
**Before the
DEPARTMENT OF COMMERCE
Internet Policy Task Force**

Inquiry on)
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Copyright Policy, Creativity, and) Docket No. 100910448-0448-01
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Innovation in the Internet Economy)
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COMMENTS OF TECHAMERICA

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TechAmerica hereby submits these comments to the Department of Commerce (“Department”). TechAmerica’s members have a vested interest in the success and future of the Internet and TechAmerica is pleased to be able to file comments on their behalf in this proceeding.¹

TechAmerica is the leading voice for the U.S. technology industry, which is the driving force behind productivity growth and jobs creation in the United States and the foundation for the global innovation economy. Representing approximately 1,200 member companies of all sizes from the public and commercial sectors of the economy, TechAmerica is the industry’s largest advocacy organization and is dedicated to helping members’ top and bottom lines. It is also the technology industry’s only grassroots-to-global advocacy network, with offices in state capitals around the United States, Washington, D.C., Europe (Brussels) and Asia (Beijing). TechAmerica was formed by the merger of the American Electronics Association (AeA), the Cyber Security Industry Alliance (CSIA), the Information Technology Association of America (ITAA) and the Government Electronics and Information Association (GEIA).

TechAmerica’s members include: manufacturers and suppliers of broadband networks and equipment; consumer electronics companies; ICT hardware companies; software and application providers; systems integrators; Internet and e-commerce companies; Internet service providers; information technology government contractors; and information technology consulting and sourcing companies.

TechAmerica welcomes this opportunity to provide the Department’s Internet Policy Task Force with a viewpoint shared by such a diverse membership.

¹ *Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy*, Notice of Inquiry, 75 FED. REG. 61419 (Oct. 5, 2010) (“Copyright NOI”).

E-Commerce and Copyrighted Works

Representing all sectors of the Internet economy, TechAmerica recognizes well the tremendous growth that has occurred in the e-commerce marketplace over approximately the last 15 years. And TechAmerica appreciates the Department's recognition that e-commerce is a leading contributor to the nation's economy.² As broadband deployment continues to expand and as broadband technologies continue to improve,³ e-commerce's role in the nation's overall economic productivity will continue to grow exponentially.

Indeed, as stated by the Department, the legitimate distribution of copyrighted works has played an integral role in the growth of e-commerce.⁴ Nonetheless, TechAmerica recognizes that a significant amount of online piracy in the form of copyright infringement continues to exist. In our view, these challenges are best approached through voluntary cooperation and collaborative efforts among all interested stakeholders, rather than through frozen-in-time technology mandates that can rapidly be outpaced by technology.⁵ All members of the Internet economy have a stake in ensuring that the distribution of unauthorized copyrighted works is minimized to the fullest extent possible. However, were government intervention deemed necessary, any proposed solutions must be technologically-neutral and take into consideration the

² Id. at 61420.

³ Indeed, the technological evolution in broadband deployment is rapid, as evidenced by the rollout over the last few years of such high-speed and higher-capacity innovations as WiMAX, LTE, HSPA+, FiOS, and DOCSIS 3.0, to name just some.

⁴ Copyright NOI at 61420.

⁵ See, e.g., the Audio Home Recording Act of 1992, Pub. L. No 102-563, 106 Stat. 4237. The AHRA requires certain digital audio recording devices manufactured or sold in the U.S. to implement the "serial copy management system" (SCMS). SCMS was intended to prevent the serial copying of sound recordings onto digital audio tape (DAT), a perceived threat at the time. Both DAT and the SCMS regime were bypassed by technological developments almost before the legislation could be fully implemented.

requisite costs and burdens of such solutions. For example, technical issues associated with monitoring, filtering and blocking to protect copyrighted works must be carefully crafted and balanced to protect the free-flow of information, to minimize impact on legitimate uses of content, to respect user privacy, and to avoid other unintended consequences for innovators, copyright owners, users and service providers. Solutions also must account for the important balance of U.S. copyright law, which includes fair use and other innovation-friendly limitations and exceptions, alongside countervailing obligations.

Facilitating the growth of e-commerce, the Digital Millennium Copyright Act (DMCA), though not perfect, reflects a careful balance struck between the responsibility of intermediaries and the responsibility of a content provider, even as new issues are confronted and technological platforms continue to evolve. Much of the success of the DMCA lies in its flexible approach, which has enabled user-generated creativity to flourish alongside professional content and provides certainty for platform providers. The DMCA also enables new ways of commerce to prosper, which is critical for the country's continued economic growth.

Indeed, there have been instances where the DMCA has been misused.⁶ However, this sort of activity has been appropriately caught and highlighted by the courts. This is the balance of the DMCA at work. Any addressing of DMCA abuse should be handled with utmost care to ensure that the careful balance of rights, responsibilities and progress continues.

⁶See, e.g., *Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004); *Design Furnishings, Inc. v. Zen Path LLC*, No. 10-2765, 2010 WL 4321568 (E.D. Cal. October 21, 2010).

Internet Intermediaries

Of course, any solution offered towards fighting online copyright infringement must take into consideration the unique characteristics and roles Internet intermediaries play in the overall Internet ecosystem.

Without a doubt, as the Department notes, Section 230 of the Communications Decency Act (CDA), though not a copyright statute, and Section 512 of the DMCA have played integral roles in the development of e-commerce.⁷ TechAmerica agrees wholeheartedly with the Department that both provisions “remain essential to promoting innovation and to protecting intellectual property online.”⁸ These two statutory provisions have greatly facilitated the free flow of lawful information online and have provided Internet intermediaries, whether they are Internet service providers, search engines, or hosting entities, with the necessary assurances that a variety of e-commerce business models can flourish without fear of liability.

With regard to copyright, TechAmerica continues to believe that the DMCA provides a workable model for removing restricted content while at the same time protecting Internet service providers from liability and therefore encouraging innovation and deployment of Internet services. The DMCA was enacted, in part, to implement the copyright treaties negotiated through the World Intellectual Property Organization (WIPO), which were carefully crafted to balance the rights and responsibilities of copyright owners, users, and online service providers. Section 512 (a) of the DMCA creates an important bright line limitation on liability, recognizing the role of service providers who function as “mere conduits” and ensuring that “mere conduits” continue to

⁷ Id. at 61421.

⁸ Copyright NOI at 61421.

promote the free flow of information. The limitations on liability in the DMCA are not conditioned on a service provider monitoring its service or removing infringing materials when it acts as a “mere conduit.” Sections 512 (b), (c) and (d) of the DMCA provide for protections for other critical Internet functions such as caching, storage, hosting and information location tools, and contain obligations to take down materials hosted on the service provider’s system or network after receipt of a valid take down notice, among other obligations.

The DMCA also provides important limitations against overly broad injunctive relief. Before ordering an injunction against a service provider, a court must apply four factors, including considering the burden on the provider’s network, the magnitude of harm likely to be suffered by the copyright owner if steps are not taken to restrain the infringement, whether the injunction would be technically feasible and effective and not interfere with access to non-infringing materials, and whether there are less burdensome and comparably effective means of preventing access to such materials. See DMCA § 512 (j)(2). These injunctive relief protections strike the right balance by helping content owners enforce their copyrights while preserving the limitations on liability provided for in the DMCA.

With regard to user generated content, Section 230 of the CDA represents a potential model for countries seeking to encourage responsible voluntary content monitoring without imposing undue liability risks. As the Department observes, Section 230 has been extremely successful in spurring rapid growth in new Internet services because companies can offer websites, social networks, and other services “without

worrying about potential liability for information stored on or moving across their networks.”⁹

International Arena

Of course, while Internet intermediaries, copyright owners and consumers benefit from the carefully crafted and balanced legal regimes in the U.S., they face somewhat different regimes abroad. TechAmerica believes that the Department can take a leading role in promoting Section 230 of the CDA and Section 512 of the DMCA overseas.

When the Senate ratified the WIPO Copyright Treaties and approved the DMCA, it appropriately required that the Executive branch promote the ISP liability provisions of the DMCA as the model for other countries to adopt as they update their copyright and related laws. Other countries have adopted DMCA-like models in this area, including the EU’s E-Commerce Directive¹⁰ and Australia’s copyright law. It is critical that U.S. government and other signatories of the WIPO treaties and WIPO itself continue to promote the Internet intermediary and copyright protections embodied in the DMCA as part of any copyright provisions in multilateral or bilateral trade agreements.

Further, it is important to promote domestic and international policies that – like the DMCA – avoid technology mandates and acknowledge, to the extent that

⁹ *Global Free Flow of Information on the Internet*, Notice of Inquiry, 75 FED. REG. 60072 (Sept. 29, 2010).

¹⁰ It should be noted, however, that while the EU’s E-Commerce Directive does contain language incorporating principles regarding limitations on liability for Internet intermediaries similar to those in Section 512 of the DMCA and Section 230 of the CDA, it has not been necessarily implemented by member countries consistent with that language. For example, in Germany, courts have developed a doctrine of appropriation of third-party content. The doctrine states that if the host has appropriated user generated content, it can be made liable for the appropriated content as for its own content. This doctrine seems to contradict the E-Commerce Directive. See *Liability of Online Publishers for User Generated Content: A European Perspective*, COMMUNICATIONS LAWYER, April 2010.

technological solutions are employed, they are technically feasible, tailored to realistic objectives, and do not create undue costs or technical constraints for service providers or users outside the country's borders. It is especially important to ensure that blocking policies take into consideration those factors to the extent private sector actors face potential liabilities for compliance failures.¹¹

Conclusion

TechAmerica appreciates the Department's leadership in examining copyright policy and the interplay copyright policy has with innovation and growth in the Internet economy. TechAmerica's members have played integral roles in the rapid development of the e-commerce marketplace and greatly respect the need to protect lawful copyrighted works online.

To be sure, Section 512 of the DMCA and Section 230 of the CDA, have greatly facilitated the growth of the Internet and have provided legal avenues for distribution of copyrighted content that otherwise may not have existed. Notwithstanding these newfound lawful distribution models, the proliferation of online pirated content remains a troubling problem that demands a collective effort from all interested stakeholders provided costs and burdens are shared among the stakeholders.

Additionally, the Department should take a leading role in promoting Section 512 of the DMCA and Section 230 of the CDA internationally. The adoption abroad of these provisions will ensure the continued growth of lawful e-commerce and the protection of copyrighted material.

¹¹ For example, in France, where under French law (HADOPI) ISPs have received thousands of government notices seeking the IP addresses of presumed copyright infringers and face stiff fines (1,500 euros per day per IP address) for non-compliance.

We appreciate the opportunity to provide input on this subject and TechAmerica looks forward to working with the Department further on these matters in the months and years ahead.