



Before the Department of Homeland Security

**Commercial Customs Operations Advisory
Committee Quarterly Meeting**

Docket No. USCBP-2019-0021

The Copyright Alliance appreciates the opportunity to submit the following comments regarding the Presidential Memorandum on Combating Trafficking in Counterfeit and Pirated Goods to the Commercial Customs Operations Advisory Committee for consideration during its quarterly meeting August 21, 2019.

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.

We applaud the Administration for supporting intellectual property rights and the people and businesses that rely on them by taking a stance against trafficking in counterfeit and pirated goods. While trafficking in pirated goods is a significant problem for the creative community, it is far from the only piracy problem in the United States and abroad. We therefore urge the Administration to also prioritize the effects of online digital piracy. Online digital piracy has been and continues to be a plague on the creative community that harms both large and small copyright owners.¹ Established channels of digital piracy, such as peer-to-peer file sharing and

¹ See David Blackburn et al., *Impacts of Digital Video Piracy on the U.S. Economy* (June, 2019), <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf> (discussing that online digital piracy costs the U.S. economy more than \$29 billion in lost revenue each year).

cyberlockers, remain popular,² while emerging threats such as stream-ripping services gain ground.³

The Importance of the Copyright Industry to the U.S. Economy

Copyright is a critical factor in the contributions of U.S. creative industries to the economy and to jobs. According to the most recent Copyright Industries in the U.S. Economy report, the core copyright industries added \$1.3 trillion to the U.S. GDP and employed nearly 5.7 million men and women.⁴ From a global perspective, sales of U.S. recorded music, television, video and motion pictures, software, newspapers, books and periodicals in foreign markets amounted to more than \$193 billion, which exceeds exports of major U.S. industries such as chemicals, aerospace products, agricultural products, electrical equipment, and pharmaceuticals.⁵

Several industries within the broader copyright community measure their own economic contributions. For example, the music industry creates \$143 billion annually in value, when both direct and indirect effects are included, and supports 1.9 million American jobs across a wide range of professions.⁶

The film and television industry's contributions are equally important. Not only does the industry support 2.1 million jobs and \$139 billion in wages in the U.S., it also supports over 93,000 businesses, 87 percent of which are small businesses employing fewer than 10 people.⁷ This does not include the \$49 billion paid by the industry to 400,000 local businesses each year during production: a major motion picture filming on location contributes on average \$250,000 per day to the local community, and a one-hour television episode contributes \$150,000 per day—benefits to local communities that are received regardless of whether the film or TV show is successful.

² See, e.g., Irdeto.com, *Global Movie and TV Piracy on the Rise as Web Video Piracy Growth Adds to Peer-to-Peer Piracy*, (Aug. 7, 2018), <https://irdeto.com/news/global-movie-and-tv-piracy-on-the-rise-as-web-video-piracy-growth-adds-to-peer-to-peer-piracy.html>.

³ International Federation of Phonographic Industry, *Connecting with Music: Music Consumer Insight Report* (Sept. 2017), <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>. (discussing that one consumer survey which found that over one third (35 percent) of all internet users accessed infringing music via stream-ripping, which rises to 53 percent of internet users using such services among people 16-24 years old.)

⁴ Stephen Siwek, International Intellectual Property Association, *Copyright Industries in the U.S. Economy: The 2018 Report 3* (2018).

⁵ *Id.*

⁶ Stephen Siwek, Recording Industry Association of America (RIAA), *The U.S. Music Industry: Jobs & Benefits* (April, 2018). <http://www.riaa.com/wp-content/uploads/2018/04/US-Music-Industries-Jobs-Benefits-Siwec-Economists-Inc-April-2018-1-2.pdf>

⁷ Motion Picture Association of America (MPAA), *The Economic Contribution of the Motion Picture & Television Industry to the United States* (Nov. 2017), https://www.mpaa.org/wp-content/uploads/2018/03/MPAA-Industry-Economic-ContributionFactsheet_2016-FINAL-2.pdf.

Video game developers and publishers also rely on copyright protection and are a strong engine for economic growth. In 2016, the video game industry sold over 24.5 billion games and generated more than \$30.4 billion in revenue. The total employment that depends on the U.S. video game industry now exceeds 220,000. And it's growing. Between 2012 and 2014, the number of game company locations grew at an annual rate of 14.1%, and between 2013 and 2015, direct employment in the U.S. game company industry grew at an annual rate of 2.9%.

Like video game companies, business software companies also rely on copyright protection. In its 2016 report, BSA reported that the software industry is responsible for a total \$1.07 trillion of all US value-added GDP, directly employs 2.5 million people in the US, and has average annual wage for software developers of \$108,760—more than twice as much as the \$48,320 average annual wage for all US occupations.⁸

The Economic and Other Harms Caused by Piracy

Piracy remains a persistent problem for most types of copyrighted works and most types of copyright owners, regardless of size. The film and television business illustrate the investment and dissemination incentives that are an essential aspect of copyright, and how these investments are harmed by piracy.

- Producing and distributing a major motion picture costs on average \$100 million. 60% of those movies fail to make back their initial investment.⁹
- A television program can cost millions of dollars per episode. It's generally understood that about 80% of scripts never become a pilot, 80% of pilots never become a series, and 80% of series never reach a second season.¹⁰

In the music industry only one in six releases makes a return on the initial investment – the rest lose money. In the first half of 2018, there were about 70,000 albums released, of which only twelve went Gold or Platinum.¹¹ According to reports, only one percent of all releases

⁸ The Software Alliance, *The \$1 Trillion Economic Impact of Software* (June 2016), https://softwareimpact.bsa.org/pdf/Economic_Impact_of_Software_Report.pdf.

⁹ *In re* Competition and Consumer Protection in the 21st Century, Docket FTC-2018-0090, MPAA Comments (Oct. 22, 2018), available at <https://www.mpaa.org/wp-content/uploads/2018/10/181022-MPAA-submission-for-FTC-Hearing-4-on-Innovation-and-Intellectual-Property-Policy.pdf>.

¹⁰ *Id.*

¹¹ Posting of Gold & Platinum's Top Certified Songs & Albums Midway Through 2018 to <https://www.riaa.com/gold-platinums-top-certified-songs-albums-midway-2018/> (Jul. 5, 2018).

account for the majority of sales revenues. Similarly, book publishers in the U.S. are reportedly losing \$300 million annually due to ebook piracy.¹²

Given these odds of success, it is essential that the copyright industries be able to get a return on their investment. The creative community needs the revenue from its successes, to fund the next wave of investment. In contrast, those who engage in piracy make no investment and take no risks. These bad actors can pirate the most successful movie, music, video games, photos and other copyrighted works without fear of losing any monetary investment or funding new creations.

Piracy of motion picture and TV programming also harms the many professional creative professionals who contribute to these entertainment products and who rely on copyright protection for their careers. Movies and TV programs incorporate a number of different copyrighted works and require the creative inputs of hundreds of different creative professionals. For example, a TV program is a copyrighted work in its own right, often owned by a TV production company, but that program also may be derived from a copyrighted script, book, or article that is owned by an independent writer. Songwriters, music publishers, and composers receive performance royalties for the music synched with a movie or TV program. These creators along with recording artists and record labels also receive performance royalties generated by cable music channels. And, of course, we cannot forget the hundreds of creative professionals working on the movie or TV program—directors, writers, actors, and composers often receive direct payments—called residuals and/or participations, and below-the-line film crews composed of set designers, grips, costumers, and cameramen—who may receive contributions toward their pension and health care plans. Some professional creators also often bargain to receive payments derived from advertising revenue and subscriber fees. By eroding legitimate markets for copyrighted works, piracy erodes opportunities for all creative professionals, whether copyright owners or not.

Piracy also harms numerous other types of individual creators, like photographers, illustrators, graphic designers, authors, songwriters, artists and bloggers, YouTubers, and many other individual creators and micro and small businesses. According to the Professional Photographers Association, 70% of all professional photographers have been victimized by copyright infringement multiple times in the past five years.¹³ Given our interest in protecting smaller creators, we encourage the Department of Justice and other federal law enforcement agencies to engage with smaller creators and organizations representing individual creators as part of their enforcement efforts.

We would like to highlight a few of the most significant piracy and enforcement problems facing our membership:

¹² Adam Rowe, *U.S. Publishers Are Still Losing \$300 Million Annually to Ebook Piracy*, July 28, 2019, <https://www.forbes.com/sites/adamrowe1/2019/07/28/us-publishers-are-still-losing-300-million-annually-to-ebook-piracy/#147d8d39319e>.

¹³ Survey conducted by Professional Photographers of America, *The Importance of Copyright to Everyday Photographers* (Oct. 16, 2015), Questions 2 and 4.

Piracy Devices and Apps Facilitate Rampant Piracy

One emerging piracy problem involving physical goods is the growing threat of Piracy Devices and Apps (PDAs). The most prevalent among PDAs in use today are Kodi boxes. While the Kodi system itself is a legitimate media player, the system is open source – meaning that just about anybody can use the device’s original blueprint to create software that configures Kodi boxes to access illegal streams of films and shows that are available online – and unfortunately, they do. A recent report by Sandvine found that roughly six percent of all households in North America have a Kodi device configured to access unlicensed content.¹⁴

Distributors of PDAs make it easy to stream and download pirated content at the push of a button. Their devices essentially allow purchasers to watch for free what legitimate streaming services charge you to access, and they advertise it as such. For instance, TickBox TV’s company website displayed a headline that asked, “Frustrated with overpriced cable bills?”, and contained alleged customer testimonials such as “I enjoy being able to watch what I want and being able to save a few bucks doesn’t hurt”. Dragon Media’s advertisements were a little less subtle, imploring potential customers to “Get rid of your Premium Channels” and “Stop paying for Netflix and Hulu”. As noted in a recent FTC blog post,¹⁵ many of these PDAs are also often rife with hidden malware that “can bombard you with ads, take over your computer, or steal your personal information.”

The widespread use of PDAs not only infringes upon the copyrights of creators of films and TV shows, but also harms competition by harming legitimate streaming services, such as Netflix and Hulu, that are licensed to provide content and increasingly produce their own works.

Due to the high costs and risks associated with these productions, and the number of different copyrighted works involved, a complex system has been developed that finances production, compensates the myriad of creators and licenses rights from many rights holders. These PDAs threaten this entire creative ecosystem. It decreases the revenue “pie” that serves to stimulate further creativity and improve the livelihoods of creative professionals.

We thank the administration for its dedication to protecting consumers as well as copyright-reliant industries by addressing piracy head-on, and welcome the opportunity to discuss these issues further or answer any follow up questions.

Criminal Penalties for Streaming of Pirated Works are Inadequate

More and more, viewers and listening are switching to streaming audio and video rather than downloading files. But currently, criminal penalties for copyright infringement distinguish between offering a work for downloading and offering a work for streaming. We urge the

¹⁴ Sandvine, *Spotlight: the “Fully Loaded” Kodi Ecosystem* (May 4, 2017), <https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-kodi.pdf>.

¹⁵ Will Maxson, *Free Movies, Costly Malware* (Apr. 12, 2017), <https://www.consumer.ftc.gov/blog/2017/04/free-movies-costly-malware>.

Administration to continue to work with other agencies and Congress to address this discrepancy.

Given the increasing popularity of streaming, “misdemeanor penalties are simply not sufficient to deter large-scale infringers,” said Acting Deputy Assistant Attorney General David Bitkower on behalf of the Department of Justice in 2014.¹⁶ Other government officials have reiterated support for aligning criminal penalties in this fashion. Most recently, Register of Copyrights Karyn Temple stated that the Copyright Office supports a legislative fix to close the “streaming loophole, explaining that, “[f]ederal law enforcement must have effective tools under the copyright law to address streaming piracy, among them up-to-date criminal penalties that are appropriate to the offenses and the digital world in which we operate.”¹⁷ In 2015, then-Register of Copyrights Maria Pallante told the House Judiciary Committee, “[w]hile Congress should carefully consider the operation of this amendment to ensure appropriate legal processes, there is no question that the change is warranted and overdue.”¹⁸ And in its 2013 Green Paper on copyright policy, the Department of Commerce’s Internet Policy Task Force said, “The lack of potential felony penalties for criminal acts of streaming disincentivizes prosecution and undermines deterrence.”¹⁹ Although criminal enforcement of copyright infringement is a small portion of federal law enforcement overall, the presence of criminal penalties plays a significant role in deterring willful and egregious infringement. Those criminal penalties should thus reflect the realities of how that infringing conduct is occurring.

In a letter to the Department of Justice and US Copyright Office, Senate IP Subcommittee Chairman Tillis and Ranking Member Coons noted that “[t]he significant increase in illicit streaming, often through devices and apps configured specifically to allow for the illicit streaming of copyrighted content, poses important risks to copyright owners.” They also noted that infringers can benefit from the “streaming loophole” identified above and said, “[w]e believe that felony penalties would more effectively deter repeat infringers.”

We agree that copyright criminal penalties should reflect the realities of how infringing conduct is occurring and believe the presence of meaningful criminal penalties plays a significant role in deterring willful and egregious infringement. We urge the Administration to continue working on harmonizing criminal penalties for the most common types of infringement.

¹⁶ Copyright Remedies, Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary, 113th Cong. (2014) (statement of David Bitkower, Acting Deputy Assistant Attorney General, Dept. of Justice).

¹⁷ U.S. Copyright Office, Karyn A. Temple, *Letter to Chairman Thom Tillis and Ranking Member Christopher Coons of the Senate Judiciary Committee*, Open-file report 2019-2 (July 18, 2019), <https://www.copyright.gov/laws/hearings/letter-to-senators-tillis-and-coons-on-felony-streaming.pdf>.

¹⁸ *The Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 13–14 (2015) (quoting Maria A. Pallante, Register of Copyrights, U.S. Copyright Office), <http://copyright.gov/laws/testimonies/042915-testimony-pallante.pdf>.

¹⁹ Dept. of Commerce, *Copyright Policy, Creativity, and Innovation on the Digital Economy* (2013), <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>.

Counterfeit and Pirated Textbooks and Trade Books

Counterfeit copies of textbooks, and recently trade books (consumer fiction and non-fiction) continue to be made available in significant volumes on online marketplaces. These infringing products are produced overseas, and through third-party vendors on online marketplaces, are sold to U.S. consumers. This remains a significant problem as marketplaces allow vendors to conduct business on their sites with little oversight, and marketplaces are not accountable when, for instance, a vendor it has allowed on its platform sells counterfeit or pirated products. It is also typically scenario that overseas financial institutions do not recognize U.S. court judgments and asset freezes, leaving rights holders without the ability to enforce these measures against overseas counterfeit producers.

While some publishers have brought actions against online marketplace vendors and removed thousands of counterfeit textbooks from the platforms, these efforts have not resulted in reducing the availability of counterfeit and pirated textbooks through online marketplaces. Unless marketplaces can be held accountable for the infringing behavior or activities of the vendors they allow to establish store fronts on their platforms, this situation will not improve.

Smaller Creators Lack the Money and Resources to Combat Piracy

Unfortunately, smaller creators face significant hurdles on the civil enforcement side. Because the federal courts have exclusive jurisdiction over copyright claims and federal litigation is so expensive and complex, most individual creators and small businesses simply can't afford to enforce their rights. The American Intellectual Property Law Association estimates that the cost of litigating through the appeals process averages \$278,000.²⁰ Few individual creators or small businesses have this type of disposable income to spend on litigation, especially on small copyright claims where the damages are many times less than the cost of litigation.

Individual creators and small businesses are hurt most by the high cost of federal litigation because the value of their individual copyright claims is often too low to warrant the expense of litigation. While these financial losses may seem modest, all too often such sums represent a significant and devastating loss of income, especially since creators often experience multiple infringements at a time. The lost income could have covered business operating expenses, medical insurance premiums, tuition payments, car payments, rent and living expenses, or the cost of travel to a location where an author will research his next book or where a photographer will capture her next photo project.

Moreover, according to a survey by the American Bar Association, most attorneys won't consider taking a case if the amount at stake is less than \$30,000, and federal litigation is much too complicated for any creator to undertake without the assistance of counsel.²¹ Thus, even if an

²⁰ Report from American Intellectual Property Law Association (AIPLA), *2017 Report of the Economic Survey*, at I-189 (2017), <https://www.aipla.org/detail/journal-issue/economic-survey-2017>.

²¹ U.S. Copyright Office, *Copyright Small Claims* at 9, FN. 35 (2013).

individual creator or small business wants to litigate a case, finding an attorney willing to take the case is yet another obstacle that is difficult for them to overcome. It is no wonder that the vast amount of infringements regularly go unchallenged and many creators feel disenfranchised by the copyright system. Some suspend their businesses entirely.

To address this issue, the Copyright Alliance supports the Copyright Alternatives in Small Claims Enforcement (CASE) Act, which would create a streamlined process for adjudicating small claims within the US Copyright Office. The bill, which was introduced in the House (H.R. 2426) and Senate (S.1273) May 1, would ensure that individuals and small businesses have a remedy for their rights. S.1273 was voted favorably out of the Senate Judiciary Committee July 18, 2019. We urge the Administration to support the passing and signing of this important legislation.

We again thank the Administration for its attention to the critical issue of trafficking in pirated goods and look forward to assisting in those efforts in the future however we can.

Respectfully submitted,

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