

November 19, 2010

VIA EMAIL copyright-noi-2010@ntia.doc.gov

Office of Policy Analysis and Development
NTIA
U.S. Department of Commerce
Room 4725
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Inquiry on Copyright Policy, Creativity and Innovation in the Internet Economy, "
Docket No. 100910448-0448-01;
Comments of American Business Media

To the Office of Policy Analysis and Development:

These comments are submitted on behalf of American Business Media (ABM), an association representing more than 200 business-to-business information providers such as publishers, producers of print and other publications and websites, and organizers of trade shows and similar events. ABM's members produce more than 2,000 high quality, business-to-business publications. American Business Media members create and disseminate copyrighted content both in print and electronically. From *Oil and Gas Journal* to *Advertising Age* to *Insect & Disease Control Guide*, ABM publications form an essential role in assembling and disseminating the industry-specific news and information needed by businesses in thousands of different fields.

ABM's members directly employ thousands of workers, but more importantly the content they create directly supports the work of hundreds of thousands of workers throughout scores of American industries. ABM's trade journals and industry informational websites provide a backbone of shared industry information and news, which permits businesses to make informed decisions, reach suppliers and customers, and work effectively within our economic and political structures. Trade publications and websites are essential to the free market economy, and copyright protection is essential to protect the work of trade publishers like ABM members.

While most discussion of copyright today focuses on sound recordings and motion pictures, copyright is also essential to today's print and electronic publishers, who indeed are the direct descendents of the original intended beneficiaries of the Statute of Anne and the U.S. Copyright Act. Digital piracy threatens electronic publishers just as it threatens music and

movie owners and distributors. As with the music, movie and software industries, content publishing has focused more and more on digital products and digital dissemination, using the Internet and Internet-related technologies. Through today's digital content products, ABM members reach their subscribers and users with timely industry news, information, and opportunities. The counterpart of the use of digital content and Internet dissemination, however, is that ABM members' content is more readily available for illegal copying and piracy.

United States law provides remedies for copyright piracy that occurs within its borders, including Section 512 of the Copyright Act, which the notice of inquiry discusses.¹ When copyright pirates can be found within U.S. jurisdiction, they may be sued for copyright infringement, and copyright owners may recover actual or statutory damages, including enhanced statutory damages in cases of willful infringement, and attorneys fees. In situations where copyright pirates cannot be directly identified or found, takedown requests under section 512 of the Copyright Act can be sent to service providers, and those providers must take down the infringing materials, and provide information relating to the identity of the infringer, so that the copyright owner can sue the infringer directly if needed. These domestic procedures and remedies, however, can usually be effective only where the piracy occurs within U.S. borders.

Piracy based in foreign countries presents a growing and serious problem, which has not yet been fully addressed by our laws. Increasingly, copyright pirates are using foreign services, and evading U.S. jurisdiction. For example, in one case of massive magazine piracy several years ago, the "mygazines.com" domain name was used for a website that posted, and made available throughout the world, complete copies of current issues of hundreds of copyrighted magazines. The domain name was registered to "John Smith" at a post office box on the Caribbean island of Anguilla. The www.mygazines.com website was hosted by service providers in France and Hong Kong. As it turned out, investigators found the operator of the website in Canada, and a group of publishers was able to achieve a negotiated and prompt shutdown of the service, and settlement of lawsuits brought in New York and Toronto.² If the operator had been located in a more remote country, less available and hospitable to the copyright owners, the piracy would have been much harder to catch and stop—even though the pirate site was fully available to

¹ The notice of inquiry also refers to section 230 of the Communications Act, but because that statute does not apply to intellectual property claims, we believe it is irrelevant to the issues raised by the department. See 47 U.S.C. § 230(d)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property"). Section 230 provides essential protections for service providers, which are necessary, as Congress noted in the act, "to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." 47 U.S.C. § 230(a). Because it specifically excludes intellectual property claims from its coverage, and because it is so essential to the functioning of the Internet, we submit that section 230 should not be considered in connection with this inquiry.

² See *Time Inc. v. Budd*, U.S. District Court, Southern District of New York, No. 08-Civ-7392; "Mygazines Online Pirating Site Closes," Oct. 18, 2008, <http://www.downloadsquad.com/2008/10/18/mygazines-online-magazine-pirating-site-closes/>.

United States users, and had pirated hundreds if not thousands of U.S. publications. To effectively combat online copyright piracy, a top priority of the U.S. Government should be on developing means for addressing piracy of U.S. copyrighted works, that originates from, or uses facilities of, foreign countries.

ABM agrees that the changing digital environment may warrant a review of methods for preventing piracy, particularly with respect to piracy based outside the United States, or using instrumentalities outside the United States. ABM endorses the Department's concept of addressing policies that will improve U.S. and international copyright enforcement:

- 1) Increasing benefits for rights holders of creative works accessible online but not for those who infringe on those rights
- 2) Maintaining robust information flows that facilitate innovation and growth of the Internet economy; and
- 3) Safeguarding end-user interests in freedom of expression, due process, and privacy.

In this regard, ABM offers the following observations:

- We must recognize that violation of the exclusive rights enumerated in the Berne Convention and U.S. copyright law that result in unauthorized uses of copyrighted works constitutes an illegal act. Governments should continue to support the rights of copyright owners in preventing such unauthorized uses and help content providers prevent such theft when such uses rise to the level of criminal acts. Of course, fair use is a part of copyright law, and ABM supports and respects the ability to make fair use of our copyright works as recognized in U.S. copyright law.
- ABM members contribute to, and do not impede, a "robust flow of information." ABM member print and electronic publications provide American industries with the information they need to thrive and prosper, and ABM members create and provide that informational content in large part because of the protection of copyright law. Continued protection for the copyrighted content of ABM members' publications, and protection of that material from piracy, whether it is based domestically or offshore, is essential to enable ABM members to continue to fulfill their key role in our economy.
- The ability of copyright owners to more effectively police unauthorized uses of their products and services in the digital world does not in any way threaten freedom of expression, due process, or privacy. The business information industry has long defended freedom of expression. That freedom, however, does not protect copyright piracy, and freedom of expression should not be used as a cloak for hiding copyright pirates. There should be no right of copyright pirates to remain anonymous and hence evade prosecution for their illegal conduct.

As technology has changed and become more ubiquitous, so has the ability of users to more rapidly and expansively disseminate illegal copies of copyrighted works. As the *mygazines.com* case described above illustrates, this problem is especially acute with respect to pirates who

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operate offshore, but copy protected U.S. works and make them available to U.S. users. We therefore advocate that the Department consider encouraging other means to help copyright owners fight cross-border infringement. Among other things, increased efforts can be directed to pursuing those who actively and deliberately aid and abet copyright infringement (and are thus liable under the concept of inducing infringement) regardless of where their activities are based, so long as they have effects in the United States.

In considering how best to fight copyright piracy, ABM would be happy to work with the Department and/or Congress, especially in areas touching on fair use, personal privacy, or freedom of expression.

Thank you for your consideration of these comments.

Very truly yours,
THOMPSON COBURN LLP

By 

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MSS/ss

cc: Mr. Clark Pettit

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