



**BEFORE THE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION**

International Internet Policy Priorities

Docket No. 180124068-8068-01

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the National Telecommunications and Information Administration's Notice of Inquiry published in the Federal Register on June 5, 2018.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

The Copyright Alliance embraces the internet as a powerful democratizing force for our world and for the creative community. We recognize and appreciate its ability to inspire positive change and improve lives. We also embrace a strong and effective copyright system that rewards creativity and promotes a healthy creative economy, one that is increasingly reliant on the internet. The incredible cultural and economic value that the internet delivers to billions of users is based in large part on the efforts of creative content makers whose livelihoods depend on being compensated for their efforts.

All creative sectors of the economy have long ago moved online, and are at the forefront of delivering news, entertainment, and informative content to consumers in cutting edge formats, benefitting from the opportunities to reach a global audience provided by the internet. The success of the internet is fueled by the availability of professionally created films and television programs, music, journalism, photographs, literary and other creative works. A World

Intellectual Property Office analysis has found a “definitive positive relationship” between the contribution of copyright industries to a country’s GDP and innovation and competitiveness.¹

The copyright community thus has an important stake in the governance of the internet, and we submit the following comments to aid the NTIA as it develops its policy priorities.

I. The Free Flow of Information and Jurisdiction

It is essential that the U.S. Government—including the NTIA, as part of the Department of Commerce’s Internet Policy Task Force that it belongs to along with the US Patent and Trademark Office—continues to recognize the complementary relationship between the protection of copyright and the free flow of information. Copyright protection serves the goal of the free flow of information by enabling individuals and businesses to recoup the investment in the creation and dissemination of creative works. Authors, publishers and distributors want to reach as wide an audience as possible, so they will offer their copyrighted works on terms and prices that achieve this. Copyright protection thus facilitates stable and sustainable markets that encourage greater production and broader distribution of such works. Unnecessary restrictions on the free flow of information across borders undermines the ability of copyright owners to leverage the internet to bring down distribution costs and reach new, global audiences.

More generally, copyright promotes freedom of expression and freedom of the press. The Supreme Court has said, “[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”² Copyright empowers creators and copyright owners to choose how and when to release their work to the public, according respect for individual voices while also allowing flexibility to construct a range of business models that meet consumer interests. Empowered creators benefit the public at large by making more and better quality contributions to our society’s cultural life. As former U.S. Register of Copyrights Barbara Ringer has said, “Freedom of speech and freedom of the press are meaningless unless authors are able to create independently from control by anyone, and to find a way to put their works before the public.”³ Similarly, a New York federal court wrote in 2013:

Paraphrasing James Madison, the world is indebted to the press for triumphs which have been gained by reason and humanity over error and oppression. Investigating and writing about newsworthy events occurring around the globe is an expensive undertaking and enforcement of the copyright laws permits [The Associated Press (AP)] to earn the revenue that underwrites that work. Permitting Meltwater to take the fruit of AP’s labor for its own profit, without compensating AP, injures AP’s ability to perform this essential function of democracy.⁴

Copyright owners are harmed by policies that arbitrarily restrict the cross-border transfer of data. Such non-tariff barriers on digital trade come in a variety of forms, from explicit

¹ World Intellectual Property Organization, *WIPO Studies on the Economic Contributions of the Copyright Industries: Overview* at 12 (2014).

² *Harper & Row, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985).

³ *The Demonology of Copyright*, R.R. Bowker Memorial Lecture, 1974.

⁴ *Associated Press v. Meltwater*, 931 F.Supp.2d 537, 552 (SDNY 2013).

requirements to store data on local servers to arbitrary restrictions on what types of data can be transferred across borders. Regardless of their form, such policies too often have the effect of raising the costs of doing business for US copyright owners. We urge NTIA to remain engaged with US trading partners and in multilateral fora to help reduce the restrictions on the free flow of information over the internet and in ensuring free expression online. Such efforts should be informed by an appreciation of the complementary role and importance of copyright protection in facilitating freedom of expression.

II. Enforcement Challenges

Creators and copyright owners face persistent challenges protecting their work online. While Section 512 of the Copyright Act, passed as part of the Digital Millennium Copyright Act (DMCA) in 1998, remains a workable legal framework, it is evident that the statute is under strain and that additional stakeholder collaboration would enable the statute to live up to its potential as imagined by Congress. When Congress enacted the safe harbor provisions of the DMCA, the intent was to “appropriately balance[] the interests of content owners, on-line and other service providers, and information users”⁵ by incentivizing “service providers and copyright owners to cooperate to detect and deal with copyright infringement” online.⁶ That balance has not been achieved. While ISPs are routinely shielded from liability under the DMCA, the problem of online copyright infringement has grown enormously since 1998, leaving copyright owners to bear the brunt of the burden—with little to show for it. The fact that copyright owners shoulder most of the burden of enforcing against infringement is not, standing alone, the primary problem. The primary issue is that, when they do take on that burden and send takedown notices, the notices have little if any effect, as the infringing material is often immediately reposted. This results in the burden being almost exclusively placed on the creative community, and that is far from the balance and cooperation that Congress intended.

Today not only are stakeholders grappling with tens of millions of notices a year,⁷ but even worse, the business models employed by certain bad actors actually take advantage of problematic judicial interpretations of this statutory scheme. The consensus from our individual creator membership is that online infringement has reached a point where content can be posted on hundreds of online infringement sites within days, and where individual creators—without access to effective tools—are unable to make any real impact in protecting their work. Online infringement has become so commonplace that it destroys once legitimate markets for creators’ works.

The voluntary adoption of technologies have helped address many of the logistical hurdles of locating infringements, and sending and processing hundreds of millions of takedown notices per year; however, it is essential that these technologies continue to be improved in order to keep pace with new technologies and new types of online infringement. In addition, more needs to be done to ensure that individual creators, who are the lifeblood of the creative community, are not left behind in a world where human review alone is no longer practical.

⁵ H.R. REP. NO. 105-551, at 21 (1998).

⁶ Id. at 49.

⁷ Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution for a Twenty-First Century Problem*, Center For Protection Of Intell. Prop. (Dec. 5, 2013).

Finally, the courts need to ensure that bad actor OSPs do not continue to operate under the protection of the Section 512 safe harbors. Congress recognized that cooperation would lead to the most beneficial, effective enforcement of the law, and it is time for stakeholders to take voluntary action.

III. Accountability

Accountability is at the heart of internet governance. Each stakeholder has a role to play in making the internet the transformative tool it has become. With that role comes responsibilities in ensuring the internet remains free, fair, and secure. The last several years has seen a growing focus on the challenges that are beginning to emerge as a result of the increasing centrality of the internet to all aspects of life—while the internet has become a liberating tool, it has also become a tool for bad actors and authoritarian regimes. Many of these challenges are new, but even those that pre-date the internet are exacerbated by the scale and architecture of the global network. It is thus vital that we, as a free society, define and pursue accountability in a way that ensures that the internet can continue to enable the public to engage in legitimate activities while inhibiting encroachment on such activities.

IV. Multistakeholder Approach to Internet Governance

NTIA's work with ICANN and the Governmental Advisory Committee remains a top priority for the Copyright Alliance. The accuracy and accessibility of WHOIS data is vital to members of the entire copyright community in their efforts to sustain and build a legal marketplace for digital works and investigate infringement of those works. Thus, we are concerned about any efforts that would limit the continued public availability of WHOIS data. We strongly support ICANN's stated objective to ensure compliance with applicable law while maintaining the existing WHOIS system to the greatest extent possible.

In May, the ICANN Board adopted a temporary specification for gTLD registration data in response to the European Union's General Data Protection Regulation (GDPR) going into effect. The temporary specification unduly limits access to most domain registration data from public WHOIS—making copyright enforcement much more difficult and online piracy much easier.

More specifically, the Board's temporary specification falls short of the requests and advice provided by the Intellectual Property Community and the Governmental Advisory Committee, and it goes beyond what the GDPR requires. For example, the temporary specification would not make the domain name registrant's email address public, it does not distinguish between legal and natural persons (the GDPR only applies to individuals, not organizations), and it does not distinguish between registrants living in or out of European countries where GDPR applies.

In addition, the temporary specification creates a good deal of uncertainty regarding access to non-public data for legitimate purposes. Registrars and registries are required to provide reasonable access to non-public WHOIS data to third parties with legitimate interests upon request except where such interests are overridden by the interests or fundamental rights

and freedoms of the registrant. Because of the lack of clarity on that standard (which comes from the language of the GDPR itself) responses from registrars and registries have been inconsistent at best.

Ensuring the continued public access to WHOIS data is a top priority for the copyright community. We urge the NTIA to continue to support this priority through ICANN's Governmental Advisory Committee and with stakeholders where appropriate.

Conclusion

We thank the National Telecommunications and Information Administration for the opportunity to comment on these issues, and we are happy to answer any further questions the Administration may have about our statement or provide any additional information it may find helpful.

Respectfully submitted,

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