

CreativeFuture

Creativity. Innovation. Tomorrow.

August 15, 2018

Ms. Lisa R. Barton
Secretary to the Commission
United States International Trade Commission
500 E Street, SW
Washington, DC 20436

Submitted Electronically via EDIS and in Copies to the Commission, Investigation No. 332– 562 and Investigation No. 332-563

Dear Ms. Barton,

CreativeFuture appreciates the opportunity to respond to the U.S. International Trade Commission’s (ITC) request for comments on *Global Digital Trade 2: The Business-to-Business Market, Key Foreign Trade Restrictions, and U.S. Competitiveness* as well as *Digital Trade 3: The Business-to-Consumer Market, Key Foreign Trade Restrictions, and U.S. Competitiveness* as set forth in the Federal Register notice dated January 23, 2018.

CreativeFuture is a coalition of tens of thousands of people from the American content industry – over 540 organizations and companies and over 190,000 individuals. Whether we work in film, television, publishing, music, or photography, our ability to engage in core expressive and culturally important activities in the digital environment are under siege from the rampant, illicit activity of digital piracy.

As representatives of the millions of Americans who work in the creative industries, we are writing to call on the ITC to support more effective laws and policies, in the U.S. and globally, to reduce this theft that stymies creative expression and totals in the billions of dollars of annual economic harm. Our ability to compete globally through digital markets is undermined everyday by a massive piracy ecosystem that is largely located in foreign countries beyond the reach of U.S. enforcement powers.

Strong copyright protections give our creative communities the freedom to pursue their art as a career, not just as a hobby. These protections ensure that the years of uncompensated work that are invested in the creation of songs, publications, films, or coding a program have a real opportunity to be rewarded with a meaningful return – a return that may then be used to pursue the next work, continuing to enrich our culture and society.

Moreover, our creative industries are a significant economic driver, contributing more than \$1.2 trillion to America’s Gross Domestic Product and employing 5.5 million Americans. U.S. core copyright industries are leading exporters, with total foreign sales eclipsing other major U.S. industries – including aerospace, agriculture, and pharmaceuticals.¹ When consumers in other countries enjoy American-made creative products through legitimate platforms properly protected by local laws, job creation and

¹ International Intellectual Property Alliance, *Copyright Industries in the U.S. Economies*, 2016

economic growth occur here at home. But rampant online theft diminishes the value of this creative economy around the world, adversely affecting our favorable trade balance and American jobs.

For these reasons, strong copyright protections are important in local laws around the globe and are crucial to any free trade agreement (FTA). For the last two decades, the United States has been steadily increasing the level of copyright protection in the intellectual property chapters of our trade agreements. Our FTAs should seek agreement on the most effective policies for the digital age, embracing the best of copyright principles and practices from the US and other nations.

For instance, copyright concepts critical to internet enforcement such as the legal principles that helped shut down notorious piracy sites Grokster, Limewire, and Isohunt – and are now being used against the emerging set top box piracy ecosystem (see page 5) – are not explicitly included in our FTAs. We must continue to build on this base in the existing ones.

These protections, which incentivize millions of Americans to make a reasonable living by contributing to the creative economy, must be reinforced here and around the globe. Copyright is no less an engine of innovation and economic growth than are patents and other property rights. Nor are they less important to economic growth and prosperity than is innovation in communications technologies, including the internet. Creative content and innovative distribution technologies are interdependent.

According to the Global Innovation Policy Center's [2018 "Create" International Intellectual Property index](#), stronger IP protections clearly correlate with larger and more dynamic creative outputs as well as larger legitimate digital content distribution marketplaces. These robust digital markets around the world contribute directly to the American workforce and its prosperity – in all 50 states.

Yet for the last few years, U.S. policy has prioritized the growth of the internet, with little attention paid to our content industries. During the past two decades, our copyright-based industries have adapted rapidly to changing markets and consumer demand worldwide, working against the continuing challenge of the global theft of our creative works. But for many creatives, it feels as if the policy deck is stacked against them.

To make matters worse, some of Silicon Valley's biggest companies and their allies have made a concerted push to weaken copyright protections at home and abroad. They are steadfast in their efforts to dilute the language that protects our jobs in every new trade agreement. And they fight vociferously for broad immunities to be included in foreign laws and new trade agreements, sometimes even broader than those in U.S. law.

This is why the International Trade Commission's request for comments from stakeholders in the global digital trade marketplace is so timely for millions of Americans who depend on copyright to make a living. The U.S. copyright industries are dependent upon global trade for their continued growth and health.

We ask the ITC and all relevant federal agencies responsible for international digital trade policy to remain sensitive to the need to preserve and strengthen these rights in the face of a global onslaught – through appropriate policy and advocacy.

Why the Creative Communities Are a Key Stakeholder in Global Digital Trade

The reports generated by ITC at the request of the United States Trade Representative are crucial to highlighting the importance of a robust global framework for the protection of American intellectual property. Today, the U.S. is home to the largest and most diverse creative economy in the world – significant not only in volume of revenue but also in contributions to global culture and understanding.

The digital age – starting in the mid '90s – has presented copyright owners with incredible opportunities, as well as increasing challenges. During this time, creatives have benefited from technological achievements that have allowed us to reach global audiences as never before. And, the U.S. creative industries have adapted, creating new and innovative digital distribution models – providing consumers with more choice than they have ever had before.

According to the [Motion Picture Association of America](#), content creators now use more than 140 legal services in the United States and more than 460 around the world through which they distribute film and television content online. U.S. audiences used those services to access 8.1 billion movies and 110.3 billion television episodes in 2016 alone.

Consumers can now watch literally thousands of movies and television shows representing decades worth of creative content. In music, consumers have access to virtually the entire historical catalogue of music, at a wide range of price points (including free with ads) through a multitude of distribution models.

Yet, those same technologies have facilitated rampant digital piracy that has devalued our life's work and created existential threats to various segments of our industry. No other American industry competes on such an un-level playing field, with a digital marketplace of stolen content that in many cases is indistinguishable from (identical to!) the original, but offered for free or by criminal enterprises whose business models are based on not paying creatives for the very products they distribute.

As bandwidth has expanded, the internet piracy ecosystem has become more sophisticated, enabling large scale facilitation of an illicit global content marketplace that creates unfair competition for all legitimate content businesses. Moreover, the U.S. policy framework has prioritized the growth of internet platforms over accountability for the harms they enable, which has disincentivized reasonable cooperation with rights holders to combat infringement and other illegal or harmful activity.

It is no coincidence that during the same decade, players in this ecosystem have grown to be among the world's most powerful (and valuable) companies. They have both destroyed and appropriated value – largely without constraints. And creatives are not alone among those negatively impacted. Every day seems to bring new examples of the wide-ranging consequences of the lack of online accountability: interference in elections, rampant hate speech, fake news, fraud, malware and identity theft, not to mention the illicit trafficking in everything from airport security credentials to opioids, and even human beings.

As the ITC considers its digital trade priorities for the global marketplace, it must acknowledge that we have reached (or are very close to reaching) a tipping point. The hands-off policies and statutory immunities adopted 20 years ago to promote the growth of the then-nascent internet are now significantly contributing to the demise of the public's confidence in the very technology our nation

sought to advance, thereby impairing its potential as a driver of economic growth and legitimate digital trade and commerce.

Many in Congress are now rethinking this model, expressing a newfound skepticism for these statutory immunities such as Section 230 of the Communications Decency Act of 1996. At a Senate Intelligence Committee hearing on August 1st, 2018, Sen. Ron Wyden was quoted as saying, “I just want to be clear, as the author of Section 230, the days when these pipes [of information] are considered neutral are over – because the whole point of 230 was to have a shield and a sword, and the sword hadn’t been used and these pipes are not neutral.”

And on July 20, 2018, Sen. Mark Warner's office released a [23-page proposal](#) with 20 different options to address the problems posed by these online platforms — ranging from putting a price on individual users' data to funding media literacy programs. His proposal specifically called for re-considering the breadth of intermediary immunities. In an [op-ed](#) by the Senator published in *USA Today* on August 1, 2018, he said, “...with each new story about fake news, bots, trolls or Facebook’s [mishandling of 87 million Americans’ private data](#), it has become even clearer that these social media companies were caught flat-footed — unable or unwilling to predict, detect or stop the abuse of their platforms.”²

Nevertheless, these outdated policies and immunities are still being promoted by their immensely profitable beneficiaries as guidelines for digital trade around the world. Why would we export the same system that has so harmed the legitimate digital marketplace for creative goods worldwide?

Balancing Digital Trade Policies that Promote the Growth of the Internet and the Creative Industries

The internet sector frequently asserts that anything short of the broad immunities it presently enjoys would be tantamount to censorship – a violation of the First Amendment rights of Americans and the free speech of people around the world. But creatives are staunch supporters of the First Amendment and free speech – it protects our communities from those who would silence our creative expression. We rely on the free, unobstructed flow of information online to reach our audiences. Indeed, few things have been more instrumental to the growth of the global economy than the open exchange of information.

However, we strongly oppose the viewpoint that criminals offering copyright infringing versions of films, television shows, books, and music online are merely exercising their free speech rights – or that the protection of copyright and the freedom of expression are competing values. Freedom of speech, and the need to protect creativity, not only coexist in our Constitution, they are interdependent. In fact, the Supreme Court has noted that copyright acts as an “engine of free expression.”³

It has been particularly insulting to watch self-anointed “internet freedom fighters” leaping to the defense of technologies, websites, and apps whose sole or predominant purposes are to make available copyrighted works like films, television shows, music, and books without the permission of the rights

² USA Today, *It's past time to learn from failures, adapt our laws to the internet age*, August 1, 2018

³ Supreme Court Majority Opinion in *Harper & Row v. The Nation*, delivered by Sandra Day O'Connor

holders. Deliberately obfuscating their conduct in the name of “free speech” or an “open internet” is not a legitimate argument.

Significantly, dozens of democracies around the world have committed themselves to stronger policies to disrupt the flow of pirated content, which have proven to be both effective and consistent with the principles of free speech and an open internet. In fact, many nations whose content industries are a fraction of the size of comparable U.S. industries have done more to address these issues and protect creatives, both indigenous and American, than we have.

For example, in dozens of countries such as Australia, Canada, Denmark, France, Germany, Ireland, Japan, Spain, and the United Kingdom, there are effective mechanisms for blocking websites that are found by courts or duly authorized administrative agencies to systematically provide visitors with copyright infringing materials. [The Information Technology and Innovation Foundation](#) (ITIF) reports that the “Australian Screen Association analyzed the impact of website blocking, finding a 53% reduction in the use of pirate sites which were targeted by a blocking order.”

The article further states that research firm INCOPRO found “that overall piracy in Australia decreased by 25 percent year-on-year” with the help of the site-blocking remedy. Similarly, a [study](#) of site blocking in the UK by Carnegie Mellon and Chapman Universities found that sustained site blocking over time, with policies in place to prevent mirror and copycat sites, leads to significant decreases in the overall rate of piracy and a meaningful increase in the use of legitimate services. If these kinds of results were achieved globally, American content creators could again be ensured of fair compensation for their hard work.

It is critical for the ITC to make clear distinctions between laws that aim to police the internet for the purpose of censorship versus laws that have the intent or effect of protecting free creative expression and intellectual property as protected by copyright. We urge the ITC to advocate for strong and effective copyright laws and policies here and around the globe – and to recognize that meaningful protections against piracy can readily coexist with and reinforce commitments to free speech and an open internet.

Piracy is Corrupting Digital Trade Worldwide

As the ITC evaluates the comments it receives, we encourage it to pay careful attention to the growth of streaming piracy and continued innovations in piracy devices and apps that make the global theft of creative content easier, more widespread, and more insidious. The output of our creative industries, while legitimately exported worldwide into every market allowable, is being cannibalized by local piracy marketplaces and products.

A prime example is the emergence of illicit video streaming devices that bring both real-time channels from every continent, as well as massive on-demand content libraries into living rooms globally. These boxes, most of which use an open-source video platform called Kodi on an Android OS, can be used for legitimate purposes, such as accessing and organizing one’s personal photos and videos, as well as a wide range of audiovisual content obtained from legitimate sources. (*CreativeFuture member and renowned producer Wendy Finerman wrote [an op-ed](#) on this issue that was published in The Hill on March 7, 2018. See attached op-ed.*)

But accessing legitimate content is not the primary motivation for many of the sellers and buyers of these devices. Because Kodi is an open-source software, programmers can easily and inexpensively create apps and add-ons that turn these devices into near-perfect piracy machines. These apps are either pre-loaded onto the boxes or are readily available to be downloaded at home – just as easily as loading an app into an Apple TV, Roku, or comparable device. Once installed, these add-ons can often look and feel like legitimate, fully licensed services, leading many unsuspecting consumers to unwittingly contribute to the piracy problem.

Piracy streaming devices are for sale at mall kiosks, stock shows, and other marketplaces, as well as through major online retail sites. They are often advertised with the promise of “free and limitless television shows and movies,” “access to your favorite live television channels, including sports and news broadcasts from all over the world,” and “never pay for cable again.” All of this is for the one-time cost of the device (a couple of hundred dollars) or, in some cases, for a “subscription” of just several dollars a month. Of course, none of the revenue ever makes its way to the creatives that actually made the content.

These boxes harm digital trade for American industries and global marketplaces alike. Consumers, whether in the E.U., Asia, or the United States, are able to watch content broadcast from around the world without any remuneration to the local copyright holders or licensees.

In the UK alone, over one million boxes were sold in 2016 and 2017. TVAddons, one of the largest purveyors of piracy apps, reported that as of December 2016, in any 24-hour period, there were more than five million IPTV boxes with these add-ons active and checking for updates around the world.⁴ And in a [2017 survey](#) by YouGov, 10% of the UK population claimed to be illegally accessing content through piracy enabled set-top boxes. 30% of those users planned to cancel their legitimate subscription services in the next 12 months.⁵

As of 2017, the Internet research firm Sandvine [found](#) that an estimated seven million North American households had a piracy device. They further calculated that those boxes equaled revenue of about \$840 million per year – straight into the pockets of criminals.⁶

A [survey of Hong Kong consumers](#) from the Coalition Against Piracy and CASBAA, the trade association for the video industry in Asia Pacific, reveals that close to one in four consumers (24%) use a set-top box which can be used to stream pirated television and video content. Of those 24%, virtually half (49%) said they had cancelled all or some of their subscriptions to legal pay TV services.⁷ According to CASBAA, 14% of consumers in Singapore admit to regularly using a piracy enabled device, with numbers growing by the day.⁸ And [according to Creative Content Australia](#), a creative industry anti-piracy organization, more than 20% of Australians are using an illegal piracy app on their media players.⁹

⁴ [TorrentFreak, October 7, 2016, Pirate Kodi Add-ons Gain Massive Popularity](#)

⁵ Birmingham Mail, *This is how many people are streaming pirated content*, May 5, 2017

⁶ [Sandvine Research Report, 2017, Global Internet Phenomena](#)

⁷ Advanced Television, *CASBAA warns of pirated TV box threat*, June 25, 2018.

⁸ Press Release, *Southeast Asia's New Coalition Against Piracy Unveiled at CASBAA Convention*, November 7, 2017

⁹ The Morning Bulletin, *Pirate's Trick: Sneaky Way Aussies are Stealing Pay TV*, May 30, 2018

Thankfully, some major online retailers have taken steps to delist or prohibit the sale of illegal streaming piracy devices in the U.S., and both government and private enforcement actions in many countries have begun to slowly fight the streaming piracy phenomenon. After the fast spread of these devices in the UK, the Police Intellectual Property Crime Unit took aggressive action, arresting five different set top box sellers in five cities in one day in February 2017.

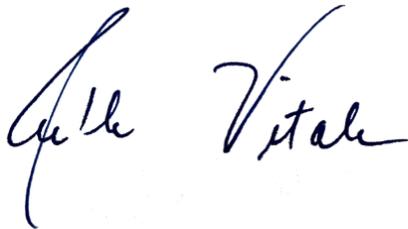
The phenomenon of streaming piracy is now a global threat, with unprecedented financial impact on the creative community as well as the legitimate distributors of innovative, creative content such as cable and satellite companies and over-the-top providers such as Netflix and Hulu.

We urge the ITC to support global enforcement efforts against piracy devices and applications and to advise the USTR to promote the effectiveness of these efforts through sound trade policies. It is only with the help of global trade policy and agreements that this epidemic will be stopped.

We very much appreciate the opportunity to share our comments and the perspective of our communities. Millions of Americans are dependent on global trade policies to make it possible to do what they love – create content that the world wants while being compensated fairly for their work. Every dollar spent abroad on the content that we create helps support an industry that improves the lives of millions of Americans across the country.

We respectfully ask the ITC to advocate for digital trade policies that promote innovation and commerce online, including advocating for strong copyright protections here and abroad.

Sincerely,

A handwritten signature in black ink, reading "Ruth Vitale". The signature is written in a cursive style with a large, stylized initial "R".

Ruth Vitale
CEO, CreativeFuture

Will the Spirit of American Cinema Become Extinct?

By Wendy Finerman, *The Hill*

March 7, 2018

When I produced *Forrest Gump* and *The Devil Wears Prada*, it was astonishing to see each of them come together, from books to scripts to financing to shooting to the day they were in theaters. Amazingly, they both hold up beautifully years after they were released. The movies still inspire audiences, make them laugh, cry and think – all very true emotions that are at the heart of American filmmaking.

It took over 10 years to get *Forrest Gump* to the big screen. The film is a result of years of toil from hundreds of people to craft this singular experience.

Forrest Gump was released in theaters in 1994, a very different world of watching movies than we now inhabit. People didn't "stream" movies at home – they were still driving to and from Blockbuster with bulky tapes. We didn't give much thought to piracy back then.

Fast forward to 2018, and if that movie were released today, it would be available illegally online, from unauthorized sources, within hours. You don't need to be a tech genius to figure out how to see it. All you would need to do is get a "fully loaded" piracy device (sometimes referred to as a Kodi box) and you could be watching any movie *ever made* within seconds – all in the privacy of your own home and on your 60-inch flat screen TV – for free, with no compensation to anyone who helped make the film.

Kodi by itself is legal software that can be loaded onto any Android streaming device, creating a viewing interface on the television screen that functions similarly to the Apple TV. However, devices that use the Kodi platform can be easily misused. When they are loaded with third-party add-ons, the user can access a virtual treasure trove of pirated entertainment media from all over the world.

Unscrupulous companies are profiteering by buying massive numbers of empty set-top boxes, loading them with Kodi and illegal apps, then selling them at a high markup. One of the most notorious is "TickBox," which has been making headlines for its role in enabling piracy on the grandest of scales. That includes "Forrest Gump" and "The Devil Wears Prada", and as well as live streams of cable and pay TV channels from around the world. Don't believe me? Here's what TickBox's marketing pitch looked like (as it appeared on their website until they were ordered by a court to take it down):

"Simply plug the Tickbox TV into your current television, and enjoy unlimited access to all the hottest TV shows, Hollywood blockbusters and live sporting events in one convenient little device, absolutely free."

But entertainment *isn't* free – it costs money to develop an idea and then execute it. Whether it's a live event, or a film, or a television show, companies big and small spend millions of dollars to bring us the characters and stories we love.

Some piracy operators even have the gall to charge additional subscription fees for “services” that pipe in stolen content, usually for about [\\$10 a month](#). A recent study from the Internet research firm Sandvine found that an [estimated 7 million North American households](#) now have a piracy device, earning criminals about \$840 million per year. And this is nothing compared to the billions lost when the device users stop paying for legitimate access.

Because they look and work just like brand-name set top boxes, these streaming piracy devices normalize piracy, ushering content theft into the cheerful light of the living room. Now it may feel just like home, but you and your family are breaking the law from your couch.

Fortunately, the news about Kodi is not all bleak. TickBox has been called out for their blatant thievery, and the courts are listening. In January, a judge in California saw through TickBox's protestations of innocence and slapped the Georgia-based company with an injunction, ordering it to keep pirate add-ons off of its devices and halt all advertisements that encourage piracy.

But while the end may be near for TickBox, our fight is far from over. A recent study found more than 750 websites that sell infringing devices, which means that wherever a TickBox falls, another like-minded device will step in to take its place.

The battle against piracy will remain an endless game of Whack-A-Mole until we change the conversation at the federal level. In Europe, the highest court has ruled that fully-loaded piracy devices are illegal, and UK law enforcement have brought numerous criminal cases against box purveyors, obtaining jail sentences as long as four years. In our country, prosecutors, with the encouragement of Congress, should be working to deliver a similar knockout blow.

My fear is that the growth of streaming piracy will prevent films like mine from being made. Although “out of the box” films often reap a higher return on investment than franchise films, they have no built-in audiences and therefore are financially riskier than franchise films that do.

My hope is that services like Tickbox will be stopped so that the next generation of American writers, directors and producers have a chance to tell their stories. If the growth of streaming piracy devices continues, it will deprive audiences of the life long memories that come from watching classic American cinema.

Piracy must be stopped – for all of us.

Wendy Finerman is an Academy Award®, BAFTA®, and Golden Globe®-winning producer. She has produced films and television shows including Forrest Gump, The Devil Wears Prada, Drumline, and Stepmom, among others.