

Before the
United States Patent & Trademark Office
Department of Commerce
Washington, DC

In re

Request of the United States Patent and
Trademark Office for Public Comments:
Voluntary Best Practices Study

Dkt. No. PTO-C-2013-0036

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments issued by the U.S. Patent & Trademark Office (USPTO) and published in the Federal Register at 78 Fed. Reg. 37,210 (June 20, 2013), the Computer & Communications Industry Association (CCIA) submits the following comments.¹

I. On the Merits of Government Evaluation

Consistent with the IP Enforcement Coordinator's (IPEC) 2013 Joint Strategic Plan (JSP), the USPTO has solicited input on processes, metrics, and methodologies that may be employed to assess the effectiveness of cooperative agreements and other initiatives to reduce infringement. The JSP provided no indication of the basis for this directive; rather, it proceeded from the unexamined premise that the U.S. Government should be evaluating unregulated, private sector action in the first place. This proposal itself deserves additional consideration. Depending on the nature of the evaluation, industry stakeholders may perceive government assessments as a form of soft regulation. Should government evaluation be perceived as imposing regulatory compliance burdens, it will deter participation in "voluntary best practices," particularly if policymakers should characterize one given effort as superior to another, toward meeting some yet-unstated metric. Such evaluation may also be perceived as setting a minimum bar of regulatory compliance necessary for market entry. Given that new entrants will be unable to deploy multimillion-dollar content and brand protection programs similar to those that larger

¹ CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. CCIA members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A list of CCIA members is available at <http://www.cciainet.org/members>.

online brands have constructed, the perception of a regulatory hurdle for starting new online businesses may have the unintended effect of impeding new entrants and consolidating the existing online marketplace.

II. *Defining the Scope of Review: The Need for Lawful Alternatives*

The voluntary practices policy discussion has been largely restricted to creating new processes, procedures, and programs aimed at directly preventing online infringement. The conversation and this inquiry should be broadened to take into account rights-holder initiatives to license and deploy comprehensive, legitimate avenues for purchase of goods, content, and services, particularly online.

The IPEC JSP reflected an unduly narrow focus, identifying various service-provider initiatives in which rights-holders may (or may not) participate. Preventing infringement is not the overarching purpose of intellectual property statutes. “[T]he monopoly privileges that Congress has authorized, while ‘intended to motivate the creative activity of authors and inventors by the provision of a special reward,’ are limited in nature and must ultimately serve the public good.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994); *accord Harper & Row v. Nation Enterprises*, 471 U.S. 539, 546 (1985). In short, IP is a means to an end: promoting invention and creativity activity, which itself fosters the broader goal of improving public welfare. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Bonito Boats Inc. v. Thunder Craft Boats Inc.*, 489 U.S. 141, 146 (1989). Stemming infringement alone will not achieve these goals; policy action must ultimately foster the sale of goods, content, and services.

Beyond the established industry practice of DMCA compliance, other voluntary initiatives have included efforts by broadband providers, payment processors, advertisers, and numerous online platforms. To date, however, there has been insufficient attention paid to initiatives aimed at indirectly preventing infringement by increasing lawful content options for online users. The result is that recent years have witnessed the creation of numerous new “sticks,” *i.e.*, inter-industry programs deployed against infringers, with limited progress toward accompanying inter-industry “carrot” initiatives to draw the public to lawful products and services. Such “carrots” could include best practices for windowing releases, to move works to digital distribution platforms sooner. The exclusive theatrical release window for movies is a substantial motivator of online piracy. While rights-holder constituencies often point to a large volume of licensed services, many services are denied access to sought-after works, and the

selective withholding of certain high-profile artists or works often means that the content which users seek is not available on any platform. USPTO could also voluntarily facilitate conversations on harmonizing licensing practices, to reduce transaction costs and encourage new services to enter the market. Other best practices could include something as simple as optimizing the online presence of rights-holders and content delivery services to maximize the online visibility of lawful content offerings.² A recent rumored Comcast proposal, which would attempt to direct users engaging in unauthorized downloading toward lawful content offerings, received some media attention.³ The design of such a program, or similar programs, may be an appropriate subject here, but it could not be effectively implemented without broad participation from rights-holders across various industries. The JSP acknowledges this, in part, saying that “[r]ightholders have a critical role to play. Voluntary initiatives will be most effective and efficient if all stakeholders are working together cooperatively. Consequently, we will pursue a set of best practices for rightholders that are using the voluntary initiatives created by service providers.”⁴

Thus, best practices should extend beyond participation in piracy-prevention programs to include the facilitation of successful lawful mechanisms for accessing content. For example, recent research indicates that the introduction of Spotify into the Netherlands and Sweden substantially decreased unlawful music downloads in those countries, whereas it still remains quite prevalent in Italy, where Spotify only just launched.⁵ A study released by Norwegian firm Ipsos MMI found that a 50% reduction in video piracy and 80% reduction in music piracy followed the introduction of Netflix and Spotify into that country.⁶

By contrast, reducing consumers’ options for lawfully accessing content (presumably, with the aim of securing greater licensing revenues from various windows or content outlets) appears to lead to increased online piracy. For example, in 2011 commentators observed a

² Matthew Schruers, *The Search Fixation: Infringement, Search Results, and Online Content*, CCIA (2013), at [http://www.ccia.net.org/CCIA/files/ccLibraryFiles/Filename/000000000821/CCIA_TheSearchFixation%20\(2\).pdf](http://www.ccia.net.org/CCIA/files/ccLibraryFiles/Filename/000000000821/CCIA_TheSearchFixation%20(2).pdf).

³ Andrew Wallenstein, *Comcast Developing Anti-Piracy Alternative to ‘Six Strikes’*, *Variety*, Aug. 5, 2013, available at <http://variety.com/2013/digital/news/comcast-developing-anti-piracy-alternative-to-six-strikes-exclusive-1200572790>.

⁴ U.S. Intellectual Property Enforcement Coordinator, *2013 Joint Strategic Plan on Intellectual Property Enforcement* (2013), at 36, available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf>.

⁵ Will Page, *Adventures in the Netherlands*, Spotify, July 17, 2013, available at <http://press.spotify.com/uk/2013/07/17/adventures-in-netherlands>.

⁶ Sophie Curtis, *Spotify and Netflix Curb Music and Film Piracy*, *The Telegraph*, July 18, 2013, at <http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>.

marked increase in downloading of Fox television programming when that network began delaying shows' release on the Hulu platform,⁷ and more recently, the Washington Post observed that "online piracy of [CBS's 'Under the Dome'] had risen by more than a third where viewers had lost access to CBS" during the Time Warner/CBS retransmission fee dispute.⁸ The converse effect – consumers opting for legal avenues when they are available and infringing when they are not – has been observed overseas. A 2012 study found that piracy had a limited effect on U.S. box office revenues, in contrast to international releases. Because there is often a release window between U.S. and international releases, many consumers do not have a legal avenue with which to view films during their initial release period, and instead, turn to piracy.⁹ Findings of this nature suggest that voluntary initiatives, focused on increasing access to content, through new services and platforms, are a necessary strategy for mitigating infringement.

This review should therefore consider to what extent content availability can be increased, and licensing agreements may be facilitated, in order to provide consumers with more options.

III. *Measuring Effectiveness of Voluntary Initiatives*

Various obstacles confront attempts to measure the effectiveness of any anti-piracy initiative. First, as noted above, government evaluation of an initiative's efficacy, whether that measure is to reduce infringement or maximize lawful sales, may be perceived as a form of soft regulatory action that could deter experimentation with innovative new ways of deterring unlawful activities and encouraging lawful transactions. Additionally, information necessary to competently assess the costs and benefits of various initiatives may be non-public.

Second, measuring the impact of piracy has always posed modeling and data-gathering problems, and absent natural experiments, changes in the quantity of infringement cannot be associated with particular policies with any precision.¹⁰ As the USPTO recently noted, GAO observed in 2010 and again in Congressional testimony last month that estimating the economic

⁷ Ernesto, *Fox's 8-Day Delay on Hulu Triggers Piracy Surge*, TorrentFreak, Aug. 22, 2011, at <http://torrentfreak.com/foxs-8-day-delay-on-hulu-triggers-piracy-surge-110822>.

⁸ Brian Fung, *How CBS Sparked More Online Piracy – of its Own Show*, Wash. Post, Aug. 8, 2013, at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/08/how-cbs-sparked-more-online-piracy-of-its-own-show>.

⁹ Brett Danaher & Joel Waldfogel, *Reel Piracy: The Effect of Online Film Piracy on International Box Office Sales* (2012), available at <http://ssrn.com/abstract=1986299>.

¹⁰ Even quantifying allegedly infringing Internet traffic gives rise to ambiguities. Data volume, for example, is a poor metric for measuring infringement since video represents one of the most data-intensive file formats. While data volume may be an attractive metric because it provides a basis for sensational claims, the disproportionately larger size of video files skews empirical observations.

impact of IP infringement is “extremely difficult,” due in part to the fact that loss estimates “involve assumptions such as the rate at which consumers would substitute counterfeit for legitimate products, which can have enormous impacts on the resulting estimates.”¹¹ As a result, it is “difficult, if not impossible, to quantify the economy-wide impacts.”¹²

Ultimately, the effectiveness of any practice should be measured by its capacity to induce lawful transactions. “Evidence from the founding, moreover, suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science.” *Golan v. Holder*, 132 S. Ct. 873, 888 (2012). For example, preventing infringements that do not substitute for lawful sales, *e.g.*, because the work is not available on the market, are unlikely to increase remuneration to rights-holders. Policy must therefore prioritize the creation of legitimate avenues for sale.

Assessments of the efficacy of a particular voluntary program should also take into account false positives. That is, it is not costless when a voluntary measure is abused in a manner that penalizes non-infringing users, services, or content. Intentional misuse of the DMCA, and certain third-party providers who produce high-volume, low-accuracy DMCA takedowns detract from the value of DMCA compliance by restricting access to lawful content. Although numerous anecdotes of DMCA abuse may be found,¹³ a proper empirical assessment of the costs of misuse would require greater transparency in notices submitted by rights-holders and their designated agents. Nevertheless, a complete evaluation of any voluntary best practice must account for costs associated with abuse of that practice by interested third parties.

IV. Conclusion

Setting aside the merits of evaluating the efficacy of voluntary practices, the USPTO may play a role encouraging parties to share information. CCIA supports the Administration’s policy of building a data-driven government; as the National Research Council recently noted, U.S.

¹¹ U.S. Dep’t of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (2013), at 8 n.27, available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (citing GAO, *infra*).

¹² Loren Yager, *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, Government Accountability Office, GAO-10-423 (2010), available at <http://www.gao.gov/assets/310/303057.pdf>; Susan E. Offutt, *Insights Gained from Efforts to Quantify the Effects of Counterfeit and Pirated Goods in the U.S. Economy*, Government Accountability Office, GAO-13-762T (2013), available at <http://www.gao.gov/assets/660/655781.pdf>.

¹³ Matthew Schruers, *This Post Is No Longer Available Due To... (Why DMCA Abuse Occurs)*, Disruptive Competition Project, Aug. 14, 2013, at <http://www.project-disco.org/intellectual-property/081413-this-post-is-no-longer-available-due-to-why-dmca-abuse-occurs>.

copyright policy debates “are poorly informed by objective data and empirical research.”¹⁴ This is one area in the copyright policy space where objective information could be gathered.

Respectfully submitted,

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¹⁴ National Research Council, *Copyright in the Digital Era: Building Evidence for Policy* (2013) at ix, available at http://www.nap.edu/catalog.php?record_id=14686.