

COMMENTS OF PUBLIC KNOWLEDGE
IN THE DEPARTMENT OF COMMERCE'S INTERNET TASK FORCE INQUIRY ON
THE IMPACT OF GLOBAL FREE FLOW OF INFORMATION ON THE INTERNET

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INTRODUCTION

Public Knowledge welcomes the Department of Commerce's review of policies that restrict the free flow of information on the Internet. The Internet is a great engine for social, political, and cultural engagement, e-commerce and innovation, and the free flow of information is crucial to preserving this role. As the Department studies the policies of governments globally, it should also review the domestic and foreign policies of the United States and ensure that our own policies continue to promote free flow of information. These comments predominantly focus on U.S. copyright law, policy, and practice, and its impact on the free flow of information.

The Impact Of Copyright Law, Policy, And Practice On The Free Flow Of Information

Copyright law can easily act as a barrier to the free flow of information. While copyright can provide a powerful incentive to create, it unavoidably creates restrictions on free expression. Effective copyright policy strikes a balance between the creator's incentive to create and the public's right to speak. However, international consensus that copyrights are worth protecting, paired with a constant promotion of copyright enforcement as a U.S. goal, can lead to speech and information-restrictive policies being couched in terms of protecting and enforcing copyrights and other forms of intellectual property (IP).

In some cases, copyright laws or enforcement practices are overbroad. In others, copyright laws are being abused and used as pretexts for more nefarious purposes in stifling speech and suppressing dissent. For instance, authorities in Russia have carried out raids on advocacy groups critical of government policies and seized their computers in the name of cracking down on copyright infringement.¹ Similarly, authorities in China have cracked down on "illegal newspapers and periodicals" and "illegal publications of a political nature" in the name of cracking down on "piracy."² The Department should recognize that copyright, as a legitimate and worthwhile means of promoting expression and creativity, operates by limiting information flows, and that mechanisms designed to limit those flows for one reason can often be repurposed or co-opted for less legitimate purposes.

The Department Must Recognize The Importance Of Free Flow Of Information To Non-Economic Values Such As Free Speech.

An open, unrestricted Internet promotes business, trade, and innovation. It also promotes participation by individuals in the social, cultural, and political life of society in ways that were unimaginable in the era mass-media.³ For example, citizens have used the Internet to expose faulty voting machines when major media outlets had largely ignored the issue,⁴ and protestors

¹ See Clifford J. Levy, *Russia Uses Microsoft to Suppress Dissent*, New York Times, (September 11, 2010), http://www.nytimes.com/2010/09/12/world/europe/12raids.html?_r=1

² Steve McIntyre, *COICA and China: Bad U.S. Copyright Policy Makes For Even Worse Chinese Law*, (October 7, 2010), http://www.publicknowledge.org/blog/coica-and-china-bad-us-copyright-policy-makes#_ftn2.

³ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 10-11 (Yale University Press) (2006)

⁴ *Id.* at 225-233 (explaining how "academics, activists, computer systems practitioners, and mobilized students" worked through the networked environment to expose problems with voting machines made and sold by Diebold to the California and Maryland governments. Their actions resulted in many of these machines being decertified.)

in Iran have used Twitter to relay information about its repressive regime.⁵ Secretary of State Clinton stressed the importance of these aspects of an open Internet in her remarks on Internet freedom.⁶

These basic, fundamental values must be adequately considered in any assessment of the freedom of the Internet. While the Notice of Inquiry (NOI) does acknowledge the importance of the “commitment to freedom of expression,” the major thrust of the NOI seems to be to understand impacts on “innovation, trade, and investment.” The Department’s mission to foster foreign and domestic commerce may explain this emphasis. However, the purpose of the Department’s inquiry is to contribute to the administration’s domestic policy and international engagement on these issues. Because U.S. foreign policy should seek to secure the right of free expression for citizens and not just business interests, the Department should be aware of how barriers to the free flow of information affect free expression in addition to commerce. This would ensure that the Department’s policies are consistent with policies adopted by the State Department in fostering the free flow of information.

The Department Should Evaluate Domestic, As Well As Foreign, Restrictions On The Free Flow Of Information.

As the Department gathers information about restrictions on free flow of information in countries all over the world, it should also look at laws, policies, and practices within the U.S. that inhibit free flow of information. This would allow the U.S. to reevaluate domestic policies and ensure that U.S. domestic policy is consistent with its foreign policy.

i. Laws And Policies Intended To Prevent Copyright Infringement Fail To Incorporate Sufficient Safeguards For Free Speech.

The copyright notice and take down regime is one area where restrictions on free expression manifest themselves. On the one hand, this regime has fostered the development of the Internet by limiting Internet service provider exposure to liability. Yet on the other hand, it has led to the suppression of free speech by providing insufficient safeguards.

The regime has been used by broadcasters to stifle political speech⁷ and by copyright owners to prevent fair uses of their material by consumers.⁸ For instance, during the 2008 presidential election campaign, CBS had YouTube take down an ad posted by the McCain campaign that incorporated a small portion of a CBS news broadcast. The ad had used a short clip of CBS news anchor Katie Couric talking about the role of sexism in American politics. The Center for Democracy and Technology, which studied takedown notices sent during the 2008 political campaign, notes how this and other campaign videos were subjected to takedown

⁵ See Lev Grossman, *Iran Protests: Twitter, the Medium of the Moment*, (June 17, 2009), available at: <http://www.time.com/time/world/article/0,8599,1905125,00.html>

⁶ Hillary Rodham Clinton, Secretary of State, *Remarks on Internet Freedom*, (January 11, 2010), <http://www.state.gov/secretary/rm/2010/01/135519.htm>

⁷ Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, (September 2010), http://www.cdt.org/files/pdfs/copyright_takedowns.pdf

⁸ See *Lenz v. Universal Music Corp.* 572 F. Supp 1150 (N.D. Cal. 2008).

notices by broadcasters, not necessarily to prevent copyright infringement but to avoid the perception of partisanship or endorsement.⁹

Although the law provides a mechanism to contest takedowns and have material restored, it is structured in a manner that encourages automatic takedowns and discourages restorations. This is because the law insulates ISPs from liability for faulty takedowns as long as they comply with certain basic notice requirements.¹⁰ Thus, ISPs who attempt to judge for themselves the validity of infringement claims may expose themselves to liability. Furthermore, such ISPs would have to allocate often scarce resources to hire personnel and invest time in these investigations. Automatic takedowns, on the other hand, are safe and inexpensive. Because of this, ISPs are heavily incentivized to grant all takedown requests indiscriminately.

In addition, the law allows a time of 10-14 days for restoration of clips. In the political context, such a delay can prevent the speech from reaching the public until an election day or other key date has passed. The more critical and time-sensitive the speech is, the more susceptible it is to being blunted by pretextual copyright claims.

ii. Practices And Policies That Seek To Aid Law Enforcement By Mandating Changes To Internet Architecture Create Unjustified Barriers To Free Flow Of Information

Legislators and policymakers must continually be wary of enforcement mechanisms that seek to impose design mandates on Internet architecture or applications. By casting too wide a net, such mechanisms are likely to harm privacy, network operations, and jeopardize the free speech interests of all.

One particularly current example of a mechanism that takes aim at Internet architecture in an attempt to prevent copyright infringement is the proposed Combating Online Infringement and Counterfeits Act (COICA).¹¹ COICA's professed goal is to prevent online infringement by singling out pieces of the Internet architecture that are located in the U.S. and using those as levers to exert control over elements of the Internet outside of the U.S. Among other remedies, it would require Domain Name System (DNS) servers to not resolve the domain names of sites determined to be "dedicated to infringing activities." By targeting the DNS system, COICA's provisions, as drafted, would undermine the unified system for matching website names (such as commerce.gov) with their corresponding IP addresses (such as 170.110.225.168). This would result in inconsistencies within a global system that depends upon maintaining uniform entries in tables scattered around the world. In addition, erecting barriers based upon domestically based DNS servers will incentivize users to use DNS servers based elsewhere, which may themselves have accompanying cyber security risks.¹² The Department should be especially wary of

⁹ Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, (September 2010), http://www.cdt.org/files/pdfs/copyright_takedowns.pdf

¹⁰ 17 U.S.C. §512(g) (2009)

¹¹ Combating Online Infringement and Counterfeits Act, 111th Congress, 2d Session, *available at:* <http://judiciary.senate.gov/legislation/upload/CombatingOnlineInfringementAndCounterfeitsAct.pdf>

¹² Center for Democracy and Technology, *The Dangers of S.3804: Domain Name Seizures and Blocking Pose Threats to Free Expression, Global Internet Freedom and The Internet's Open Architecture*, 5, (September 28, 2010), http://cdt.org/files/pdfs/Leahy_bill_memo.pdf.

attempts to interfere with the technical functioning of DNS in view of its historic role in preserving the “security and stability” of this system.¹³

Another proposal that takes aim at Internet architecture is the FBI’s reported proposal to require communications application providers to incorporate into their applications a back door that would allow law enforcement to obtain the plain texts of online communications.¹⁴ If implemented, this proposal would undermine Fourth Amendment protections by inhibiting the ability of citizens to take privacy precautions.¹⁵ It would consequently undermine the public’s confidence to use the Internet to its full extent. Furthermore, repressive foreign regimes would justify similar or more extensive restrictions on the Internet by pointing to the U.S. example. For instance, Saudi Arabia pointed to the U.S. Communications Assistance for Law Enforcement Act (CALEA) as an example to justify its attempts to exert greater control over the communications of blackberry customers.¹⁶

Many of the objections to COICA and the FBI’s proposal result not from their intent, but the particular methods they propose to achieve their ends. These problems would be implicated in *any* system that attempted to manipulate or otherwise alter the functioning of global technical systems. Laws and policies that attempt to exert influence through changes to technical systems often lead to a wider range of unintended consequences than when they target behaviors.

In view of these concerns, the Department should be guided by the example set by the Supreme Court in *Sony Corp. of America v. Universal City Studio*.¹⁷ In that case, the court held that the manufacturer of a general- purpose product (the Betamax in that case) was not responsible for infringements caused by its customers. Scholars have noted that by freeing product manufacturers from fear of liability, this decision paved the path for tremendous innovation in the consumer electronics industry.¹⁸ Following *Sony*’s principle, government policy should allow general-purpose technologies, such as content hosting sites, discussion boards, cyber lockers, and many others, to flourish despite their ability to be used for unlawful activities in particular instances. These new products and services should be allowed to become the new staple articles and avenues of commerce, despite the temptation to require them to eliminate all potential abuses. Such an overabundance of caution can smother innovative ideas and prevent them from taking root.

Laws like COICA would run afoul of this principle by subjecting sites that may only have a tangential connection to infringement to its processes. Similarly, attempts to build a back door into Internet applications would target many more applications and communications than

¹³ See Lennard G. Kruger, Congressional Research Service, *Internet Domain Names: Background and Policy Issues*, 4, (September 22, 2005), available at: <http://fpc.state.gov/documents/organization/55828.pdf>

¹⁴ Joshua Gruenspecht, *The FBI and Service Provider Wiretapping, Or What’s in Your Wallet?*, (November 16, 2010), available at: <http://www.cdt.org/blogs/fbi-and-service-provider-wiretapping-or-what%E2%80%99s-your-wallet>

¹⁵ See Lee Tien, *Doors, Envelops, and Encryption: The Uncertain Role of Precautions In Fourth Amendment Law*, 54 DePaul L. Rev. 873, 902-904, (2005)

¹⁶ Center for Democracy and Technology, *UAE, BlackBerry Fight Highlights Global Internet Freedom Risks*, (August 4, 2010), <http://www.cdt.org/print/15376>

¹⁷ 464 U.S. 417 (1984)

¹⁸ See. E.g. Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 Fordham L. Rev. 1831 (2006).

are necessary to achieve law enforcement purposes, thereby undermining public confidence in the Internet.

The Department Should Not Endorse Best Practices That Are Developed By Industries Without Public Interest Input

The NOI asks for comment on identifying best practices that maintain a balance between legitimate restrictions on information and freedom of information. In recognizing best practices, the Department should be wary of proposals that are devised without a full set of stakeholders. While industry-derived policies and best practices can often be useful, they do not always reflect the public interest inherent in Internet and information policy.

This problem can be illustrated with examples from the field of copyright. Containing the level of copyright infringement on the Internet is a legitimate policy goal for public and private actors, and there have been ongoing discussions of how this can be achieved via cooperation between rights holders and technological intermediaries. These efforts relate both to best practices regarding sites that host user generated content¹⁹ and agreements on technological means for reducing infringement.²⁰

While private agreements can represent more flexible alternatives to legislation or rulemaking, and while the possible enforcement of those mechanisms will not bear the weight of criminal sanctions, industry-established enforcement agreements can create other problems. Private means of enforcement may carry sanctions that are as significant as those imposed through civil judicial processes. For example, termination of user's Internet accounts after a pre-set number of accusations has been suggested as a means to prevent copyright infringement. Private self-help remedies like canceling user accounts can cut users off from the vital communications link that the Internet provides. Far from being a luxury today, Internet access provides a necessary means for citizens to participate in society, assisting individuals in finding work, paying taxes, and, in the case of many subscribers, providing the only wireline communications service from their residences. Severing this connection can easily have consequences as severe as civil remedies or fines. Furthermore, privately-created and enforced processes will often lack the due process provisions constitutionally required of government action.

In addition, industry agreements will naturally take into account the interests of those negotiating them first and may not give adequate consideration to their effects on free speech, innovation, or privacy. To take one example, the User Generated Content Principles, negotiated between Disney, CBS, NBC, Fox, Microsoft, Veoh and DailyMotion, call upon platforms hosting user generated content to use content identification technology to filter out infringing content. While these principles set out a detailed set of rules to prevent infringement, they do not provide for a mechanism to protect fair use.²¹ As the Supreme Court has held, the doctrine of fair

¹⁹ See *Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement*, at <http://www.ugcprinciples.com/>.

²⁰ See for ex: Comments of NBC Universal, Inc., WC Docket No. 07-52, 8, (June 15, 2007) available at: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519528962

²¹ Sherwin Siy, *Unprincipled "Principles" for User Generated Content*, (October 18, 2007), <http://www.publicknowledge.org/node/1230>; See also *Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement*, at <http://www.ugcprinciples.com/>.

use is what allows copyright to coexist with the constitutional guarantees of free speech.²² The privately-created guidelines, further removed from the civic interests at stake, more easily neglected this important value.

While industry best practices may be a means to achieving legitimate policy goals, the government should always be aware that industries have an incentive to secure what is in their own economic interest. It should view skeptically best practices that are developed without participation of all stakeholders, including consumer or citizen representatives.

Requiring Intermediaries To Monitor Or Remove Content Raises Free Speech, Privacy, And Due Process Concerns

The NOI asks what principles the government should consider when dealing with intermediaries who might be in a good position to monitor or remove content. As a general rule, the law should consider Internet intermediaries, such as content hosts and ISPs, as neutral conveyors of content. To prevent invidious discrimination against particular users, regions, or viewpoints, and to protect individual privacy, intermediaries should generally remain ignorant of the contents of their users' communications, save for the information required to accurately deliver that information. Derogations from this general rule in the name of preventing copyright infringement are likely to have a negative impact on citizens' free speech and privacy interests. For instance, some have suggested that ISPs filter all content traversing their network and remove content that infringes copyright.²³ Any attempt to install such filtering mechanisms would require ISPs to view the content of all traffic, thereby harming user privacy.²⁴ In addition, by filtering legal uses of copyrighted material that may not be authorized by the copyright owner, such mechanisms harm free speech interests of citizens.²⁵

For the same reasons that intermediaries might at first appear to be a promising point of enforcement contact—their centrality and necessity—they are prime targets for policies that attempt to police and control speech.

The Department should consider the following principles when dealing with content restrictions by intermediaries: 1) Procedures for dealing with unlawful content, such as the notice and takedown procedures may be used for pretextual purposes to stifle critical speech or competition; 2) automated techniques to prevent consumer access to unlawful content are likely to stifle free speech and privacy interests; 3) ISP attempts to enforce policy objectives through programs such as graduated response schemes are likely to harm due process interests. As noted above, to the extent that there are instances where intermediaries and service providers are the logical place to address concerns related to the transmission of information, the Department should be guided by the example set by Congress in section 230 of the Communications Act and section 512 of the Copyright Act.

²² *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003)

²³ *Supra* note 21.

²⁴ Mehan Jayasuriya, Jef Pearlman, Robb Topolski, Michael Weinberg, and Sherwin Siy, *Forcing the Net Through a Sieve: Why Copyright Filtering is Not a Viable Solution For U.S. ISPs*, <http://www.publicknowledge.org/pdf/pk-filtering-whitepaper-200907.pdf>

²⁵ *Id.*

To Promote Innovation In Intermediary Services, Intermediaries Must Be Treated As Neutral Conduits And Required To Act Accordingly

The NOI asks how the government can promote responsible conduct by intermediaries. As it correctly notes, treating intermediaries as neutral conduits has ensured a “flexible environment for innovation and growth.” On the one hand, this principle exempts intermediaries from much liability. On the other hand, however, it imposes an affirmative obligation on providers to be neutral. Although governments may be an eminent source of restrictions to the free flow of information, the actions of private carriers can just as easily create the same sorts of barriers. Thus, ISPs should be prohibited from discriminating among content, services, and applications that travel over their networks. Such a rule would promote responsible conduct of ISPs who might otherwise have an incentive to discriminate against content or services not affiliated with them.²⁶ This incentive to discriminate is rendered even more acute because a majority of ISPs are vertically integrated companies that provide not only ISP services but also cable and telephone services.²⁷ For instance, Comcast is the largest cable provider²⁸ as well as the second largest ISP in the United States.²⁹ Verizon is the seventh largest video programming distributor and the fourth largest ISP. Such providers may have an incentive to degrade video streaming services offered over the Internet in order to influence customers to subscribe to or keep their current video subscription services.

Trade Agreements Should Not Hamper Free Flow Of Information, But May Not Be Suited To Promote Free Flow Of Information Norms

The NOI asks how trade or other agreements might promote the free flow of information over the Internet. Trade agreements should be formulated with a view not to impede the free flow of information, even where the subject matter of the agreement does not address this topic directly. However, this value can be easily overlooked in trade agreements focused on zealously protecting IP. For instance, the Anti-Counterfeiting Trade Agreement (ACTA), in numerous drafts, has detailed a blueprint not simply for trade issues, but for substantive copyright law and policy in an international forum. In attempting to strike or alter that critical balance between the rights of IP holders and the rights of the public, ACTA risks impeding the free flow of information in a process that occurs outside of the transparent and public legislative system.

This should suggest a limiting principle for trade agreements. While many aspects of Internet communication and commerce have distinct trade effects and can therefore easily fall within the scope of trade considerations, this does not necessarily mean that trade agreements should be the avenue by which carefully balanced public policies are adjusted, invented, or applied for the first time.

²⁶ See John Windhausen, *Good Fences Make Bad Broadband: Preserving an Open Internet Through Net neutrality*, 16-23, (February 6, 2006), <http://www.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf> (listing examples of discrimination by Internet Service Providers against content and applications that compete with services offered by their affiliates)

²⁷ See *Ownership Chart: The Big Six*, <http://www.freepress.net/ownership/chart/main>.

²⁸ National Cable and Telecommunications Association, *Top 25 Multichannel Video Programming Distributors, as of Sept. 2010*, <http://www.ncta.com/Default.aspx>

²⁹ ISP Planet, *Top 23 U.S. ISPs by Subscriber: Q3 2008*, <http://www.isp-planet.com/research/rankings/usa.html>

The Department should therefore approach the possibility of using trade agreements as an instrument to establish positive norms for the free flow of information with great caution. The trade paradigm tends to address issues from an economic perspective and may not be suited to promote values such as free speech as ends in themselves, and not just as promoters of stable and competitive commerce. Furthermore, commentators have pointed out that organizations, such as the World Trade Organization (WTO), which are responsible for maintaining and promoting free trade, are producer-driven and closed to participation by groups that represent the interest of the general public.³⁰ This structure inhibits consideration of all the facets of free flow of information. Within the U.S., the USTR is also structured in a way that substantially limits public participation.³¹ This closed nature of trade processes further inhibits consideration of the full range of interests affected by restrictions on free flow of information

Governmental And Multi-Stakeholder Forums Should Reflect The Interests Of All Stakeholders And Conduct Proceedings In An Open And Democratic Manner.

The NOI asks whether particular governmental or multi-stakeholder forums are better suited than others for developing policies that concern the free flow of information. As a general rule, governmental forums that involve input from all stakeholders, including the public, are the most appropriate forums to develop norms that encourage free flow of information. Normative instruments that emerge from such forums strike a balance between a wider range of competing interests. In addition, government forums should operate in a transparent manner, by making publicly available drafts of instruments under consideration and holding most meetings in public. Such openness would not only result in policy outcomes that reflect the interests of all stakeholders including the public, but also enjoy legitimacy in the eyes of those it seeks to govern. The Department should be wary of forums, such as ACTA, that are shrouded in secrecy and consequently suffer from widespread mistrust.

The NOI asks what attributes a multi-stakeholder forum should possess in order to maximize its efficacy. Like governmental forums, multi-stakeholder forums also should be designed to represent the interests of all stakeholders affected. With respect to stakeholder forums designed to protect IP, representatives of the public and the public interest should be considered stakeholders. Their absence results in outcomes that do not represent a balance between rights of IP owners and users, a balance that has been the hallmark of U.S. IP law.

³⁰ See Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, Jean Monnet Working Paper No.12/02, available at: <http://centers.law.nyu.edu/jeanmonnet/papers/02/021201-02.pdf>; Ernst-Ulrich Petersmann, *Time for Integrating Into The Law of Worldwide Organizations: Lessons From European Integration Law for Global Integration Law*, 44, Jean Monnet Working Paper 7/01, available at: <http://centers.law.nyu.edu/jeanmonnet/papers/01/012301.pdf> (although the author favors integration of human rights values into international trade law, he also acknowledges the international organizations, including the WTO, are “secretive and producer-driven”.); Patti A. Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 Wash. L. Rev. 1279, 1283 (1992).

³¹ Prior to and during negotiation of trade agreements, the USTR seeks input from various industry sectors through the Industry Trade Advisory Committees. These committees operate secretively. Their membership predominantly represents business interests and has been very resistant to making their processes more public. For a greater explanation of concerns with this process see *Testimony of Gigi B. Sohn, President, Public Knowledge*, Hearing of Trade Advisory Committee System, U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Trade, (July 21, 2009), available at: <http://www.publicknowledge.org/pdf/pk-eff-testimony-20090721.pdf>

Conclusion

The Internet has facilitated an unprecedented free flow of information that has enhanced democratic discourse and economic opportunity. But this platform can also be used to transmit content unlawfully. Law and policy designed to deal with the latter must be careful not to harm the former. However, as these comments have explained, U.S. domestic and foreign policy has not always represented this balance.

Domestically, this lack of balance has resulted in laws and policies that inhibit too much free expression in order to prevent some illegal conduct. Internationally, this lack of balance has resulted in different parts of the government pursuing inconsistent policy approaches.

As the Department gathers information from comments presented in this docket and reviews U.S. policy, it should recommend resolving these inconsistencies and adopting policies more conducive to free flow of information on the Internet.

Respectfully submitted,

_____/s/_____
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