

CreativeFuture

Creativity. Innovation. Tomorrow.

November 13, 2018

The Honorable Vishal J. Amin
United States Intellectual Property Enforcement Coordinator
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Submitted Electronically via Regulations.gov and in Copies to the Coordinator via Email, Federal Register Number 2018-19863

Dear Mr. Amin,

CreativeFuture appreciates the opportunity to respond to your request for comments on *Development of the Joint Strategic Plan on Intellectual Property Enforcement* as set forth in the Federal Register notice dated September 13, 2018.

CreativeFuture is a coalition of over 540 organizations and companies and over 220,000 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 is under siege from the rampant, illicit activity of digital piracy.

We are writing to encourage the Intellectual Property Enforcement Coordinator (IPEC) to support more effective enforcement action, laws, and policies in the U.S. and globally to reduce this theft that stymies creative expression and causes billions of dollars of annual economic harm.

Strong copyright protections give our creative communities the freedom to pursue their art as a career. These protections ensure that the years of uncompensated work that are invested in the creation of songs, publications, or films are rewarded with a meaningful return – a return that may then be used to pursue the next work, further enriching our culture and society.

Moreover, the creative industries contribute more than \$1.2 trillion to America's gross domestic product and employ 5.5 million Americans. U.S. core copyright industries are leading exporters, with international sales eclipsing other major U.S. industries – including aerospace, agriculture, and pharmaceuticals.¹

Copyright 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.

Yet, for some time, U.S. policy has prioritized the growth of the internet, while paying little attention to the sometimes-adverse impact on our content industries. During the past two decades, our copyright-based industries have adapted rapidly to changing markets and consumer demand worldwide, working

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

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 intended to protect creative jobs in every new trade agreement. And they fight vociferously for the inclusion of overly broad immunities.

This is why the Intellectual Property Enforcement Coordinator's request for comments is so timely for millions of Americans who rely upon copyright to make a living. The U.S. content industries are dependent upon copyright protections for their continued growth and health.

To ensure that creativity and the jobs it creates are protected against unfair or illegal practices, CreativeFuture respectfully asks that the Intellectual Property Enforcement Coordinator adopt the following measures:

- Work closely with the U.S. Trade Representative and other agencies to ensure that trade agreements contain strong provisions ensuring meaningful copyright protections and are not used to export into other nations' laws overbroad immunities for the large internet platforms
- As it did in previous Joint Strategic Plans, the IPEC should strongly support harmonizing criminal penalties for downloading and streaming infringement. The latter is currently, at most, a misdemeanor, while the former can result in felony charges for willful and egregious infringement. Criminal penalties for copyright infringement should not differ depending on whether a work is made available to the public to download or to stream.
- Work closely with the Department of Justice (DOJ), the Department of Homeland Security (DHS), the Federal Trade Commission (FTC), the Federal Communications Commission (FCC) and other relevant departments to ensure effective action to combat the illegal digital theft of creative works
- Encourage internet platforms to enter into voluntary initiatives that will mitigate the wholesale infringement of copyrighted content

Why the Creative Communities Are a Key Economic Stakeholder Domestically and Internationally

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 unprecedented challenges.

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. In America alone, audiences used those services to access 8.1 billion movies and 110.3 billion television episodes in 2016.

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 is forced to

compete on such an unlevel playing field, facing an illicit global digital marketplace of stolen content that in many cases is indistinguishable from the original.

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.

Large internet platforms have been immunized from accountability for facilitating theft by decades-old laws. These overbroad safe harbors have been exploited not only by global criminal piracy operations but also by the major internet platform providers (companies like Google and Facebook), which profit enormously from clicks and advertising by or for those seeking (and often steered by the platforms to) infringing content.

The legal framework that protects these platforms rests largely on two '90s-era laws – the 1996 Communications Decency Act (CDA)² and the 1998 Digital Millennium Copyright Act (DMCA).³ These were intended by Congress to promote the growth of the then-nascent internet by alleviating the liability of intermediaries for the unlawful acts occurring on their platforms, *while also encouraging those intermediaries to act responsibly in addressing abusive conduct.*

America's overbroad safe harbor protections hamper effective enforcement by or on behalf of rights holders in addressing the facilitation of piracy by the internet platform providers. This has had a negative impact on American creativity – the movies, music, television shows, books, photographs, video games, and other desirable products that make our creative economy the envy of the world. To cite just one example, in just a few seconds of searching on Google, or its YouTube subsidiary, or Facebook, one can readily find and obtain for free access to thousands upon thousands of copyrighted works without the permission of, or any compensation to, those who created, invested in, and marketed them.

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. 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, fraud, malware and identity theft, not to mention the illicit trafficking in everything from airport security credentials to opioids, and even human beings.

The hands-off policies and statutory immunities adopted 20 years ago to promote the growth of the then-nascent internet need to be carefully reexamined to avoid their contributing to illegal activity and the loss of the public's confidence in the internet, especially as a venue for free speech and digital commerce that is crucial to the success of creatives.

Many in Congress are now exploring the impact of the current framework of statutory immunities. Though copyright claims lie outside the scope of the most important of these immunities (those created by Section 230 of the Communications Decency Act of 1996), it is important to note that those who

² Telecommunications Act of 1996, tit. V, Pub. L. No. 104-104, 110 Stat. 56, 133.

³ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

benefit most from these broad policies and immunities – the immensely powerful and profitable major internet platforms – are still pushing the U.S. to promote them as guidelines for digital trade around the world. Why would the U.S. want to export the same system of overbroad immunities that has so harmed the legitimate digital marketplace for creative content and many other types of goods worldwide?

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.”⁴

These platforms and other large internet intermediaries should instead focus on building upon recent successful voluntary initiatives to combat piracy. Such agreements have, as the previous Joint Strategic Plan discussed, addressed online advertising, payment processors, and internet service providers. The IPEC should continue to facilitate, encourage, and monitor these cooperative efforts:

- Advertisers, advertising agencies, and online ad networks have worked with stakeholders to steer advertising from respected brands away from websites facilitating malware, piracy, and counterfeit goods.⁵ Over the last three years, CreativeFuture, in partnership with the Trustworthy Accountability Group (TAG), has pursued a campaign called “Follow the Money” in which we send letters to advertisers urging that they remove their ads from these dangerous sites. Impressions for all brands we have worked with has dipped by 85% in the U.S. This translates to over 200 million fewer impressions for ads that have been providing a valuable source of revenue for the criminal enterprises that run for-profit piracy sites.
- Payment processors such as MasterCard, Visa, and PayPal have been working with content creators and others to prevent pirate websites from processing subscriptions or other revenue from their illegal activities.
- A handful of domain name registrars have also stepped up to do their part. Registrars are uniquely situated intermediaries – and we would like to see them do their part just as advertisers, payment processors, and ISPs have done. In the past, we worked closely with .film – the domain registrar that controls the .film domain suffix. They are monitoring their registry to prevent bad actors from using this domain to distribute illegal copies of creative content.

The powerful internet platforms in Silicon Valley should follow these sorts of voluntary and collaborative initiatives for combatting copyright infringement and other unlawful online behavior. We urge the IPEC to use its authority and influence to promote an expansion of these kinds of partnerships.

Harm to American Creatives

Filmmaking is a difficult and demanding process – requiring years of hard work and often millions of dollars in investment. Even on a small independent film, dozens of people work for years to capture an

⁴ USA Today, *It's past time to learn from failures, adapt our laws to the internet age*, August 1, 2018

⁵See Trustworthy Accountability Group, <https://www.tagtoday.net/>.

idea and bring it to the screen for audiences. Many in the next generation of creative voices may never have that opportunity because of digital piracy.

Here is just one noteworthy example:

Moonlight, a small independent film, went on to win the Oscar® for Best Picture in 2017. It took Barry Jenkins, the director, eight years to get the movie financed. The film's team worked for little compensation. They worked for what is known as back-end participation, which is paid out from proceeds after production, marketing, and distribution costs are recouped.

Worldwide ticket sales totaled \$65 million, which translates to approximately 9 million tickets sold. But during the time that the film was in theaters, there were roughly 60 million piracy transactions – *over 650% more pirate transactions than paid ticket sales.*

It can reasonably be argued that those 60 million transactions would not have necessarily translated 1:1 into 60 million legitimate ticket purchases. But, even if *only* 5% of the pirated transactions had instead been paid theatrical ticket sales, at an average worldwide ticket price of \$7.00, the film would have earned an additional \$21 million. Or, alternatively, if just 5% of those pirated transactions had been paid downloads or rentals, and at a conservative price of \$3.99 per download or rental, the film would have earned an additional \$12 million.

This kind of sales displacement by piracy can be life or death for an independent film, and can justify the decision by any financier to no longer invest in up-and-coming filmmakers and their projects.

Another prime example of the harm to American creatives is the emergence of illicit video streaming devices (ISDs) 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 Google's Android operating system, 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.

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 currently 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. TVAddon's, 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.⁶ 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.⁷

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.⁸

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.

As mentioned above, criminal penalties for copyright infringement differ between streaming and downloading. Because of the growth of ISDs and websites where films, television shows, and music can be streamed, streaming is now the primary form of copyright infringement.

While reproducing and distributing infringing copyrighted work is considered a felony, an illegal public performance of a copyrighted work (which includes streaming) is only considered a misdemeanor. This is an example of the digital world evolving faster than our laws can adapt. As it has in the past, IPEC should continue to strongly advocate for elevating the criminal penalties associated with illegal streaming to the same level as illegal downloading.

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. An update in legal remedies is certainly necessary.

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

There are some who argue that meaningful copyright enforcement would be tantamount to censorship – a violation of the First Amendment rights of Americans and the free speech of people around the world. We strongly disagree.

⁶ [TorrentFreak, October 7, 2016, Pirate Kodi Add-ons Gain Massive Popularity](#)

⁷ Birmingham Mail, *This is how many people are streaming pirated content*, May 5, 2017

⁸ [Sandvine Research Report, 2017, Global Internet Phenomena](#)

We start from the key premise that creatives are staunch supporters of the First Amendment and free speech – it protects our communities from those who would silence our creative expression.

However, we strongly oppose the notion 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.

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.

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 those websites that are found by courts or duly authorized administrative agencies to be systematically providing visitors with copyright infringing materials. In one such case, [the Information Technology and Innovation Foundation](#) (ITIF) reports, 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.”

ITIF further states “that overall piracy in Australia decreased by 25 percent year-on-year” with the help of the site blocking remedy. Similarly, a [study](#) in the U.K. 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 would have more reasonable assurance of fair compensation for their hard work.

It is critical for the IPEC to use its coordinating function with relevant government entities to make clear the distinction between laws that aim to police the internet for the purpose of censorship, which we all oppose, versus laws that have the intent or effect of protecting free creative expression and intellectual property as protected by copyright. We urge the IPEC to advocate for strong and effective copyright laws and policies here and around the globe – and to recognize that meaningful protections against piracy can both coexist with and reinforce commitments to free speech and an open internet.

We also urge the IPEC to use its authority and influence to facilitate domestic and global enforcement efforts and to aid relevant government entities, like the DOJ, Homeland Security, the FTC, the FCC, and others, to promote the effectiveness of these efforts. In particular, we applaud your efforts to date to focus attention on the problem of streaming piracy devices and apps and encourage you to continue those efforts to see that appropriate criminal and other enforcement actions are taken to address the threats posed by criminals acting in this space. It is only through effective enforcement and sound policy initiatives that this and other systematic infringements contributing to the worldwide piracy epidemic can be stemmed.

Finally, we hope the IPEC will encourage internet platforms and other key intermediaries to voluntarily engage in collaborative efforts with rights holders that could proactively mitigate the wholesale infringement of our communities’ copyrighted content. To be effective, these collaborative efforts must engage and provide solutions for all copyright owners both large and small.

We applaud the Administration for prioritizing “strong intellectual property rights protection and enforcement, both domestically and abroad.” And we wholeheartedly concur that “America’s inventive and creative capacity [is] something that we must protect, promote, and prioritize.”⁹

We very much appreciate the opportunity to share our comments and the perspective of our communities. Millions of Americans are dependent on copyright 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 worldwide on the content that we create helps support an industry that improves the lives of millions of Americans in every state.

We respectfully ask the IPEC to advocate for strong copyright protections here and abroad.

Sincerely,

A handwritten signature in blue ink, reading "Ruth Vitale". The signature is fluid and cursive, with the first name "Ruth" and the last name "Vitale" clearly distinguishable.

Ruth Vitale
CEO, CreativeFuture

⁹ *In re* Development of the Joint Strategic Plan on Intellectual Property Enforcement, *Request for Written Submissions*, 83 Fed. Reg. 46522, 46522 (Sept. 13, 2018)