

United States Patent and Trademark Office

Voluntary Best Practices Study

File No. **PTO-C-2013-0036**

Submitted by: The Internet Association

August 21, 2013

The Internet Association submits the following comment in response to the United States Patent and Trademark Office’s (USPTO) request for comments to inform its “Voluntary Best Practices Study.” The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies and their global community of users.¹ We are dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.

The USPTO in the above-captioned docket has invited input from interested parties on the processes, data metrics, and methodologies that could be used to assess the effectiveness of cooperative agreements and other voluntary initiatives to reduce infringement.² This data gathering stems from the Administration’s policy of encouraging the private sector to develop

¹ The Internet Association’s members include Airbnb, Amazon.com, AOL, eBay, Expedia, Facebook, Gilt, Google, IAC, LinkedIn, Monster Worldwide, Path, Practice Fusion, Rackspace, reddit, salesforce.com, SurveyMonkey, TripAdvisor, Yahoo!, and Zynga.

² USPTO Request for Comments, 78 Fed. Reg. 119 at 37210 (June 20, 2013) (“USPTO Notice”).

and implement cooperative voluntary initiatives to reduce infringement that are practical and effective.³ In its 2013 Joint Strategic Plan, the Intellectual Property Enforcement Coordinator (IPEC) noted that a number of voluntary, multi-stakeholder initiatives have commenced in recent years and encouraged a “voluntary, non-regulatory approach to combating online infringement.”⁴ As part of that effort, the IPEC directed the USPTO to solicit input and initiate a process to assess the effectiveness of voluntary initiatives.⁵

The Internet Association member companies participate in several of the voluntary initiatives cited in the 2013 *Joint Strategic Plan*, such as the development of best practices to withdraw payment services for sites selling counterfeit and infringing goods⁶ and the more recent White House initiative on best practices by advertising networks to reduce the flow of advertising revenue to operators of sites engaged in online infringement.⁷

³ U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT (June 2013), *available at* <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf> at 37.

⁴ *Id.* at 36.

⁵ *Id.* at 37.

⁶ *Id.* at 36.

⁷ OFFICE OF MANAGEMENT AND BUDGET, COMING TOGETHER TO COMBAT ONLINE PIRACY AND COUNTERFEITING (July 15, 2013), *available at* <http://www.whitehouse.gov/blog/2013/07/15/coming-together-combat-online-piracy-and-counterfeiting>.

While willing to engage in these voluntary initiatives, the Internet Association and its member companies encourage the USPTO to set aside the present inquiry. Below we discuss the reasons for our request, namely:

- The USPTO Notice focuses on the single issue of enforcement. This narrow focus ignores the reality that a host of industry practices, marketplace realities, consumer behavioral dynamics, Internet adoption, and statutory changes likely have a larger collective effect on the trends of online infringement.
- The National Academy of Sciences recently made the exact point in its recent publication, *Copyright in the Digital Era: Building Evidence for Policy*,⁸ that policymakers' singular focus on enforcement is taking place without the benefit of basic information about how the copyright system works today.
- Consequently, if the USPTO continues with this inquiry despite the lack of necessary information upon which to make conclusions about copyright policy, it must recognize that any metrics it receives about the incidences and effectiveness of voluntary enforcement efforts will paint an incomplete and ultimately unsatisfactory picture of the appropriateness of voluntary enforcement efforts relative to the trends in online infringement.

⁸ NATIONAL ACADEMY OF SCIENCES, *COPYRIGHT IN THE DIGITAL ERA: BUILDING EVIDENCE FOR POLICY* (2013) [hereinafter *COPYRIGHT IN THE DIGITAL ERA*], available at <http://www.ip-watch.org/weblog/wp-content/uploads/2013/05/NRC-Copyright-in-the-Digital-Era-FINAL-Apr-2013.pdf>.

We recommend that the USPTO recalibrate its evaluation of copyright policy by setting aside this data-gathering project in favor of a more comprehensive examination of the copyright ecosystem. In addition, the USPTO should explore ways to partner with and encourage participation from a wider group of stakeholders and experts in developing this examination.

I. There Is a Demonstrated Need for Better Data On the Entire Copyright System, Not Just Enforcement.

In 2000, the Computer Science and Telecommunications Board of the National Academies of Sciences recommended that

[r]esearch should be conducted to characterize the economic impacts of copyright. Such research might consider, among other things, the impact of network effects in information industries and how digital networks are changing transaction costs. . . . Research should be initiated to better assess the social and economic impacts of illegal commercial copying and how they interact with private noncommercial copying for personal use.⁹

In *Copyright in the Digital Era*, the National Academy of Sciences (NAS) observed that “in the intervening 13 years, only very modest progress” on those questions has been made.¹⁰ As a consequence, the debate over the relationship between digital technologies and copyright protection “is poorly informed by independent empirical research.”¹¹ Accordingly, the NAS

⁹ NATIONAL ACADEMY OF SCIENCES, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000), *available at* http://www.nap.edu/openbook.php?record_id=9601&page=1 at 227.

¹⁰ *COPYRIGHT IN THE DIGITAL ERA* at *x*.

¹¹ *Id* at 1.

called for comprehensive research to explore a number of factors, including the (i) incentive calculus for various actors in the copyright system, (ii) impact of the costs of voluntary copyright transactions, (iii) enforcement costs and benefits, and (iv) the balance between existing exclusive rights and limitations and exceptions to those rights.¹²

The NAS noted that while the government and private entities have released studies on the contribution of certain “copyright-affected industries” to employment and GDP growth, “these data do not tell us anything specific about the role that copyright plays in generating these assets nor about the impact of any particular copyright policy choices”¹³ Even with respect to the specific issue of infringement, the NAS study observed that data on the effect of infringing copying are incomplete. Missing from the analysis is data regarding the impact of unpaid copies on sales of copyrighted works, the nature and magnitude of sales displacement caused by infringing distribution, and user welfare effects.¹⁴ The Department of Commerce’s *Green Paper* acknowledges this gap and observes that “increasing amounts of data are being amassed from objective sources,” on costs associated with infringement.¹⁵ The *Green Paper* similarly

¹² *Id.* at 10.

¹³ *Id.* at 21.

¹⁴ *Id.* at 31-32. *See also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, OBSERVATIONS ON EFFORTS TO QUANTIFY THE EFFECTS OF COUNTERFEIT AND PIRATED GOODS, at 27 (Apr. 2010), *available at* <http://www.gao.gov/new.items/d10423.pdf> (finding that it is “difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole.”).

¹⁵ U.S. DEP’T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (July 2013) [hereinafter *COPYRIGHT GREEN PAPER*], *available at* <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> at 40 n. 207.

acknowledges that traditional markets for physical products are shrinking due in part to the rise of digital goods but does not attempt to quantify that impact or compare it to losses in those markets resulting from infringement.¹⁶

On balance, the NAS study concludes that “the overall picture that emerges from research is still ambiguous, patchy, and in some respects contradictory. There is inconclusive evidence of how infringing copying and distribution affects social welfare or what kind of copyright regime would redress the problem without excessive unintended consequences.”¹⁷

Focusing exclusively on “the processes, data metrics, and methodologies that could be used to assess the effectiveness of cooperative agreements and other voluntary initiatives to reduce infringement,”¹⁸ will be incomplete. It neglects, for example, the need to collect data on the effect of copyright-related transaction costs and related market failures on both the market for copyrighted works and resulting infringement.¹⁹ Moreover, such a focus fails to account for copyright’s role in a larger inquiry about our existing legal framework’s ability to encourage creativity and innovation: “Copyright needs to be seen as part of a larger policy environment related to creativity and innovation, an environment that includes other mechanisms that may

¹⁶ *Id* at 41.

¹⁷ *Id.* at 33.

¹⁸ USPTO Request for Comments, 78 Fed. Reg. 119 at 37210 (June 20, 2013) (“USPTO Notice”).

¹⁹ See COPYRIGHT IN THE DIGITAL ERA at 38.

serve as complements or even alternatives for copyright’s particular mechanism of promoting creativity.”²⁰ It is for this reason that the NAS study urges policymakers not to limit cross-cultural comparisons of copyright systems to enforcement questions.²¹

II. Any Inquiry into Enforcement Initiatives Must Include an Analysis of Efforts to Make Content More Available and Accessible

The link between online infringement and affordable alternatives is beyond question. A recent study by Ipsos, a Norwegian research organization, found that the introduction of legal alternatives to infringement for online content like Spotify and Netflix was followed by dramatic reductions in online infringement of music and videos – 80% and 50%, respectively.²² The Ipsos study is only the most recent iteration of a well-documented relationship between infringement and availability of legal alternatives. A 2008 “Digital Entertainment Survey” noted that the perceived lack of choice in legal sites contributes to online infringement.²³ Nearly two

²⁰ *Id.* at 42.

²¹ *Id.* at 43.

²² Sophie Curtis, *Spotify and Netflix curb music and film piracy*, (July 8, 2013), <http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>. See also Matt Schruers, *The Search Fixation: Infringement, Search Results, and Online Content* (2013) [hereinafter *The Search Fixation*], [http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000821/CCIA_TheSearchFixation%20\(2\).pdf](http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000821/CCIA_TheSearchFixation%20(2).pdf) at 5.

²³ Entertainment Media Research, *2008 Digital Entertainment Survey* (2008), <http://www.arretsurimages.net/media/library/s127/id12678/original.pdf> at 209.

out of three infringers claim that they would pay for legal downloads if the content they wanted was available.²⁴

Availability and market access of these legal alternatives are under-examined phenomena when compared to other sources and solutions for infringement. As the Social Science Research Council's 2011 report on "Media Piracy in Emerging Economies" observed, much of the source of overseas infringement reduces to a problem with local access to a market for affordable copyrighted works. Unfortunately, this problem receives insufficient attention, if any, in deliberations over how to address infringement. "The centrality of pricing problems to this dynamic is obvious, yet strikingly absent from policy discussions."²⁵

This dynamic also results in a regrettable first-mover problem with respect to infringement of certain digital goods. As the Senate Judiciary Committee noted in its deliberations over the Digital Millennium Copyright Act, "copyright owners will hesitate to make their works readily available without reasonable assurance that they will be protected against massive piracy."²⁶ This understandable reluctance overlooks that the refusal to make available a legal alternative for access to copyright works online incents individuals to engage in online infringement, which is then cited by rights holders as a reason for refusing to make those

²⁴ *Id.*

²⁵ Social Science Research Council, *Media Piracy in Emerging Economies* (2011), available at <http://piracy.americanassembly.org/wp-content/uploads/2011/06/MPEE-PDF-1.0.4.pdf> at iii.

²⁶ S. REP. NO. 105-190 at 8 (1998); *See also* COPYRIGHT GREEN PAPER at 16.

works available. Any measured study of voluntary initiatives must take account of this feedback loop and seek to disrupt it. The *Green Paper*'s assertion that "the answer to the machine is in the machine"²⁷ is only partially correct. The answer to the machine is in the marketplace, where the relationship between infringement and the market for legitimate goods can be more nuanced than it may appear.

III. Any Inquiry Must Account for the Limitations on Conclusions that Can Be Drawn from both Objective and Subjective Measures of Effectiveness, and Give Them Time to Work.

A. The Limitations of Metrics.

If the USPTO decides to move forward with its present inquiry, any proposal of metrics for evaluating the effectiveness of voluntary initiatives to reduce infringement should recognize the inherent limitations on conclusions one may draw from those metrics. As noted in the NAS study, a full understanding of the digital economy will require a collection of additional data that currently do not exist and, in some cases, may not be quantitative or even quantifiable.²⁸

Accordingly, a strictly numerical assessment of cooperative agreements or other voluntary initiatives will tell only a limited story about that initiative's effectiveness in reducing infringement and impact on the overall copyright system.

²⁷ COPYRIGHT GREEN PAPER at 16 (quoting Charles Clark, *The Future of Copyright in the Digital Environment* (Hugenholtz, ed. (1996))).

²⁸ COPYRIGHT IN THE DIGITAL ERA at 59.

Further, any proposal or assessment of metrics should recognize that empirical data related to online infringement and enforcement can lead to many different and possible conflicting conclusions. It is unclear, for example, what the available data tells us about the notice-and-takedown regime beyond the fact that it is being put to use. Moreover, it is facile to deploy this data on either side of an argument over the effectiveness of our current copyright regime in addressing infringement. The rise in the number of URL removal requests received from copyright owners could be construed as an overall increase in online infringement, an increase in automation and efficiency of notice-and-takedown systems, neither, or both. The threshold for any metric or other assessment for cooperative agreements or other voluntary initiatives to reduce infringement should be “does this information advance cooperation throughout the copyright system or simply provide fodder to reinforce existing arguments that lapse into familiar patterns?”

B. Voluntary Initiatives Should Be Given Time and Room to Evolve.

The way that users interact with copyright works in the digital environment rapidly and constantly evolves. For many years, peer-to-peer (P2P) traffic was viewed as both the primary method of online infringement and a primary contributor to broadband congestion. Between 2009 and 2010 alone, however, P2P traffic’s proportional share of Internet traffic plummeted from 38% to 25%.²⁹ A study by the research firm NPD Group similarly found that P2P music

²⁹ Karl Bode, *Cisco: Average Connection Generates 14.9 GM Monthly While video consumption grows and overall P2P impact slows*, DSL REPORTS (Oct. 27, 2010) available at <http://www.dslreports.com/shownews/111109>.

file sharing declined significantly in 2012, driven in large part by increased use of free music streaming services.³⁰

As the migration away from P2P services show, the way that users interact with content on the Internet evolves quickly. Accordingly, voluntary initiatives must be given time to work and room to evolve before their efficacy is evaluated. It is unfortunate, for example, that the Motion Picture Association of America offered a same-day dismissal of the White House Intellectual Property Enforcement Coordinator's and the Interactive Advertising Bureau's joint announcement of Best Practices for Ad Networks To Address Piracy and Counterfeiting.³¹ This swift criticism overlooks that cooperative agreements and voluntary initiatives to address infringement must be iterative, flexible, and backed by reasonable expectations. For example, only 15% of traffic to alleged "rogue sites" in 2011 was referred by search results.³² Expectations of the efficacy of search-based responses to infringement must be calibrated accordingly. Further, search-based initiatives to address infringement can work only if there is

³⁰ The NPD Group, *Music File Sharing Declined Significantly in 2012*, <https://www.npd.com/wps/portal/npd/us/news/press-releases/the-mpd-group-music-file-sharing-declined-significantly-in-2012/> (last visited Aug. 13, 2013).

³¹ See Press Release, Motion Picture Association of America, *MPAA's Statement on IPEC's Release of Best Practices for Advertising Networks (July 15, 2013)*, <http://www.boxoffice.com/news/2013-07-15-mpaas-statement-on-ipeccs-release-of-best-practices-for-advertising-networks> (“[A]n incremental step forward that addresses only a narrow subset of the problem and places a disproportionate amount of the burden on rights holders is not sufficient.”).

³² *The Search Fixation* at 2.

cooperation from rightsholders in search engine optimization. “[A] lawful commercial site is unlikely to appear in organic search results for a query including ‘download’ or ‘mp3’ if those terms do not actually appear in the indexed pages of the site.”³³ By any measure, voluntary initiatives must be able to adapt to technological change and enlist the participation of multiple stakeholders in the digital environment.

An example of where these concepts are evolving can be seen with the Copyright Alert System announced in July 2011 by several ISPs and major record labels and movie studios.³⁴ As originally conceived, this “six-strikes” response to infringement over P2P networks involved notice to ISPs, escalating alerts to their subscribers, and the imposition of possible mitigation measures at the ISP’s discretion.³⁵ Recently, Comcast has adapted its response to infringement over P2P networks by sending subscribers a pop-up notification of where they may rent or buy a legal copy of the copyright work they are attempting to view illegally.³⁶ Although Comcast’s

³³ *Id* at 5.

³⁴ See Recording Industry Association of America, *Music, Movie, TV and Broadband Leaders Team to Curb Content Theft* (July 7, 2011) available at http://www.riaa.com/newsitem.php?content_selector=newsandviews&news_month_filter=7&news_year_filter=2011&id=2DDC3887-A4D5-8D41-649D-6E4F7C5225A5 (July 7, 2011).

³⁵ Center for Copyright Information, Memorandum of Understanding, Copyright Alert System, at § 4 (July 6, 2011), available at <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>.

efforts are separate from those of the Copyright Alert System participants, they may prove more effective in both reducing infringement and growing the legitimate market for copyrighted works. This type of innovation should be encouraged and the USPTO should be careful not to assess voluntary initiatives by rigid criteria that would hamstring it.

IV. A Comprehensive Review of the Ecosystem Should Be a Multi-Agency, Multi-Stakeholder Effort.

The Department of Commerce's recent *Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy* was a collaborative effort led by the USPTO and NTIA.³⁷ Given that copyright policy is an inter-agency issue, both of these agencies should be substantially involved in any inquiry into cooperative agreements and voluntary initiatives to reduce infringement. As the NAS study observes, copyright occupies a prominent but not exclusive role in a larger policy environment. Particularly with respect to the intersection of copyright and digital technology, the Administration's principal advisor on telecommunications and information policy should have a prominent role in that larger discussion. The Internet Association encourages the USPTO to consult the individuals and entities who contributed to the NAS study and others who have expertise in the digital space. Further, The Internet Association recommends the NAS study to policymakers and suggests that such a comprehensive exploration

³⁶ See Andrew Wallenstein, *Comcast Developing Anti-Piracy Alternative to 'Six Strikes' (Exclusive)* (Aug. 5, 2013), <http://variety.com/2013/digital/news/comcast-developing-anti-piracy-alternative-to-six-strikes-exclusive-1200572790/>.

³⁷ COPYRIGHT GREEN PAPER at *iv*.

is appropriate *prior to* asking the question in the above-captioned docket about the effectiveness of voluntary initiatives to reduce infringement. The government also should partner with academic research institutions to explore various aspects of this discussion.

Conclusion

Cooperative agreements and voluntary initiatives undeniably play an important role in reducing infringement and promoting the overall health of the copyright system. But a meaningful examination of the copyright system requires more of an in-depth and balanced inquiry than that possible by the limited questions posed here. Moreover, an inquiry focused exclusively on enforcement practices without addressing basic, threshold gaps in information about the copyright system as a whole may lead to skewed and ultimately counterproductive policy. The Internet Association encourages the USPTO to contribute to the NAS's efforts to set the table for a fully informed discussion of copyright in the digital environment before focusing on the limited set of questions posed in this proceeding.

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