question is legally responsible for the infringement on their network or site. Some Member States have failed to provide expressly for such injunctions in their national laws or those laws are not worded clearly enough to ensure the availability of these injunctions, which are a key tool in the fight against digital piracy, e.g. Finland, Germany, Spain, and Sweden.

Privacy has always been a major issue in the European Union. EU Member States have implemented a number of privacy directives to protect individuals' personal data. One of these instruments is the Framework Directive on Data Protection which was adopted in 1995. It was completed by another Directive in 2002 on privacy and electronic communications.

All EU Member States have detailed data protection laws. These rules, often very strict, are subject to the interpretation of the national data protection authorities. These authorities, which have significant discretionary power, work together and regularly adopt opinions and recommendations at the EU level. Most of them consider IP addresses as personal data and believe that the privacy rules apply to their use. In recent years, the situation has become very problematic for copyright holders and their representatives in many EU countries and at the EU level. Many national data privacy authorities, including the Italian, German, and French data privacy authorities, strictly interpret data protection rules and tend to consider that privacy rules are more important than other norms. MPAA supports robust consumer privacy and data protection. Privacy rules must not, however, be used to shield criminals or those who have been involved in illegal or harmful activities at the expense of others. Data protection and privacy rules must take into account the rights of all stakeholders in the online space and respect for the law. A balance between data protection and law enforcement can certainly be found and should be pursued.

The EU Data Retention Directive aims to harmonize data retention obligations for ISPs and telecom operators. Data shall be kept for at least six months and be available for the investigation, detection, and prosecution of serious crimes. The Directive does not expressly include the obligation to retain data for prosecution of IPR infringements. Data protection lobbyists argue that right holders should not profit from the data stored pursuant to the Directive. Should this view prevail, enforcement of online copyright infringements would be seriously hampered.

Russia's legal framework is currently not fit to address internet piracy. These deficiencies were recognized by President Medvedev in November 2009. The Government of Russia is currently assessing intellectual property reform but that reform appears to be headed in the wrong direction with consideration of compulsory licenses and a further weakening of Russia's legal framework. Online Service Providers in Russia oppose any effort to strengthen Russia's legal framework for protecting intellectual property online and fostering legitimate online commerce. Recognizing that illegal online activity in Russia will impact the global marketplace, it is imperative that

Russia provide the minimum legal protections found in the United States and Europe. These include provisions on ISP responsibilities and safe harbors, provision for injunctive relief, and clarifying that the private copy exception does not apply to copies from illegal sources.

In Brazil, the Ministry of Justice launched a public consultation in 2010 on a draft Civil Rights on the Internet Bill. The draft bill fails to address the importance of protecting intellectual property online, departing from international best practices aimed at fostering legitimate electronic commerce. The bill, in its current form, is internally inconsistent and would allow the rights of content holders to be infringed without offering them any effective remedy. To ensure that this bill encourages legitimate electronic commerce and effectively combats the theft of intellectual property online, the bill should be modified to: (1) affirm the importance of protecting intellectual property rights online; (2) recognize the responsibilities, as well as the rights, of Internet users; (3) ensure that privacy and data protection rules accommodate respect for the rights and freedoms of all stakeholders in the online space, including content providers; (4) include an indirect liability regime that incentivizes ISPs to cooperate with content owners in combating illegal activity on their networks; (5) allow for the reasonable use of network management tools including content recognition technologies; (6) preserve the ability of rights holders to obtain effective injunctive relief against online infringing activity; and, (7) provide law enforcement, with a court order, access to access logs without consent of users.

Canada signed the WIPO Internet Treaties in 1997 but has still not implemented the treaties' obligations. Moreover, amendments to Canada's Copyright Act are urgently required in order to clarify ISP liability and responsibility to ensure that copyright owners can effectively protect their rights in the online marketplace. Parliament is currently considering Bill C-32 which aims to ensure that Canada's copyright framework for the Internet is in line with international standards and that rights holders have the tools necessary to fight piracy online. Unfortunately, C-32, as initially introduced, fails to achieve this objective.

Asia-Pacific is the slowest region in the world to ratify and implement the WIPO Internet Treaties, which provide the global minimum standards necessary for protecting the transmission of legitimate content in the digital age. The US government should work with India, Malaysia, New Zealand, and Thailand to ratify and fully implement the WCT and WPPT which are critical to the global free flow of information online.

In addition to these minimum standards embodied in the WIPO Internet treaties, MPAA is working with governments in the Asia-Pacific region to enact effective laws and regulations that will encourage cooperation between copyright owners and Internet service providers in response to identified instances of unauthorized or illegal activity over the internet. Such considerations are especially important in territories with deepening broadband penetration.

There is no one silver bullet to eradicate the online theft of creative content. There is, however, a range of technological tools and policy approaches that can and should be used to address online infringement. These efforts, which include graduated response policies and site blocking, as well as technologies such as watermarking and filtering, require the cooperation of online service providers and have proven to be successful in various contexts around the world.

MPAA believes Government has a vital role in addressing the online theft of creative content. It is critical that the US government continues to work with foreign governments to establish adequate legal protections for copyright owners, and to enforce those laws in an aggressive and effective manner, including: adequate notice and takedown provisions, clearly defined Internet service provider liability guidelines, protection of temporary copies, “making available” right, and provisions against circumvention of technological protection measures. These protections are essential elements of a legal framework capable of responding to the demands of the digital environment. Without these protections, the industry’s viability will be undermined, no matter what it might do on its own and the global free flow of legitimate online commerce will be seriously hampered.

Impact of Restricted Internet Information on Innovation, Trade and Commerce Flows

The online theft of creative content adversely impacts legitimate online trade and commerce flows. A number of studies have been conducted around the world to measure the extent of online piracy and the economic impact of such theft on local economies. Some of these studies are discussed below.

A 2010 TERA Study found that the European Union’s creative industries most impacted by piracy experienced retail revenue losses of €10 billion and over 185,000 lost jobs due to piracy (largely digital piracy) in 2008. The study went on to find that the EU’s creative industries will have lost 1.2 million jobs due to copyright theft by 2015 as a result of cumulative retail revenue losses of as much as 240 billion Euros absent significant policy changes.

In addition to this regional TERA study, several studies have been undertaken in various EU member states to determine the extent and impact of online intellectual property theft. In Germany, a 2006 study by the University of Weimar found that the annual loss to the film industry from file sharing is around \$300 million per year. A 2005 GfK study found that 2.7% of Germans aged 10+ downloaded pirated films, for a total of 12 million units in a six month period.

In Spain, a 2009 IDC Research survey conducted by Nielsen Online found that the 80% of online consumers in Spain aged 16-55 have downloaded infringing content from P2P file sharing protocols; 43% have done so from the newer direct download services. A 2008 GfK survey of 16+ year olds found that 19% had downloaded films online for free. A 2006 GfK survey found that 14% of people in Spain 15+ had illegally downloaded a film in the past year, accounting for 132 million downloads.

A 2008 Environics survey of 18+ year old Canadians for the Canadian Intellectual Property Council found that 25% have at some point purchased counterfeit movies and that 65% would have been willing to buy the genuine version.

Several Asia-Pacific territories have also conducted studies to determine the economic impact of online theft. A 2008 Nielsen Omnibus News poll of 16-64 year old Australians found that 27% admitted to pirating movies and TV shows. The Korean Film Council (KOFIC) estimated that

the Korean film industry suffered losses of USD one billion in 2007 as a result of online piracy, which was a threefold increase of its losses of USD 300 million in 2005. It also found that as a result of piracy, the overall Korean home entertainment market was reduced by half from 2002 to 2007. KOFIC's study found that 47% of South Koreans had, in 2008, illegally downloaded feature movies for free and/or had paid less than 50 cents per title. In Korea, where high-speed broadband access has proliferated reaching average speeds of over 50 Mbps, the value of the home video market is now just four percent of what it was in 2000, and one percent of its size in 1995. Fortunately, the Korean government has recognized the damage that piracy, particularly online piracy, has done to its content industry and it is actively working, and investing significant resources, to deal with these problems. Those steps are discussed below.

Best Practices

Governments around the world are undertaking efforts to respond to online theft of creative content. While these approaches vary and appropriately reflect each territory's social and political norms, they are similar in their shared interest to foster legitimate online commerce and to protect consumers from rampant infringing content. There is a shared appreciation among these governments that full exercise of the Internet must be limited to legitimate and lawful uses. These governments have fostered cooperative processes wherein copyright holders and online services providers work together to more effectively respond to illegal activity. The programs may differ in detail, but are in their essence rooted in educating internet users to change infringing behavior and fostering legitimate commerce.

The Government of France passed the "Encouraging the Distribution and Protection of Creativity on the Internet" bill following years of failed discussions between online stakeholders. This legislation creates a new state agency, the Higher Authority for the Distribution of Works and the Protection of Copyright on the Internet (Hadopi) to oversee implementation of most aspects of the law. The bill imposes a statutory duty of care on Internet account holders to ensure that his or her subscription is not used to infringe copyright. The Government will educate Internet users through successive notifications and, as a last resort in the case of repeat infringement, fines and a suspension of Internet access. The increased use of direct download services is expected to be tackled through Art. 10 of Law 2009-669 (injunctions against facilitators). A 2010 survey conducted by BVA found that 53% of individuals who illegally download or have illegally downloaded content have changed their behavior since Part II of the Law was voted on October 28, 2009.

In Spain, legislation (a particular provision of the Sustainable Economy Law) towards the establishment of an administrative procedure with the aim of blocking illegal sites has been making its way through parliament, where it is hoped to be approved in late 2010. In Spain and Italy, the criminal courts have on several cases ordered blocking of pirate sites abroad.

The UK's Digital Economy Act, introduced in 2010, sets out a framework for rights holders, ISP's and government departments to work collaboratively to deal with online piracy and infringement. Although timelines have been introduced with regard to the implementation of

agreed measures, the Act has been challenged by a number of ISP's and there may be a delay in the introduction of the requirements of the Act.

Amendments to Korea's copyright law empower the Minister of Culture, Sports and Tourism to order an online service provider to suspend or terminate the accounts of users who continue to reproduce or to transmit illegally reproduced materials. In addition, the Minister of Culture, Sports and Tourism may order the online service provider to close an infringing online board after three warnings for illegal reproduction of materials. Most recently, Government has proposed amendments to the Copyright Act clarifying that the private copying exceptions in Article 30 are inapplicable to reproductions from copies known to be infringing.

In February of this year, New Zealand introduced into Parliament the Copyright (Infringing File Sharing) Amendment Bill. The bill, also known as Section 122a, outlines a three-notice regime to deter online copyright infringement. In lieu of terminating the accounts of repeat users of infringing content, the bill envisions imposition of fines based on the amount of damage sustained by the copyright owner. Copyright owners will also be able to seek through the District Courts the suspension of internet accounts for a period of up to six months. These new remedies are separate and distinct from the options already available under New Zealand's current Copyright Act.

In May 2009, Taiwan enacted legislation that incorporates both a three stage policy to respond to repeat infringers, and regulations for the use of content recognition technologies in the fight against copyright infringement.

Trade Agreements

Well-established international norms, such as the WTO TRIPS Agreement contribute valuable elements to the needed legal infrastructure to support legitimate electronic commerce and combat Internet theft. The WTO TRIPS Agreement includes a technology-neutral enforcement obligation that must be aggressively applied against online piracy.

The WIPO Internet Treaties provide a more tailored framework to protect the transmission of content in today's global economy. There are 88 WCT members and 87 WPPT members; together, these treaties provide the global minimum standards necessary to protect content in the digital age. It is critical that the US work with foreign governments -- and particularly Brazil, Canada, India, Israel, Malaysia, Mexico, New Zealand, and Thailand -- to ratify and fully implement the WCT and WPPT which are essential to the global free flow of information.

U.S. free trade agreements (FTA) specify and clarify the standards in the TRIPs agreement and the WIPO treaties, particularly with regard to online commerce. To date, the US-Korea FTA with its IPR chapter and supplementary online side letters includes the strongest provisions for fostering the free flow of information. MPAA strongly encourages the US government to ensure that the IPR chapter of the Trans Pacific Partnership builds on the high standards of US-Korea FTA, raising the level and effectiveness of copyright enforcement in the online marketplace.

As previously noted, fostering legitimate commerce and the free flow of information is dependent not just on robust protections for intellectual property online, but also on the ability of a legitimate product or service to enter quickly and efficiently into a market.

The GATS, unfortunately, provides producers and distributors of filmed entertainment limited market access. Much of this stems from foreign governments' entrenched policies and views that cultural goods and services should not be included in trade agreements. Limited market access in the WTO is further exacerbated by the GATS positive list format which does not capture new, more efficient, online business models.

Recognizing the limitations of the WTO and Doha Round to enhance legitimate online commerce for audiovisual goods and services, it is priority that the US negotiate robust free trade agreements where the services and investment chapters follow a negative list approach. A negative list will best ensure a comprehensive scope and secure market access for evolving and future business models. It is also critical that US free trade agreements, including the TPP, avoid "cultural exceptions." Such cultural exceptions prejudice US economic interests and suggest that cultural promotion and open markets are incompatible. Rather, trading partners should rely on the flexibilities built into FTAs to promote economies' cultural interests.

The e-commerce chapter of US FTAs is also very important to MPAA member companies as it enshrines the customs duty moratorium for all electronically traded goods and affirms that electronically delivered products receive no less favorable treatment than their physical equivalents. Going forward, it is important that the US government not replicate the audiovisual and broadcasting exception in the US-Australia FTA e-commerce chapter. Such a limitation may impede cultural diversity, restrict consumers' access to legitimate goods and services, and severely prejudice the US motion picture and television industry.

Finally, future US free trade agreements, including the TPP, should follow the Singapore FTA example and include not just institutional transparency provisions but also include specific provisions for transparency in the domestic regulatory processes including licensing decisions. This is particularly important for the US motion picture industry that occasionally finds itself subject to discriminatory licensing regimes in foreign territories. Robust transparency provisions would provide the US motion picture industry with some recourse should such discriminatory practices arise in the future.

International Cooperation

APEC, which has a long history of promoting legitimate electronic commerce, is especially well-positioned to advance online policy discussions⁵. While non-binding, agreements in APEC can be leveraged in binding fora, such as free trade agreement negotiations or the WTO. APEC model guidelines can also lend useful guidance to economies seeking information for domestic reforms. Further, APEC economies, with limited exceptions, generally agree with the US view

⁵ Statement to Implement APEC Policy on Trade in the Digital Economy, 2004; APEC Model Guidelines to Protect Against Unauthorized Copies. (2005); APEC Model Guidelines to Reduce Trade in Counterfeit and Pirated Goods (2005); APEC Model Guidelines to Secure Supply Chains against Counterfeit and Pirated Goods (2006); November 2008 APEC Ministerial Statement on IPR and the Digital Economy.

that open markets foster cultural diversity, making APEC a more hospitable forum for comprehensive agreements that can accommodate the interests of the US creative industries.

Conclusion

The six major studios of the MPAA generate billions of dollars annually from filmed entertainment distributed around the globe. Electronic commerce is integral to the business models of MPAA member companies and MPAA members' efforts to respond to consumers' evolving consumption demands. MPAA places high priority on ensuring that this critical means of distribution is not jeopardized by discriminatory regulations nor prejudiced by initiatives that aim to exclude audiovisual products under the guise of cultural promotion.

The online theft of creative content is one of the most significant and ubiquitous barriers to the global free flow of information that US industry confronts around the world. To effectively foster legitimate online commerce, the US government must grapple with the massive quantity of stolen content available online and the perception among some consumers that the theft of property of online is of little consequence.

MPAA strongly supports efforts by the US government to work with trading partners to foster legitimate online commerce, which includes the protection and enforcement of intellectual property rights online.

MPAA appreciates the opportunity to comment and is ready to provide further information or answer questions as required.

Sincerely,



A. Robert Pisano
President and
Interim Chief Executive Officer