

U.S. DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

Inquiry on Copyright Policy, Creativity,) Docket No. 100910448-0448-01
And Innovation in the Internet Economy)

COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association (“NCTA”) hereby submits its Comments in the Notice of Inquiry (“Inquiry”) issued by the Commerce Department Office of the Secretary, U.S. Patent and Trademark Office, and National Telecommunications and Information Administration (collectively, “Department”) in the above-captioned proceeding.¹ The Department’s Internet Policy Task Force seeks comment on the relationship between the availability and protection of online copyrighted works and innovation in the Internet economy.²

As the Notice states, the purpose of this inquiry is to identify policies that will “(1) [i]ncrease benefits for rights holders of creative works accessible online but not for those who infringe on those rights; (2) maintain robust information flows that facilitate innovation and growth of the Internet economy; and (3) at the same time, safeguard end-user interests in freedom of expression, due process, and privacy.”³ NCTA applauds these goals. Internet service providers (ISPs) and copyright owners have a shared interest in maximizing the value of the

¹ NCTA is the principal trade association of the U.S. cable television industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of high-speed Internet service (“broadband”) after investing \$160 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to over 23 million customers.

² 75 Fed. Reg. 61419 (Oct. 5, 2010).

³ *Notice* at 61420.

online environment for consumers, developing new ways for users to access lawful high value content on the Internet, and detecting and deterring online infringement.

Internet piracy of intellectual property is a significant concern for content creators and distributors. While technological innovation is good for consumers and business, technologies such as individual peer-to-peer file exchanges using distributed networks, file hosting, and streaming from cyberlockers can also be abused to infringe copyrights. This infringement imposes significant costs on the American creative community and the nation's economy, and can also contribute to network congestion, negatively affecting the Internet experiences of law-abiding users and increasing costs to ISPs. The increasing availability of live and recorded programming from pirated sources places stress on the entire broadband ecosystem and poses risks to the business models and incentives for content creators and distributors alike.

Ultimately, all consumers are harmed if the quality of content is diminished or prices are forced to rise to compensate for these lost revenues and increased costs.

Importantly, consumers in the digital age are increasingly seeking lawful ways to view television programs, movies and other copyrighted material on the Internet. In response, industry is working to develop consumer awareness of legitimate avenues for purchasing online content.⁴ In that regard, we note the significant progress made, namely that content and copyright owners are making available an array of legal alternatives for consuming content online, and will continue to experiment with new business models that make it easy and attractive for consumers to lawfully obtain the content they want. For example, cable operators and programmers have been exploring an online distribution model called "TV Everywhere," which would allow multichannel video programming customers to access cable programming for

⁴ Notice at 61423.

no extra charge on their PC or lap-top.⁵ The cable industry is also an active player in the UltraViolet initiative, a “once pay, play everywhere” approach.⁶ These and other concepts under consideration will ensure that users have increasing amounts of lawful content on the Internet. The cable industry is proud of its history of business model innovation, which led to a flourishing marketplace for video programming in competition with established “free” over-the-air television.

Any new approach to addressing piracy must build on the existing law, which contains important protections for consumers and service providers alike. Key among those existing provisions is the protection for ISPs against secondary liability for copyright infringement when ISPs simply transmit material initiated by another.⁷ As the *Notice* recognizes, “the flow of content across the Internet is enabled by the carefully constructed balance of roles and responsibilities among stakeholders set forth in two key statutes [Section 230 of the Communications Act and Section 512 of the DMCA].”⁸ These provisions have been credited with “[h]aving contributed significantly to expansion of the digital economy and both remain essential to promoting innovation and to protecting intellectual property online.”⁹ Any recommendations for policies in this area must maintain these important protections.

There similarly must continue to be a balance between reasonable efforts to prevent, detect and deter infringement and respect for the legitimate interests of Internet users in

⁵ <http://www.cabletechtalk.com/video/2010/01/04/mcslarrow-statement-on-tv-everywhere/>.

⁶ <http://www.uvvu.com>.

⁷ 17 U.S.C. § 512(a) (providing that a service provider is not liable for transmission, routing or providing connection for infringing material under specified circumstances); *Notice* at 61423 (explaining “notice and takedown” regime.) .

⁸ *Id.* at 61421.

⁹ *Id.*

protecting their privacy, in accessing legitimate content, and in being able to challenge the accuracy of allegations of infringing activity. Efforts to combat infringement, whether through voluntary agreement or government policy, must afford users appropriate procedural protections. That includes protecting user privacy by limiting disclosure of personally identifiable information to instances where there is user consent, a court order or a government directive, or where authorized by contract with appropriate confidentiality provisions. At the same time, Internet users also must be educated about their responsibilities as users of content on the web. Such an effort serves not only the shared interests of creators and distributors of creative works, but also the interests of Internet users who benefit from constructive measures aimed at education and deterrence in lieu of litigation.

The Notice asks about collaborative efforts that can meet these challenges and appropriately balance protection for copyrighted works with these other important principles.¹⁰ A voluntary “graduated response” system is one such potential means to cut down on piracy while educating users about their rights and responsibilities. Such a program could consist of calibrated user notifications of claimed infringement coupled with the imposition of measures reasonably calculated to deter infringement for those who receive and do not successfully challenge repeated notifications. An effective program would also have to contain several additional elements: a level of notices, mutually acceptable to participating content owners and ISPs, to be directed to alleged infringers; a reasonable opportunity for users to contest in a timely manner the imposition of any deterrent measures; reasonable indemnification provisions; and programs for educating consumers about lawful online sources of content. Complementing the

¹⁰ *Id.* at 61423.

graduated response program, ISPs seeking protection of the DMCA safe harbor would also have to adopt a policy for the termination of repeat infringers in appropriate circumstances.

Development of new technologies to combat piracy is another area under exploration. Technologies like watermarking, fingerprinting and filtering technologies, site-blocking, and other tools can potentially be used to improve the efficiency and accuracy of detecting and deterring online infringement and the unauthorized distribution of copyrighted material.

In short, effectively addressing online infringement is critically important both to ISPs and content providers. Any such effort must build upon continued investment and innovation in creative works and new business models for their dissemination, combine enforcement, education, and shared responsibilities, and protect legitimate consumer rights. To that end, NCTA looks forward to continuing to work with all stakeholders to advance the twin goals of promoting innovation and protecting intellectual property online.

Respectfully submitted,

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