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UNIVERSITY

To: Department of Commerce, US Patent and Trademark Office,
National Telecommunications and Information Administration
Re: Part II – Addressing specific questions on Comments on “Inquiry on
Copyright Policy, Creativity, and Innovation in the Internet
Economy,” [Docket No. 100910448-0448-01][DOCID:
fr05oc10-35]
Date: November 16, 2010

This is a response to the request for public comment on “Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy,” [Docket No. 100910448-0448-01]. This represents the opinion and insight of the individual authors and not of the overall Programs, Schools, Colleges, or of the Michigan State University.

This is **Part II**, submitted separately from **Part I** of our comments, which represent more direct comments on more direct questions. **Part I** represented overall comments.

These comments expand directly on the previous submitted documents for other intellectual property and counterfeiting related Federal Register Notice postings.

To begin, we applaud the coordinated efforts of the USPTO with IPEC, and to the other agencies such as ICE/CBP, FBI, and others. This is an extremely interdisciplinary issue that requires an overall strategic effort in a public-private partnership. We are pleased to support those efforts from Academia.

Comments:

1. Rights Holders: Protection and Detection Strategies for Online Infringement

- General responses
 - As with all types of consumer product fraud, there are a range of fraudsters and a range of types of fraud. This is true with digital copyright piracy. We agree that many of the cybercriminals originate in other countries, but domestic cybercriminals are also very adept at cloaking their identities and locations, and at evading even the most aggressive countermeasures. That being said, there is a wide hierarchy of fraudsters from those who are **un-**sophisticated to very sophisticated, and from low volume and high volume.
 - There is a definite difference in modus operandi of the fraudsters who are offering deceptive (consumers believe the products are legitimate) or non-deceptive counterfeits (consumers are aware the products are probably fakes).



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- There is a burgeoning business expanding from providing stolen credit card numbers to providing stolen software key codes. (At MSU we are researching these criminal networks.)
- “What Assumptions are made in such studies on the substitution rates among different types of content?”
 - This ratio is elusive and very product, channel, and consumer specific. This ratio is also a function of the specific type of fraudster and specific type of fraud.
 - Another elusive ratio is of genuine product sales that are offset (lost) by the prevalence and sale of counterfeit goods – not every single counterfeit sale equates to a loss of a genuine product sale.
- “Is litigation an effective option for preventing internet piracy?”
 - Litigation is an effective option when dealing with “responsible defendants,” meaning, defendants who will show up in court and can be stopped from perpetrating the crime. Many of the fraudsters evade capture and their networks are designed to swarm, disband, reform, and circumvent freezing of any nodes.
 - A constant challenge with wide scope fraud such as in product counterfeiting and piracy is the near infinite number of fraudsters of one kind or another.
 - Usual guidance for pursuing civil litigation for traditional IP violations is to advise clients to sue only if they can recover more than the costs of litigation. This includes the ability to stop the bad guy from committing the crime and recovering fines or penalties.
- "Can commenters make any generalizations about the online business models that are most likely to succeed in the 21st century, as well as the technological and policy decisions that might help creators earn a return for their efforts?"
 - The reality is that the growth and expansion of technology both enables the legitimate digital economy to be more efficient and more innovative, but the same technologies enable additional the illegal activities.
 - As many businesses selling physical products have evolved into services organizations, the revenue streams shift from the one-time, sunk-cost to ongoing maintenance or monthly access fees. The ease of duplicating high-quality copyrighted product common consumer equipment is a major challenge if the business model focuses on protecting that initial-sale, one-time, sunk cost. The initial-sale, one-time, high-stakes investment provides an increased incentive to risk committing the fraud in that one-time product sale. Ongoing value-add services devalue the one-time investment and provide value in the ongoing procurement of products or services. The business model of the bulk of the financial value to the brand owner, and

experience value to the consumer, has a lower fraud opportunity. To gain the ongoing value-add would require that the fraudster continue to commit a series of smaller scale fraud... and that repeat fraud would increase their risk of being caught.

1. Internet Intermediaries: Safe Harbors and Responsibilities

- "What are the stakeholders' experiences with volume and accuracy of takedown notices issued for allegedly infringing content across the different types of online services?"
 - In this paper we have discussed the fraudster's ability to adapt to threats and opportunities. Quick "notice and takedown" is important to continue, though the sophisticated fraudsters will build this into their business model and create automated systems to spawn new websites as fast as infringing URLs are closed. Research has found specific text or typos that are found in many websites, leading to the hypothesis that a single fraudster is running all these sites.
- "Are Internet intermediaries' responses to takedown notices sufficiently timely to limit the damage caused by infringement?"
 - A key is the deceptive and non-deceptive products. Using a prostitution analogy, if a consumer is seeking fraudulent product, the "Johns" will continue to search until a suitable "Trick" can be found. The internet enables anonymous and less personally risky searching and procurement of this type of vice. Again, the same features that create great opportunities for commerce also provide opportunities for a fraudster.
- "What challenges exist to the identification of such systematic infringers?"
 - As mentioned, considering the full range of crimes, there are a near infinite number of fraudsters. But it was also mentioned, that the repeat activity creates additional opportunities to catch the systematic infringer.
 - The fraudsters are improving their stealth and product quality to the point that without physically procuring the suspicious material goods and conducting forensic analysis, it is very difficult to identify fraudulent product.
- "What are stakeholders' experiences with developing collaborative approaches to address online copyright infringement? What range of stakeholders participated in the development of such collaborative approaches?"
 - A key to engaging consumers is to first seek to understand their perceptions on the action or risk. The second step is to examine messages that effectively shape behavior as intended. The third step is to continue to monitor how the messages are received and interpreted over time. This is standard procedure in health risk communication research. An example is from Alcohol warning labels, where there the impacts of the messages were effective at first but then waned over time. There is a need to develop and *Understanding of Consumer Perceptions of Counterfeiting and Piracy, and the Development of New Messages*.

2. Internet Users: Consumers of Online Works and User-Generated Content

- “What initiatives have been undertaken to improve the general awareness of Internet users about online copyright infringement and the availability of legitimate sources to access online copyrighted works?”
 - See the last bullet point for Question 2. Consumers want to find trusted information from trusted sources, in simple terms, with messages that are believable to the consumer. Regardless of the rational or irrational nature of the consumer objection, if it is real and credible to them, we must consider the *perception* real and credible. To not understand and consider the rational or irrational consumer perception is to risk that any of our messages will not be seen as credible – or even more dangerous, further validate the customer’s irrational world view.

We want to reiterate that we feel these are very important discussions, and important discussion to have in a public-private partnership setting. We would welcome more direct involvement in the Internet Policy Task Force or, the predecessor, Working Group on Intellectual Property Rights.

I would like to mention the research and insight provided in our research and on this topic from my colleague, Dr. Thomas Holt (HoltT@msu.edu). He is a true thought leader in this emerging topic and he has been influential in all our research concerning digital copyright piracy.

We thank the DOC/USPTO for the opportunity to review and comment on this Notice of Inquiry. This is an extremely interdisciplinary threat with very complex and organized fraudsters. To develop efficient and effective countermeasures will require a strong public-private partnership. At Michigan State University and within the Anti-Counterfeiting and Product Protection Program (A-CAPPP), we are pleased to participate in the process and contribute to the research.

Sincerely,

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