

Before the  
**U.S. DEPARTMENT OF COMMERCE**  
**Office of the Secretary; United States Patent and Trademark Office; National  
Telecommunications and Information Administration**

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

**COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance hereby submits its comments in the above captioned proceeding.<sup>1</sup> We are a nonprofit, nonpartisan 501(c)(4) educational organization dedicated to promoting copyright as an engine for creativity, jobs, and growth. The Copyright Alliance also has created the Copyright Alliance Education Foundation, a nonprofit, nonpartisan 501(c)(3) educational organization dedicated to providing free curricula on copyright and digital citizenship to educators and students in the U.S. K-12 education system. The Copyright Alliance is a membership organization comprised of individual artists and institutions, including guilds and unions, corporations, trade associations, and sports leagues. Our members come from a full range of creative industries including musical composition, music publishing, performing rights organizations and sound recordings; book, magazine and newspaper publishing; business and entertainment software; visual arts, including illustration, graphic arts and photography; and motion pictures and broadcasting.<sup>2</sup>

---

<sup>1</sup> See Federal Register, Vol. 75, No. 192, Tuesday, October 5<sup>th</sup>, 2010, pp. 61419-61424 -- <http://edocket.access.gpo.gov/2010/2010-24863.htm> .

<sup>2</sup> Members of the Copyright Alliance include the American Federation of Musicians; American Federation of Television & Radio Artists; American Intellectual Property Law Association; American Photographic

## INTRODUCTION

In this proceeding, the U.S. Department of Commerce has initiated a Notice of Inquiry (“NoI”) as part of its Internet Policy Task Force examination of key policy issues related to the Internet. We welcome the opportunity to provide information on the challenges of protecting copyrighted works online and the relationship between copyright law and innovation in the Internet economy.

The NoI states that the dual public policy imperatives of the Task Force are “to combat online copyright infringement more effectively and to sustain innovative uses of information and information technology.”<sup>3</sup> The Copyright Alliance supports these dual imperatives, and maintains that they are in fact symbiotic.

A great deal of innovation is occurring in the *legal, licensed* distribution of copyrighted works – from large corporations to individual artists and creators – by copyright owners as well as third parties. For instance, Copyright Alliance members have licensed and launched SVOD and pay-per-view models, subscription and streaming services (including for example, Hulu and Vevo), services to deliver pay TV content via broadband and distribute their works through Amazon, iTunes and other download

---

Artists; American Society of Composers, Authors and Publishers; American Society of Media Photographers; Association of American Publishers; Association of Independent Music Publishers; AT&T; Broadcast Music, Inc.; Business Software Alliance; CBS Corporation; Church Music Publishers Association; Directors Guild of America; Entertainment Software Association; Graphic Artists Guild; Magazine Publishers of America; Motion Picture Association of America; National Association for Stock Car Auto Racing (NASCAR); National Association of Broadcasters; National Collegiate Athletic Association; National Music Publishers' Association; National Basketball Association Properties, Inc.; NBC Universal; News Corporation; Newspaper Association of America; Picture Archive Council of America; PPL and VPL; Professional Photographers of America; Professional School Photographers Association; Recording Industry Association of America; Reed Elsevier; SESAC; Software & Information Industry Association; Sony Pictures Entertainment; Time Warner Inc.; Universal Music Group; Viacom; The Walt Disney Company; and Writers Guild of America, West.

<sup>3</sup> See page 61420 of Federal Register, Vol. 75, No. 192, Tuesday, October 5<sup>th</sup>, 2010, pp. 61419-61424 -- <http://edocket.access.gpo.gov/2010/2010-24863.htm>

services. We also support interactive formats like Blu-ray and have licensed services that facilitate the making of fan videos and mashups, such as yoostar (may check spelling). The venture capital and entrepreneurial initiative required to foster innovation from information technology professionals in the distribution of licensed copyrighted works requires a functioning market, in which the entrepreneurs and the copyright owners all have an opportunity for return on their investment.

In order to ensure this market exists, it is imperative to have more effective online copyright enforcement targeting the illegal competition of infringement. Enforcement of the rights of copyright owners furthers the Task Force’s goal of “robust information flows that facilitate innovation and growth of the Internet economy.”<sup>4</sup> U.S. Supreme Court Justice Sandra Day O’Connor wrote that “it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”<sup>5</sup>

In the section below, we will address the importance of effective online copyright enforcement as a vehicle for growth in innovation and e-commerce for all copyright industries, including individual artists and creators in those industries.

## **DISCUSSION**

---

<sup>4</sup> Ibid.

<sup>5</sup> *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985). O’Connor was joined in the decision by Chief Justice Burger and Justices Blackmun, Powell, Rehnquist and Stevens. <sup>6</sup> See “Copyright Industries in the U.S. Economy: The 2003-2007 Report” prepared for the International Intellectual Property Alliance (IIPA) by Stephen E. Siwek of Economists Incorporated, 2009 (<http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>).

The Copyright Alliance encourages the U.S. Department of Commerce and Secretary Gary Locke to take steps toward the vision the Secretary has articulated, namely of a vibrant, robust economy with strong enforcement of copyright as a central component of the U.S. government's economic policy.

The U.S. Department of Commerce last year hosted the introduction of a very important study on the copyright industries by the International Intellectual Property Alliance and economist Stephen E. Siwek.<sup>6</sup> which found that core copyright industries (including theatrical films, TV, DVDs, business and entertainment software, books, music and sound recordings) contributed 22.74% of US real economic growth in 2006-2007, and total copyright industries (including impacted industries such as distribution and retail) contributed 43.06% of U.S. growth.<sup>7</sup> The study also found that the value-added of core copyright industries in 2007 was \$889.1 billion, more than 6% of U.S. gross domestic product (GDP), and the value of total copyright industries in 2007 was \$1.52 trillion, or 11.05% of U.S. GDP.<sup>8</sup>

U.S. Commerce Secretary Gary Locke welcomed the introduction of the study, calling copyright industries among the “critical drivers” of U.S. economic growth and job creation, while noting that “copyright industries are plagued by widespread counterfeiting... of both physical and online products.”<sup>9</sup> This echoed remarks Secretary Locke gave earlier that year at a motion picture industry event, in which he said the federal government supported “cutting-edge solutions to Internet piracy,” adding: “The

---

<sup>6</sup> See “Copyright Industries in the U.S. Economy: The 2003-2007 Report” prepared for the International Intellectual Property Alliance (IIPA) by Stephen E. Siwek of Economists Incorporated, 2009 (<http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>).

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> See a summary of the event and Secretary Locke's remarks here

(<http://blog.copyrightalliance.org/2009/07/secretary-locke-endorses-latest-iipa-siwek-copyright-contributions-study/>).

Commerce Department will be a partner to you in ensuring the protection of intellectual property.”<sup>10</sup> This was one of many welcome public statements the Secretary has made supporting strong copyright enforcement.<sup>11</sup>

The Secretary’s strong language echoes President Barack Obama, who earlier this year said: “What’s more, we’re going to aggressively protect our intellectual property. Our single greatest asset is the innovation and the ingenuity and creativity of the American people. It is essential to our prosperity and it will only become more so in this century.”<sup>12</sup>

With Secretary Locke sitting just to his right, Vice President Biden, on June 22, 2010, focused on Internet infringement when announcing the Administration’s Joint Strategic Plan on Intellectual Property Enforcement: “Piracy is theft, clean and simple. It’s nothing but theft. It’s smash and grab.”<sup>13</sup> Making clear that the Administration was

---

<sup>10</sup> Remarks at the Business of Show Business 2 conference, April 21<sup>st</sup>, 2009. A summary of his remarks and the event are here (<http://blog.copyrightalliance.org/2009/04/live-from-business-of-show-business-2-piracy/>).

<sup>11</sup> Among the highlights of Secretary Locke’s endorsement of strong intellectual property protection: 1) Locke addressing the Copyright Policy in the Internet Economy Symposium, Washington, D.C., July 1, 2010 (<http://www.commerce.gov/news/secretary-speeches/2010/07/01/remarks-copyright-policy-internet-economy-symposium>). 2) Locke in Los Angeles January 13, 2010, offering “Remarks to Entertainment Industry Officials on Protecting Intellectual Property,” ([http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01\\_008799](http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_008799)). 3) Locke on December 15, 2009 “Commends European Union and Member State Ratification of WIPO Internet Intellectual Property Treaties” ([http://www.commerce.gov/NewsRoom/PressReleases\\_FactSheets/PROD01\\_008732](http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_008732)). 4) Locke on October 27, 2009 in Guangzhou, China offering “Remarks at International Forum on Innovation and Intellectual Property” ([http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01\\_008556](http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_008556)).

<sup>12</sup> See “Remarks by the President at the Export-Import Bank’s Annual Conference,” at the Omni-Shoreham Hotel in Washington, D.C., March 11, 2010 (<http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>).

<sup>13</sup> Vice President Biden was joined by U.S. Commerce Secretary Gary Locke, U.S. Attorney General Eric Holder, U.S. Department of Homeland Security Secretary Janet Napolitano, U.S. Trade Representative Ron Kirk, and U.S. Intellectual Property Enforcement Coordinator Victoria Espinel at a White House introduction of the 2010 Joint Strategic Plan on Intellectual Property Enforcement. A video of the event is on the White House web site at <http://www.whitehouse.gov/blog/2010/06/22/releasing-joint-strategic-plan-combat-intellectual-property-theft> The plan can be found at [http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty\\_strategic\\_plan.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf)

focused on those profiting from infringement online, he said: “We’re going after the people. We’re going after the web sites.”<sup>14</sup>

There have been many other encouraging and supportive statements by leaders of the Administration.<sup>15</sup>

The Task Force, in partnership with the U.S. Intellectual Property Enforcement Coordinator, has the potential to work with copyright industry stakeholders to advance online copyright enforcement, which will lead to economic growth and job creation, while also creating opportunities for continued growth in consumer-friendly licensing and distribution models for valued copyrighted works. The Copyright Alliance and its institutional members will remain an ongoing resource for the Task Force and the entire

---

<sup>14</sup> Ibid.

<sup>15</sup> 1) President Obama addressing a Town Hall Meeting in Elyria, Ohio, January 22, 2010 (<http://www.whitehouse.gov/the-press-office/remarks-president-during-town-hall-meeting-elyria-ohio>). 2) President Obama speaking at the Forum on Jobs and Economic Growth, Washington, D.C., December 3, 2009 (<http://www.whitehouse.gov/issues/economy/jobsforum>). 3) President Obama speaking on “innovation and sustainable growth” at Hudson Valley Community College in Troy, New York, September 21, 2009 (<http://www.whitehouse.gov/the-press-office/remarks-president-innovation-and-sustainable-growth-hudson-valley-community-college>). 4) Vice President Biden February 15, 2010, in a statement endorsing the Department of Justice Task Force on Intellectual Property created by U.S. Attorney General Eric Holder ([http://www.toplawyernews.com/TopLegalNews/IntellectualPropertyRights/id\\_102817/](http://www.toplawyernews.com/TopLegalNews/IntellectualPropertyRights/id_102817/)). 5) Attorney General Holder speaking at the International Intellectual Property Summit in Hong Kong on October 18, 2010 (<http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101018.html>). 6) Attorney General Holder speaking at the Rio De Janeiro Prosecutor General’s Office in Rio De Janeiro February 24, 2010 (<http://www.justice.gov/ag/speeches/2010/ag-speech-100224.html>). 7) Attorney General Holder announcing the creation of the U.S. Department of Justice IP Task Force, Washington, D.C., February 12, 2010 (<http://www.justice.gov/opa/pr/2010/February/10-ag-137.html>). 8) U.S. Trade Representative Ron Kirk announcing the latest Special 301 Report on Intellectual Property on April 30, 2010 (<http://www.ustr.gov/about-us/press-office/press-releases/2010/april/ustr-releases-2010-special-301-report-intellectual-p>). 9) USTR Kirk speaking September 30, 2009, before the Global Intellectual Property Center Annual Summit in Washington, D.C. (<http://www.ustr.gov/about-us/press-office/speeches/transcripts/2009/september/remarks-ambassador-ron-kirk-global-intelle>). 10) USTR Kirk addressing the American Chamber of Commerce in Sao Paulo, Brazil, September 16, 2009 (<http://www.ustr.gov/about-us/press-office/speeches/transcripts/2009/september/remarks-ambassador-ron-kirk-american-chamb>). 11) David J. Kappos testifying at his nomination hearing to be U.S. Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office before the U.S. Senate Judiciary Committee July 29, 2009 (<http://judiciary.senate.gov/pdf/07-29-09KapposTestimony.pdf>). 12) U.S. Government Accountability Office Director of International Affairs and Trade Loren Yager in testimony December 9, 2009 before the U.S. Committee on Oversight and Government Reform Subcommittee on Government Management, Organization, and Procurement (<http://www.gao.gov/new.items/d10219t.pdf>).

U.S. Department of Commerce as this effort to improve online copyright enforcement is undertaken.

Below is some guidance in response to the Task Force NoI:

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

- *Consistent with free speech, due process, antitrust, and privacy concerns, what incentives could encourage use of detection technologies by online services providers, as well as assistance from payment service providers, to curb online infringement?*

Free speech is an essential value championed by copyright owners, and central to the process of creation. Participating in a functioning online marketplace demands a system with privacy protections, due process and competition free from antitrust concerns, as well as a system that has respect for property rights, strong enforcement mechanism to protect such rights and nourishes an environment for experimentation and innovative business models. A lack of such principles in international jurisdictions can provide challenges to the legal distribution of copyrighted works, leaving those markets to infringers.

Online infringement is a growing threat, affecting numerous copyright industries. Illegal file-sharing on peer-to-peer networks remains a pervasive problem. Infringement increasingly is being driven by pirate websites and cyberlockers established specifically to profit from infringement. Infringing activity also may occur on legitimate sites that are

unwilling to enforce terms of service agreements with their users. Absent this enforcement, these sites lack meaningful deterrents to repeat infringements.

These sites rely upon products and services provided by legitimate businesses to help carry out their infringing activities. For example, legitimate businesses may provide ad brokerage, domain name registration, and payment solution services. Some of these businesses may not be aware that a particular client is using their services for infringing purposes, while others may be aware but choose to service the client anyway. In either case, the end result is the same. These third parties allow such rogue sites to monetize and effectively deliver the illicit services, thus significantly undermining legal and legitimate e-commerce, from copyright owners large and small. We would welcome assistance from the government in encouraging third party intermediaries to cooperate with copyright owners.

Internet video is in high demand, totaling 22% of global consumer Internet traffic in 2007, with that percentage expected to reach 90% by 2012.<sup>16</sup> The number of U.S. online video viewers reached 137.5 million in 2007, and is expected to reach 190 million by 2012.<sup>17</sup> However, the Organisation for Economic Co-Operation and Development found that online piracy of copyrighted works is on the rise, from traditional peer-to-peer technology but also increasingly from infringing use of “cyberlockers,” often with the infringed video available for instant streaming.<sup>18</sup> Consumers “subscribe” to these sites through credit card transactions on the site, and the sites are also funded by advertisers.

---

<sup>16</sup> See “Cisco Visual Networking Index – Forecast and Methodology, 2007–2012,” Cisco, June 16, 2008 ([http://newsroom.cisco.com/dlls/2008/ekits/Cisco\\_Visual\\_Networking\\_Index\\_061608.pdf](http://newsroom.cisco.com/dlls/2008/ekits/Cisco_Visual_Networking_Index_061608.pdf)).

<sup>17</sup> See “The Kelsey Group’s US Local Video Forecast (2007-2012),” The Kelsey Group, June 25, 2008 (press release at <http://www.kelseygroup.com/press/pr080625.asp>).

<sup>18</sup> See “Economic Impact of Counterfeiting and Piracy,” Organisation for Economic Co-Operation and Development, June 2008 ([http://www.oecd.org/document/4/0,3343,en\\_2649\\_33703\\_40876868\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/4/0,3343,en_2649_33703_40876868_1_1_1_1,00.html)).

These offerings help to make the infringing sites appear legal. This is particularly dangerous for consumers because many of these sites inadequately protect consumer information or may even fraudulently use credit data, thus putting consumers at risk of identity theft.<sup>19</sup>

While it is virtually impossible to calculate the true impact of piracy on the creative industries because it often occurs undetected and because rogue websites offer streaming and downloads without accurately accounting for the number of units served in a way that can quantify damages, a recent study by the Entertainment Software Association (ESA) sheds some light on the extent to which one small segment of online piracy is affecting the computer and video game industry. These studies estimate that millions of copies were made of leading member titles through popular peer to peer networks during December 2009, and do not include piracy occurring through the use of direct download hosting providers, or “one-click” hosting sites, also known as “cyberlockers.”<sup>20</sup>

The online music industry internationally grew about 27% to \$4.2 billion in 2009, with digital platforms now totaling about 27% of recorded music sales. Single track downloads globally rose 10% to 1.5 billion units.<sup>21</sup> But that promise is undercut by piracy, with the IFPI estimating that there were more than 40 billion files illegally file-

---

<sup>19</sup> See “Widespread Data Breaches Uncovered by FTC Probe: FTC Warns of Improper Release of Sensitive Consumer Data on P2P File-Sharing Networks,” Federal Trade Commission alert from February 22, 2010. The FTC notified nearly 100 organizations that the private data of their organizations, employees and customers may have been compromised through data breaches caused by use of peer-to-peer file-sharing sites (<http://www.ftc.gov/opa/2010/02/p2palert.shtml>).

<sup>20</sup> See “IIPA Special 301 Letter to USTR” of February 18, 2010 (<http://www.iipa.com/rbc/2010/2010SPEC301COVERLETTER.pdf>). The ESA data is cited on pages 11-12.

<sup>21</sup> See “IFPI Digital Music Report 2010,” International Federation of the Phonographic Industry, January 2010 (<http://www.ifpi.org/content/library/DMR2010.pdf>).

shared in 2008, a piracy rate of 95% of total downloads.<sup>22</sup> The percent of the U.S. Internet population participating in illegal file-trading reached 19% in 2007, with P2P music sharing continuing to grow among teens.<sup>23</sup> More than one-fourth of U.S. children ages 9 to 14 that year were found to share infringing files on a popular P2P site.<sup>24</sup>

Individual artists and creators are also being harmed. The Copyright Alliance has been highlighting examples of its own grassroots members who have suffered from rampant infringement on offshore, for-profit pirate sites. Examples include independent filmmaker Ellen Seidler and comic book illustrator and author Colleen Doran, both of whom have found their creative works on hundreds of for-profit pirate sites.<sup>25</sup> Those sites are largely unresponsive, but also unresponsive are the U.S.-based online ad brokers selling ads on those rogue sites.<sup>26</sup> One Florida-based site operator pirating Ms. Doran's work was finally shut down by U.S. authorities, but nothing has been done to deal with the hundreds of other online sites profiting from her work.<sup>27</sup>

---

<sup>22</sup> See "IFPI Digital Music Report 2009," IFPI, January 2009 (<http://www.ifpi.org/content/library/DMR2009-summary.pdf>).

<sup>23</sup> See "NPD's Digital Music Study and NPD MusicWatch," NPD Group, 2008 (press release at [http://www.npd.com/press/releases/press\\_080226a.html](http://www.npd.com/press/releases/press_080226a.html)), via "The Digital Economy Fact Book: Tenth Edition," Grant Eskelson, Adam Marcus, and W. Kenneth Ferree, The Progress & Freedom Foundation (PFF), 2009 ([http://www.pff.org/issues-pubs/books/factbook\\_10th\\_Ed.pdf](http://www.pff.org/issues-pubs/books/factbook_10th_Ed.pdf)).

<sup>24</sup> See 2008 survey by NPD Group of 3,376 completed surveys of U.S. parents with kids age 2 to 14 living in the household, focusing on children between the ages of 9 and 14 (press release at [http://www.npd.com/press/releases/press\\_080130b.html](http://www.npd.com/press/releases/press_080130b.html)) via "The Digital Economy Fact Book: Tenth Edition," PFF, 2009.

<sup>25</sup> Ellen Seidler financed the romantic comedy film *And Then Came Lola* -- <http://andthencamelola.com/> -- with her own personal finances, only to find the film streamed without authorization on hundreds of rogue pirate sites. She has chronicled her frustration with third-party facilitators such as online ad brokers of that theft at the Profits From Pirates web site at <http://popupirates.wordpress.com/>. Colleen Doran is an accomplished comic book illustrator and author who has seen her comic books reproduced without authorization on hundreds of rogue pirate sites, and also has experienced frustration with unresponsiveness from third-party facilitators. She has blogged about her own battles with infringement on A Distant Soil at <http://adistantsoil.com> and is profiled in a Copyright Alliance Creators Across America video discussing her frustration with rogue pirate sites -- <http://www.youtube.com/watch?v=QR6sYeIVtBA>.

<sup>26</sup> Ibid.

<sup>27</sup> The site in question was [htmlcomics.com](http://htmlcomics.com), which was infringing dozens of leading comics including work by Colleen Doran. The site was shut down in May of 2010 and the Florida offices of the infringer raided by the Tampa field office of the Federal Bureau of Investigation. A summary of the legal action is here --

The U.S. government can play an important role in discouraging facilitation of infringement by third parties. One method would be to reduce the fear of liability those third-party facilitators may cite when explaining their inaction.

That point was made clear by third-party industry representatives at the joint NTIA-PTO event held at the Ronald Reagan International Trade Center on July 1<sup>st</sup>, 2010.<sup>28</sup> Several executives from third-party industries – such as Internet service providers, financial transaction processors, and online ad brokers – said uncertainty about the nature of certain sites and antitrust liability under U.S. law made it difficult to take pro-active steps to avoid facilitating infringement by rogue sites.<sup>29</sup>

U.S. Intellectual Property Enforcement Coordinator Victoria Espinel has repeatedly stated that targeting for-profit rogue pirate sites is a priority for the Obama Administration.<sup>30</sup> The Task Force should work with the U.S. IPEC and support efforts in the U.S. Congress to find solutions that provide incentives for third parties to not facilitate online infringement of copyrighted works.

---

<http://www.kattenlaw.com/pirate-website-wwwhtmlcomicscom-shut-down-by-coordinated-efforts-of-department-of-justice-fbi-katten-and-consortium-of-comic-publishers-05-05-2010/>

<sup>28</sup> USPTO-NTIA Symposium: Copyright Policy, Creativity & Innovation in the Internet Economy:

<http://www.ntia.doc.gov/internetpolicytaskforce/copyright/copyrightsymposiumprogram.pdf>

<sup>29</sup> For example, AT&T Legal Counsel Keith Epstein said the ISP wasn't comfortable deciding which sites it should block, but it would feel differently if it received a directive from the U.S. Department of Justice. Mr. Epstein spoke on the first panel of the Symposium, moderated by Arti Rai, Administrator for External Affairs with the USPTO. An archival webcast of the entire event can be found at

<http://www.ntia.doc.gov/internetpolicytaskforce/copyright/webcast.html>

<sup>30</sup> A recent example was a speech given by U.S. IPEC Victoria Espinel on September 28, 2010 at a public event hosted by the Information Technology & Innovation Foundation, which has posted a video of the event at <http://www.itif.org/events/next-generation-ip-protection-enhancing-global-economic-growth-and-prosperity-event>. “Lots of copyrighted products and trademarked products are distributed online” without authorization of the owners and creators in an illegal effort to profit from that infringement, she said. Emphasizing the Obama Administration’s commitment to strong IP enforcement, she noted that the Administration has been talking to the sectors of the Internet economy that have enabled these illegal sites to profit — the payment processors (such as credit card companies), the domain name registrars and registries, the search engine operators, and the online ad brokers. The goal is to get these parties that are funding the infringement to stop.

- *What challenges have the creative industries experienced in developing new business models to offer content online and, in the process, to counteract infringing Internet downloads and streaming?*

As noted above, copyright industries have operated on the cutting edge of innovation in the production and distribution of their works in consumer friendly ways. However, online piracy has joined physical counterfeiting as a daunting economic challenge to all copyright industries and to the U.S. economy. According to a study conducted for the Institute for Policy Innovation, piracy costs the U.S. economy \$58 billion annually in total output, including revenue and related measures of gross economic performance.<sup>31</sup> A conservative estimate of 2005 data from four major U.S. copyright industries – motion pictures, sound recordings, business software and entertainment software/video games – demonstrate at least \$25.6 billion in lost revenue.<sup>32</sup>

Many of the business models developed depend upon technical protection measures to distinguish among offers to users, to facilitate payment, to protect privacy of user data, and to ensure rightsholders comply with their legal obligations under laws and contracts. Circumvention of such technologies is a problem in launching new business models, for example, websites, often offshore, sell products that facilitate circumvention of technologies used to protect content distributed in new formats. The government can be helpful by educating users about the risks to their online security when visiting certain sites and by helping them distinguish between legitimate and illegitimate sites.

---

<sup>31</sup> See “The True Cost of Copyright Industry Piracy to the U.S. Economy,” prepared for the Institute for Policy Innovation by Stephen E. Siwek of Economists Inc., October 2007 ([http://www.copyrightalliance.org/files/siwecopyrightpiracy\\_study.pdf](http://www.copyrightalliance.org/files/siwecopyrightpiracy_study.pdf)).

<sup>32</sup>For example, this results in federal, state and local governments forfeiting at least \$2.6 billion in tax revenues annually, with \$1.8 billion of that total lost personal income taxes and \$0.8 billion lost corporate income and production taxes. See Siwek, “The True Cost of Copyright Industry Piracy to the U.S. Economy,” IPI, 2007.

Launching direct distribution to customers, or crafting licensing agreements with other online retailers and distributors, works best when the legal distribution channels are not competing with robust infringing competitors such as off-shore, for-profit pirate sites. The problem is exacerbated when corporations such as online ad brokers, Internet service providers, online registries and registrars, and online financial transaction processors, are providing revenue streams for these infringing sites.

- *How can government policy or intellectual property laws promote successful, legitimate business models and discourage infringement-driven models? And, how can these policies advance these goals while respecting the myriad legitimate ways to exchange on copyrighted information (or the fair use of copyrighted works) on the Internet?*

The Copyright Alliance recognizes the role of fair use in U.S. copyright law, and many Copyright Alliance members, large and small, avail themselves daily to the traditional uses permitted under the fair use defense. Those members include news organizations, journalists (including photojournalists), filmmakers, authors, songwriters and educators. Current U.S. law strikes a working balance between copyright protection and fair use and in the areas where these interests find some tension, U.S. laws provide exemptions or other means that facilitate the free exchange of information and expression while still protecting copyrighted works from widespread infringement. But the fair use question is a red herring - most copyright owners are concerned primarily about the wholesale infringement of their works, hence it is of primary importance to reduce the availability of sites that enable and profit from piracy. As we have suggested throughout

this filing, this can be accomplished in part by enlisting U.S. Government assistance in removing obstacles for content owners and intermediaries that refuse to address the problem.

It is important that the term “fair use” not be conflated with the practices of for-profit rogue pirate sites. These sites are both practicing and inducing infringement. They play no essential role in the facilitation of fair use. As for the myriad legal ways to distribute copyrighted works, those legal means are the very services that are undermined and disabled by rogue pirate operations.

As mentioned above, it is wholly compatible with copyright law and the stated mission of the U.S. Intellectual Property Enforcement Coordinator for the U.S. government to take steps addressing liability concerns of third-party facilitators of online infringement, encouraging them to take proactive steps against pirate operators identified as such by federal authorities. This would build on two actions taken earlier this year by the U.S. Department of Homeland Security (DHS) as part of the Operation in our Sites campaign, which involved the seizure the domain names of dozens of such rogue pirate sites.<sup>33</sup>

As DHS demonstrated earlier this year, there are plenty of online pirate sites operating in clear defiance of legal, licensed distribution obligations. They are clearly neither practicing nor facilitating fair use, and these sites should be the first priority of U.S. enforcement of copyright online.

---

<sup>33</sup> The first action in June by the U.S. Immigration and Customs Enforcement (ICE) was coordinated with the U.S. Attorney for the Southern District of New York and resulted in the seizure of nine domain names. See more at <http://www.ice.gov/news/releases/1006/100630losangeles.htm> . The second action was coordinated by ICE and the U.S. Department of Justice and resulted in the seizure of 82 domain names. More at <http://www.justice.gov/opa/pr/2010/November/10-ag-1355.html> .

## 2. Internet Intermediaries: Safe Harbors and Responsibilities

- *What are stakeholders' experiences with the volume and accuracy of takedown notices issued for allegedly infringing content across the different types of online services (i.e., storage, caching, and search) and technologies (e.g., P2P, cyber lockers, streaming, etc.)?*

The volume of infringement notices sent by copyright owners can be overwhelmingly large. Paramount Pictures, for example, estimates it sends roughly one million notices of infringement to ISPs for forwarding to P2P users worldwide every week. As for cyberlocker sites, Paramount in September of 2010 identified more than 160,000 links to infringed Paramount films and sent takedown notices to those sites.<sup>34</sup> Unfortunately, these volumes of notices, or more, are required just to put a dent in the problem.

Independent artists and creators find great frustration with a notice-and-takedown approach to enforcing their own rights online. Independent filmmaker Ellen Seidler (mentioned above) estimates she spends more than two hours daily sending notices to parties engaged in infringement, with mixed results. Most of that time is spent contacting infringing streaming sites that are using cyberlocker or P2P technology to power them, as well as the online ad brokers selling the ads on those sites.<sup>35</sup> The time consumed in this daily exercise is time that could be spent creating her next film.

---

<sup>34</sup> Data provided by Paramount Pictures to the Copyright Alliance. Paramount uses BayTSP to send infringement notices to P2P users worldwide.

<sup>35</sup> See Ellen Seidler's blog Profits from Pirates -- <http://popuppirates.wordpress.com/>

Her plight is consistent with testimony at the July 1 Internet Policy Task Force Summit. Susan Cleary of the Independent Film & Television Alliance (IFTA) -- whose members have produced many Oscar-winning films – noted that independent film studios have very small staff, and simply do not have the man-hours to dedicate to enforcing their rights via a notice-and-takedown system.<sup>36</sup> Assistance from the federal government in identifying and targeting rogue sites will alleviate some of the burden on these independent creators.

More fundamentally, the “notice and takedown” process only works as well as the ISP or online service provider’s implementation of it. Some ISPs/OSPs may not respond in a timely manner, or at all. In other cases, they may forward the notices but fail to implement strong policies addressing repeat infringement, or, where such policies already exist, fail to enforce them.

- *In confronting the challenges of online content and copyright infringement, to what extent have all relevant stakeholder groups, such as independent creators and Internet users, participated in or had a window on collaborative approaches to curb online infringement?*

Independent creators have participated in collaborative efforts to combat online infringement largely via groups like Copyright Alliance and IFTA, which represent their interests as part of the larger copyright community. But independent creators face unique challenges.

Independent creators often lack the resources to engage aggressively in defense of their own rights under copyright law, and find themselves dismissed by large third-party

---

<sup>36</sup> See <http://www.ntia.doc.gov/internetpolicytaskforce/copyright/webcast.html>

organizations facilitating infringement that have not created clear-cut and responsive avenues to address concerns raised by copyright owners with lesser resources.

Independent filmmaker Ellen Seidler, for example, has struggled with the fact that a very large online ad broker has provided no clear channel for her to protest ads placed on rogue sites infringing on her work, and has met with little success when trying to engage executives at this corporation.<sup>37</sup> Similarly, since independent creators don't typically enter into large scale licensing agreements for use of their copyrighted works online, they lack the bargaining power to insist that their works be properly protected as part of a commercial business arrangement.

### **3. 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?*

The Copyright Alliance in the last year has worked aggressively to provide education to consumers on the latest consumer-friendly and legal services available for the enjoyment of copyrighted works. In the last six months alone, we have posted information and links on nearly forty new offerings.<sup>38</sup>

---

<sup>37</sup> Ms. Seidler has documented the challenges she has faced in attempting to reason with a major online ad broker at her Profits from Pirates site (<http://popuppirates.wordpress.com/>) and has produced a slide show documenting with screen shots how the ad broker is profiting from infringement and resisting her requests to stop ([http://www.youtube.com/watch?v=xgh0wWHxF4k&feature=player\\_embedded](http://www.youtube.com/watch?v=xgh0wWHxF4k&feature=player_embedded)).

<sup>38</sup> These innovative business models are featured as part of the Copyright Alliance blog In Syn© series at <http://blog.copyrightalliance.org/category/in-syn%C2%A9/>

We have also held public events highlighting the latest in legitimate sources for online copyrighted works for the consumer, business, and education markets, such as two widely attended panel discussions on Capitol Hill.<sup>39</sup>

The importance of education is highlighted in the Copyright Alliance's founding Principles.<sup>40</sup> From its founding in 2007, the Copyright Alliance has promoted K-12 education materials free to schools, produced by some Alliance members as well as other organizations such as the U.S. Patent and Trademark Office. In 2008, it developed a robust "Teach the Teacher" program to assist teachers, librarians and media specialists in providing sound digital citizenship education in schools.<sup>41</sup>

In 2009, the Alliance launched a 501(c)(3) charitable organization, the Copyright Alliance Education Foundation, to further promote free digital citizenship resources to K-12 schools across the United States, recognizing that many states have now mandated such lesson plans in their schools.<sup>42</sup> To date the Foundation has distributed free curricula directly to more than 76,000 librarians and media specialists in all 50 states. Much of the

---

<sup>39</sup> On September 22, 2010, in the U.S. Capitol Visitors Center, The Copyright Alliance hosted a panel discussion promoting new business models for the business, education and consumer markets, with Michael Binko, President and CEO, Kaulkin Information Systems; Sarah Hegarty, Director of Product Management, McGraw-Hill; and Bob Zitter, Executive Vice President, Technology and Chief Technology Officer for HBO. The event is chronicled here <http://blog.copyrightalliance.org/2010/09/in-syn%C2%A9-innovators-and-innovation-in-the-copyright-community/>. A similar panel discussion focusing on consumer-friendly innovations by copyright owners was held in the Rayburn House Office Building on November 17, 2009, featuring Judith Curr, publisher of Atria Books, a Simon and Schuster imprint; Mark Lukasiewicz, Vice President, NBC News Specials and Digital Media; Becky Brasington Clark, Marketing Director at Johns Hopkins University Press; and Erik Huey, Senior Vice President for Government Affairs at the Entertainment Software Association. A summary of that event can be found here <http://blog.copyrightalliance.org/2009/11/live-from-expo-copyright-innovation-and-the-new-consumer-experience/>.

<sup>40</sup> Specifically, Principle #3 is Education, and reads as follows: "To advance educational programs that teach the value of strong copyright and its vital role in fostering creative expression, driving economic growth, and enriching the lives of our citizens." See all of our Principles on our web site -- <http://www.copyrightalliance.org/content.php?id=43>

<sup>41</sup> The full curriculum is online at <http://www.copyrightfoundation.org/curriculum>

<sup>42</sup> All materials and other information on the Copyright Alliance Education Foundation, including testimonials from grateful educators, can be found at its web site -- <http://www.copyrightfoundation.org/index.php>

Foundation's mission is promoting existing curricula developed by numerous organizations such as the U.S. Patent and Trademark Office as well as many Copyright Alliance members.<sup>43</sup>

Despite our best efforts to educate students, legislators and consumers, many challenges still persist.

- *In turn, are independent creators and Internet users able to fully exploit the Internet platform for the distribution of their works and, if not, what barriers have been encountered?*

Unfortunately, independent creators are not able to fully exploit the Internet. Copyright owners are often forced into competition with sites providing their own works without authorization. This is problematic whether the copyright owner is seeking direct payment for online works or looking to distribute the works at no cost. Free online distribution models could be pursued if supported through online advertising or driving traffic to the copyright owner's web site to leverage the consumer into other revenue-

---

<sup>43</sup> The Copyright Alliance Education Foundation distributes an education programs created by the U.S. Patent and Trademark Office and iSafe called i-CREATE ([http://www.isafe.org/channels/sub.php?ch=pto&sub\\_id=pto](http://www.isafe.org/channels/sub.php?ch=pto&sub_id=pto) ). Among curricula developed by our members and distributed by our Foundation: 1) ASCAP with the National Association of Music Education, "Creativity in the Classroom" (<http://www.menc.org/resources/view/creativity-in-the-classroom> ). 2) Business Software Alliance, "Cyber Tree House" (<http://www.cybertreehouse.com/> ), "B4U Copy" (<http://www.b4ucopy.com/kids/index.html> ) and "Play it CyberSafe" ([http://www.copyrightfoundation.org/library/14/play\\_it\\_cybersafe](http://www.copyrightfoundation.org/library/14/play_it_cybersafe) ), 3) Entertainment Software Association, "Join the © Team" (<http://www.jointheteam.com/> ). 4) Motion Picture Association of America, "Lucky and Flo: Crime-Fighting Canines" ([http://www.copyrightfoundation.org/library/11/lucky\\_flo\\_crime\\_fighting\\_canines](http://www.copyrightfoundation.org/library/11/lucky_flo_crime_fighting_canines) ). 5) Recording Industry Association of America, "Learn B4U Burn" ([http://www.copyrightfoundation.org/library/13/learn\\_b4u\\_burn](http://www.copyrightfoundation.org/library/13/learn_b4u_burn) ) and "Music Rules" (<http://www.music-rules.com/> ).

generating business models. It is therefore harmful to copyright owners when traffic is directed elsewhere – such as to illegitimate pirate sites.

Colleen Doran, for example, is posting back issues of her comic book series, *A Distant Soil*, on her own web site (<http://adistantsoil.com>) at no cost, with hopes of receiving a small revenue stream from online ads and a donation button, while creating a way for her fans to keep coming back to her site and remain engaged as a marketing tool for future works she would wish to promote. Yet the ubiquitous presence of all four volumes of *A Distant Soil* on rogue pirate web sites steals that traffic from her own site at significant cost to her in both revenues and promotional opportunities.

The challenges posed by online piracy to individual creators are steep. Hundreds of Copyright Alliance grassroots supporters filed comments earlier this year with the U.S. Intellectual Property Enforcement Coordinator, strongly encouraging the IPEC Office to proactively target online infringement and facilitate a legal online market for their own copyrighted works.<sup>44</sup> For example, there was this submission by author Casey Sheridan of Oconomowoc, Wisconsin:

*I have always loved writing and dreamed of being a published author. In July 2009 my dream came true when my first short novel was published as an e-book. It took a long time and a lot of hard work for me to realize this dream, so when I found my novel on two websites as a free download to anyone, I felt my dream crash. I spent many months writing, editing and promoting my book. For these people to take my hard work without my permission, for their own personal gain, is stealing and should be punished as such, both swiftly and strongly.*

---

<sup>44</sup> All of the comments received by the US IPEC, including the filing by the Copyright Alliance, can be found on the White House web site -- [http://www.whitehouse.gov/omb/intellectualproperty/frn\\_comments/](http://www.whitehouse.gov/omb/intellectualproperty/frn_comments/)

*Trying to get those who infringe upon my work to remove the links from their websites is a long and arduous process, a grueling up hill battle. It shouldn't be that way. Something needs to be done to make the process for all artists and creative persons to have their work removed from a criminals website, or other media outlet, easier. To have the work removed immediately not when they decide they are tired of our requests. Our requests should not be ignored as they are now.<sup>45</sup>*

Unfortunately, Casey Sheridan's story is echoed by many other individual artists and creators who submitted comments with the U.S. IPEC.<sup>46</sup>

## **RECOMMENDATION**

---

<sup>45</sup> See Casey Sheridan's submission online at

[http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn\\_comments/SheridanCasey.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/SheridanCasey.pdf) .

<sup>46</sup> A few other examples: 1) Composer and recording artist Georg Bissen "My rights are violated every day, and it makes me angry and sad, since all of the time and effort I put into my work gets disrespected." [http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn\\_comments/BissenGeorg.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/BissenGeorg.pdf) 2) Sound engineer Alex Dal Piaz "In a normally operating marketplace, it is the worst businesses that go out of business - but as continued piracy has eroded labels appetite for risk-taking, it is actually the best places that have suffered the most."

[http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn\\_comments/DalPiazAlex.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/DalPiazAlex.pdf) 3) Architectural photographer Jeffrey Jacobs "I would like to see a huge campaign to get the word out, copyright infringement is illegal. One problem is the costs are so high to pursue a case, most don't even try, they feel defeated before they start, simplifying the process would be very helpful."

[http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn\\_comments/JacobsJeffrey.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/JacobsJeffrey.pdf) 4) Interior photographer Jeff Wolfram "I know that the stronger the United States government supports protecting intellectual property rights the more secure our businesses will be in our future economy."

[http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn\\_comments/WolframJeff.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/WolframJeff.pdf) 5) Photographer and web designer James Sullivan "Unless the intellectual property and copyright laws are not only enforced but strengthened creators will find little reason to create as they cannot make a living, and cease to exist."

[http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn\\_comments/SullivanJames.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/SullivanJames.pdf) 6) Illustrator Diana Ponce "If inventors, computer programmers and other creators have full rights of intellectual property protection, visual artists, photographers, writers and musicians should have equal protection against misappropriation by infringers."

[http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn\\_comments/PonceDiana.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/PonceDiana.pdf) 7) Freelance writer Jane Yolen "[W]ith copyright theft and Internet piracy, I have been finding a lot of my work on line without either permission, copyright notice, or payment. While I am told that this expands my audience, and such thieves exhort me that information wants to be free, I wonder how they would feel if I put their Visa card numbers and names on line so everyone could help themselves to their credit. They are doing exactly that by taking the only thing I can possibly sell to make my living, supporting my children, grandchildren, keeping a roof over my head, buying my groceries, paying my taxes."

[http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn\\_comments/YolenJane.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/YolenJane.pdf)

The Internet provides unprecedented opportunities for copyright owners large and small to distribute their works to the consumer, business and education markets in a multitude of user-friendly ways. Copyright owners have been experimenting broadly in this area, as the Copyright Alliance has long identified.<sup>47</sup>

The recipients of those copyrighted works are not the only winners in a legal, licensed online market for copyrighted works. The U.S. economy benefits from the success of copyright industries thriving online within the U.S. and abroad. Those employed by copyright industries, members of copyright industry unions and guilds, and individual artists and creators all find work and pay taxes. The U.S. Commerce Department and the Internet Joint Task Force is absolutely correct in stating that the protection of copyright owners' rights online is a critical component of any Administration economic policy.

The online marketplace must be hospitable to legal, licensed business models in order to bring safe and flexible benefits to consumers, growth to the U.S. economy and job growth, and return on investment for producers and owners of copyrighted works. The threat of rogue pirate sites has reached a critical mass online, threatening all of these benefits found in a legitimate marketplace.

A central goal of U.S. policymakers should be seeking ways to enforce copyright owners' rights online. To the extent third parties – online ad brokers, Internet service providers, financial transaction firms, domain name registers and registrars, and other industries – are facilitating profit for infringing online operations, it is incumbent upon

---

<sup>47</sup> See the Copyright Alliance In Syn© series at <http://blog.copyrightalliance.org/category/in-syn%C2%A9/>

policymakers to discourage and deter such support. There is no place in the U.S. economy for one sector facilitating theft from another.

The Copyright Alliance is encouraged by the commitment to online copyright enforcement articulated by The U.S. Commerce Department and Secretary Gary Locke, as well as President Barack Obama, Vice President Joseph Biden, and others in the Administration. The Alliance and its members stand ready to provide guidance and assistance in pursuing the critical goal of targeting online infringement and creating a legal online marketplace to benefit consumers, copyright owners and the U.S. economy.

Respectfully submitted,

/s/ Patrick Ross

Patrick Ross  
Executive Director  
Copyright Alliance

December 10, 2010