
August 21, 2023

VIA REGULATIONS.GOV (Docket No. PTO-C-2023-0006)

Katherine K. Vidal
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office
U.S. Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

Re: IIPA's Written Comments on "Future Strategies in Anticounterfeiting and Antipiracy," 88 Fed. Reg. 33872 (May 25, 2023)

Dear Director Vidal:

The International Intellectual Property Alliance (IIPA) appreciates the opportunity to submit these comments in response to the U.S. Patent and Trademark Office's (USPTO's) May 25, 2023, request for public comments on "Future Strategies in Anticounterfeiting and Antipiracy."

A. Description of the IIPA and its Members

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include: Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com).

Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and distributed by IIPA member companies include: entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and non-fiction books, educational, instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

B. Enforcement Issues for the Copyright Industries

The U.S. copyright-based industries are one of the fastest-growing and most dynamic sectors of the U.S. economy, responsible for millions of well-paying U.S. jobs. Inexpensive and accessible reproduction technologies, however, make it easy for copyrighted materials to be pirated in other countries, including in the online environment. IIPA’s goals abroad include for foreign countries to adopt copyright laws and enforcement regimes that keep pace with market and technological trends to encourage the creation and dissemination of copyright materials, and to deter piracy of unauthorized materials in these countries. Such strong and effective copyright laws and enforcement regimes create a framework for trade in creative products, foster technological and cultural development, and encourage investment and employment in the creative industries.

IIPA appreciates the opportunity to provide “input relevant to future strategies in the fight to prevent counterfeited and pirated goods from entering the stream of commerce and reaching the hands of consumers.”¹ In particular, IIPA below responds to requests for information numbers 2, 3, 4, 5, 6, and 8 enumerated in the request for comments.

Request 2. Please identify the types of harms you have observed from sales of counterfeited and pirated goods.

Digital delivery, whether through wired online or mobile networks, is the dominant form of delivery for copyrighted works, including music, films and television programs, journal publications, and video games—both by licensed and unauthorized services. The entrenchment of infringing services (including those misconstruing laws to avoid licenses) is a leading barrier to access for U.S. creators and rights holders in markets worldwide. Online piracy, including the sharing of digital content and the sale of pirated physical goods over e-commerce platforms, financially burdens and harms the creative industries in the United States, causing significant hardships for U.S. creators. Online piracy constrains the ability of the U.S. creative industries to export legitimate content, which negatively impact revenues returning to the United States and the growth of U.S. jobs, particularly those that are connected to exporting content to the worldwide marketplace.

Numerous studies have demonstrated the negative effect of piracy not only on the market for legitimate content, but on creators themselves, whether corporate or individual. A 2016 study “estimate[d] that the commercial value of digital piracy in film in 2015 was \$160 billion,” while the corresponding estimate for the music industry was \$29 billion.² The study also spells out methodological reasons why “it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount.”³ This study does not include a comparable estimate for video games but discusses briefly how such an estimate might be prepared. The study also attempts to quantify the broader social and economic costs of piracy.

¹ See “Future Strategies in Anticounterfeiting and Antipiracy,” 88 Fed. Reg. 33872, 33873 (May 25, 2023).

² Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy*, February 2017, pp. 23-39, available at <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf>.

³ *Id.*

Another 2014 analysis of the major studies on piracy determined that “the vast majority of papers that have been published in peer-reviewed academic journals—papers spanning a variety of methods, time periods, and contexts—find that piracy causes a statistically significant decrease in sales.”⁴ A 2013 study noted that economic literature has generally found that piracy has a negative impact on legal media sales.⁵ The study went on to conclude that the analysis and results “strongly suggest that the shutdown of the popular Megaupload and Megavideo sites caused an increase in digital motion picture sales and rentals leading to an increase in digital revenues of 6.5-8.5%.”⁶

For example, in inflation-adjusted dollars, the music industry’s revenues in 2021 remained 37% below its peak U.S. revenues from 1999.⁷ This period of time coincides with the rise of broadband and digital piracy generally, as well as the later rise of the sale and importation of foreign-made, counterfeit physical music products through e-commerce platforms. Additionally, in 2020, there were an estimated 137.2 billion visits to film and TV piracy sites globally,⁸ which cost the U.S. economy at least \$29.2 billion in lost revenue each year.⁹

In addition, piracy has been shown to negatively impact employment. For example, piracy has been estimated to reduce employment in the motion picture and television industry between 230,000 and 560,000 jobs.¹⁰ IIPA notes that creative professionals’ unions have identified numerous harms to workers from sales of counterfeited and pirated goods. For example, for the jobs that do exist, there is a negative effect on employment and retirement income and on benefits. In 2021, the Department for Professional Employees (DPE) of the AFL-CIO quantified the direct and significant negative economic impact on workers by copyright theft,¹¹ and stated: “creative professionals rely on copyright protections and royalty or residual payments to make a living, provide healthcare for their families, and retire with security.”¹²

⁴ Brett Danaher, Michael D. Smith, and Rahul Telang, “Piracy and Copyright Enforcement Mechanisms,” *Innovation Policy and the Economy*, Volume 14, 2014, p. 43, available at <https://www.journals.uchicago.edu/doi/epdf/10.1086/674020>. (The paper concluded that government intervention in piracy can help increase legal sales “by reducing the convenience, reliability, and usability of pirated content relative to content offered in legal channels.”)

⁵ Brett Danaher and Michael D. Smith, *Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales*, September 2013, p. 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229349.

⁶ *Id.* at 24.

⁷ RIAA, *2021 Year-End Music Industry Revenue Report*, available at <https://www.riaa.com/reports/2021-year-endmusic-industry-revenue-report-riaa/>.

⁸ Alliance for Creativity and Entertainment, *2020 Movie & TV Piracy Trends Worldwide*, available at <https://www.alliance4creativity.com/wp-content/uploads/2021/06/ACE-Piracy-infographic-2020-Final.pdf>.

⁹ David Blackburn, Ph.D., Jeffrey A. Eisenach, Ph.D., David Harrison, Jr., Ph.D., NERA Economic Consulting and the U.S. Chamber of Commerce, *Impacts of Digital Video Piracy on the U.S. Economy*, June 2019, available at <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf>.

¹⁰ *Id.*

¹¹ See e.g., AFLCIO, Department for Professional Employees, *Intellectual Property Theft: A Threat to Working People and the Economy 2021 Fact Sheet*, October 25, 2021 (“Digital theft has a direct negative impact on creative industries and the professionals who work in them, with a cost of at least 290,000 jobs and \$29 billion in lost revenue in the film and television industry alone.”), available at <https://www.dpeaflcio.org/factsheets/intellectual-property-theft-a-threat-to-working-people-and-the-economy>.

¹² Department for Professional Employees of the AFL-CIO, *Intellectual Property Theft: A Threat to Working People*

Piracy of Books and Journals

Unauthorized and pirated copies of books (consumer trade, professional books, and textbooks) and journal articles are readily available on cyberlockers, via peer-to-peer (P2P) technologies, social media platforms, and apps, and through online marketplaces where counterfeit copies are also made available by third-party sellers on the platform. Counterfeit copies of books and textbooks are also sold by third-party sellers on ecommerce platforms.

Piracy of Motion Picture and Television Programs by Piracy Devices and Piracy-as-a-Service

A damaging piracy ecosystem has emerged around piracy devices and apps, i.e., illicit streaming devices (ISDs). These piracy devices and apps provide illegal access to movie and television content through a variety of means, including downloading and streaming content, as well as unauthorized streaming of live television and sporting events, thus undermining the licensing fees paid by distributors on which content creators depend. Motion Picture Association (MPA) members continue to suffer enormously from the growing threat of these devices and apps. Streaming devices that are preloaded with infringing apps and illicit TV/video-on-demand (VOD) subscription services can be found online and in physical markets. The challenge is particularly acute in countries where the legality of the devices (i.e., boxes), and of activities surrounding their trafficking, remains in doubt. Additionally, illegal apps that can place infringing material on otherwise legitimate streaming devices can be found through a myriad of mainstream and specialty app repositories. This issue was the focus of USTR’s 2017 Notorious Markets Report.¹³

Because these piracy devices and apps are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials, enforcement against them presents complex challenges. Under the right fact patterns, the retailer/distributor can be held liable; alternatively, the app developer can be prosecuted (if identified). Governments can also take action against key distribution points for devices that are used illegally, including marketplaces (both online and physical) where such devices are sold. Many of the physical marketplaces of greatest concern to the copyright industries now increasingly feature goods and services enabling piracy devices and apps, or stalls, kiosks, or “repair” shops that offer to load unauthorized copyright material or piracy-enabling apps onto any device. Vigorous action is needed to lessen the growing harm to the legitimate digital delivery of copyright materials by these devices.

and the Economy, p.1, available at <https://www.dpeaficio.org/factsheets/intellectual-property-theft-a-threat-to-working-people-and-the-economy>.

¹³ In its 2017 Notorious Markets Report, USTR spotlighted the growing problem of Piracy Devices (i.e., PDs), concluding that they “pose a direct threat to content creators, sports leagues, and live performance, as well as legitimate streaming, on-demand, and over-the-top (OTT) media service providers.” See USTR, 2017 Out-of-Cycle Review of Notorious Markets at 8-9, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

In addition, “Piracy-as-a-Service” (PaaS), which is a subset of the larger threat of Cybercrime-as-a-Service, was identified by Europol as a growing threat enabling a variety of cybercrimes. PaaS encompasses a suite of often off-the-shelf services that make it easy for would-be pirates without any technical knowledge to create, operate, and monetize a fully functioning pirate operation, such as website templates, databases of infringing content, and hosting providers specialized in servicing infringers. PaaS services are evidence of the scale, sophistication, and profitability of modern online commercial copyright infringement. The emergence and development of PaaS services have become a key concern of the motion picture industry and a top priority for its antipiracy efforts.

Illegal Camcording of Theatrical Motion Pictures

In addition to the problems of piracy devices and apps and emerging PaaS, another priority for the motion picture industry involves stopping camcording or the illegal recordings of movies in theaters. One digital (camcorder) copy, uploaded to the Internet and made available around the world, can undermine global markets and the huge investments needed to produce and distribute a feature film. A multifaceted approach is needed to tackle camcording that includes: (i) enacting and enforcing anti-camcording legislation to outlaw the use or attempted use of an audiovisual recording device in a theater to make or transmit a copy of all or part of a motion picture; (ii) educating the public about how unauthorized camcording hurts both businesses and the consumer; and (iii) working with the private sector to identify and prevent unauthorized camcording in cinemas. This strategy has been implemented in many foreign markets (including Canada, Japan, and South Korea) with good results.

IPTV Piracy

Another long-standing problem for the motion picture and recorded sound industries is the unauthorized broadcast, cablecast, or satellite delivery of motion pictures, television content, and music and sound recordings, including the unauthorized retransmission of broadcast signals over the Internet. Cable and satellite piracy still persists in some markets (including: the use of hacked set-top boxes; decoding or decrypting signals; and, stealing signals from neighboring countries that are within the satellite’s footprint). However, Internet Protocol TV (IPTV) services have become the dominant threat in major markets.

Pirate IPTV services provide access to stolen telecommunication signals or channels and offer on-demand infringing film and episodic television content to a global audience via dedicated web portals, third-party applications, and piracy devices configured to access these services. Thousands of illegal IPTV services operate worldwide, offering thousands of channels sourced from multiple providers, along with VOD content of unauthorized movies and television programs. Many of these illegal services are subscription-based, for-profit services, with monthly or yearly user packages, and often coincide or are found or used with more typical online piracy sites (e.g., streaming, BitTorrent, P2P).

The technical infrastructure of these services is often vast and complex, making the identification of content sources and service operators extremely challenging. The marketing and

sale of these IPTV services are often carried out by a network of global IPTV re-sellers who purchase subscriptions at wholesale prices and re-sell them for a profit, further complicating investigations. IPTV services have been the driving force in the emergence of related illegal businesses, including those engaged in the re-sale of IPTV services or the theft, distribution, and sale of channel feeds. In addition, IPTV services rely on infrastructure and support services, including from hosting providers, media servers, and panel hosts, sometimes without the knowledge or approval of the illegal services or product (but sometimes in cooperation with these services). As a result, criminal enforcement against these large-scale operations is the most effective deterrent.

Online Sources of Unauthorized Game Content

Piracy of video games continues to proliferate globally, requiring the industry to dedicate resources to a variety of enforcement measures and to joint enforcement operations with local authorities where possible. Pirates diminish legitimate revenue streams by downloading unauthorized games through hyperlinking and hosting websites, and by using cheat software and unauthorized digital goods.

Hyperlinking Websites (also known as “linking sites” or “link sites”) provide hyperlinks (“links”) to infringing copies of complete versions of copyright protected video games stored on third-party hosting sites known as cyberlockers. The links are typically organized by content category (i.e., “Games” sections) and/or are supported by a search functionality that enables visitors to find content. These sites typically generate revenue from user donations and/or online advertisements, drawing revenue away from legitimate rights holders. Cyberlockers host infringing content on cloud storage platforms and are accessible through links indexed on linking sites. Users visit linking sites to find content on cyberlockers because cyberlockers generally do not support native search functionality.

Unauthorized sales of in-game digital items have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as “cheat software”) that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and “cheats,” or which otherwise tilt the scales in favor of one player over another. The rise of Unauthorized Digital Goods (UDGs) and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sales of digitally delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (2) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; (3) video game publishers and developers are forced into a perpetual virtual “arms race” to update their products and security technology before the sellers can update theirs; and (4) sellers of UDGs and cheat software divert revenue away from video game developers and publishers.

Cheats are unauthorized game modifications, using software code, that allow advantages for the player. Examples of cheats include: aimbots (which help a player aim in a first-person action game); trainers (which allow a player to turn on or off features to make the game easier or

more difficult); and one-button maneuvers that allow a player to complete a task in-game with a single click that normally would take extended gameplay (like “Instant Build” or “Always Run”). Cheats can infringe Entertainment Software Association (ESA) member IP in instances where the cheat software code copies the underlying code of the game software. In addition, cheat software is specifically designed to defeat security code measures meant to prevent unauthorized game uses such as unfair player advantages (a form of technological protection measure). Cheat sites generate revenue through sales transactions (where the site itself is the seller) and through advertisements.

Request 3. Please indicate how consumers are educated about the harms and dangers that may result from the use and sale of counterfeited or pirated products.

Raising consumer awareness regarding the harm of pirated products is of great importance to IIPA. IIPA applauds the U.S. and foreign governments in their efforts to promote respect for copyright and to protect creators from the theft of their work. Such efforts have taken a variety of forms over the years, from innovative IP awareness campaigns run out of individual U.S. Embassies, to DC-based government programming, such as the International Trade Administration’s STOPFAKES initiative.¹⁴ Likewise, USPTO and ITA roadshows are also greatly welcomed initiatives that support IP awareness as well as educate on the harms—commercial and otherwise—of copyright piracy.¹⁵ IIPA also applauds USPTO’s efforts to encourage public awareness programs in foreign markets, such as the Mexican Institute of Industrial Property (IMPI) “*Elige el Original*” (“choose the original”) campaign.¹⁶

Likewise, the IP sector has engaged in public-private partnerships with the U.S. government on anti-piracy campaigns that include critical educational components for consumers regarding the harms of infringement. For example, last year Customs and Border Protection and the Global Innovation Policy Center at the U.S. Chamber of Commerce collaborated on a joint effort—Fake Goods, Real Dangers—to educate consumers about the dangers associated with purchasing pirated goods. As part of that initiative, consumers can report suspected counterfeits via the [e-Allegations Online Reporting System](#) or by calling 1-800-BE-ALERT.¹⁷

IIPA and its members also actively engage in a variety of programs to educate consumers regarding the harms of copyright piracy. This includes making regular public filings to the U.S. government that identify piracy marketplaces and detail the negative impacts of piracy¹⁸ and

¹⁴ See <https://www.stopfakes.gov/welcome>.

¹⁵ See e.g., <https://www.uspto.gov/about-us/events/china-ip-road-show-texas-strategies-protecting-intellectual-property-china>; <https://www.uspto.gov/about-us/events/southeast-asia-ip-roadshow-2023>; and <https://www.stopfakes.gov/roadshows>.

¹⁶ See <https://www.uspto.gov/blog/director/entry/go-for-real-an-innovative>.

¹⁷ See <https://www.cbp.gov/newsroom/national-media-release/cbp-and-us-chamber-commerce-partner-combat-counterfeit-goods>.

¹⁸ See e.g., IIPA’s 2022 submission 2022 Review of Notorious Markets for Counterfeiting and Piracy, available at https://www.iipa.org/files/uploads/2023/01/IIPA_2022-Notorious-Markets-1-2.pdf; Comments from IIPA members Association of American Publishers, Entertainment Software Association, Motion Picture Association, and Recording Industry of America, available at <https://www.regulations.gov/document/USTR-2022-0010-0001/comment>.

working through a variety of channels to heighten awareness regarding piracy and its negative effects.¹⁹

Request 4. Please describe current anticounterfeiting and antipiracy strategies that may be available, identifying which elements have proven successful and those that have not. Your answer should identify the targets of anticounterfeiting and antipiracy efforts, such as ecommerce platforms, physical markets, and social media.

Online and Mobile Network Piracy

Digital delivery, whether through wired online or mobile networks, is the dominant form of delivery for copyrighted works, including music, films and television programs, journal publications, and video games—both by licensed and unauthorized services. The entrenchment of infringing services (including those misconstruing laws to avoid licenses) is a leading barrier to access for U.S. creators and rights holders in markets worldwide. For example, piracy via cyberlockers, which are often based in countries such as Russia where enforcement is difficult, BitTorrent, and other P2P services continues to pose constant and serious problems for the creative industries. To address these concerns, IIPA continues to recommend at least the following steps:

(1) Identification: Identify and close down services and actors engaged in infringement activities, especially criminal syndicates, through criminal enforcement remedies and other tools. USTR makes an indispensable contribution to this step by regularly conducting its “Special 301 Out-of-Cycle Review of Notorious Markets.”²⁰ There have been many successes with the closure of Internet sites and services identified as notorious markets by USTR. IIPA’s long-standing recommendation is that USTR should urge trading partners either to convert sites and services to licensed disseminators of works and recordings, or these notorious markets should be taken down followed by, where appropriate, criminal enforcement actions.

(2) Create an Adequate and Effective Legal Framework: The goal is a legal framework that: (i) prevents the operation of services that promote or otherwise induce infringement; (ii) criminalizes online infringement (particularly all “commercial scale” piracy, in line with best practices); and (iii) provides strong incentives for neutral intermediaries to work with rights holders to curb the use of their proprietary networks and services for infringing purposes. Such a legal framework should: (i) provide the relevant panoply of exclusive copyright and related rights (as well as effective protections for technological protection measures (TPMs) and rights management information (RMI) protections) starting with the minimum standards mandated by the WIPO Internet Treaties, and adopt global best practices for copyright protection in the digital environment; (ii) ensure that any Internet service provider (ISP) liability limitations, if present, do

¹⁹ For example, RIAA makes resources widely available on its website regarding music theft. See <https://www.riaa.com/resources-learning/about-piracy/>. RIAA also provides a user-friendly interface for music fans to report such theft. See <https://www.riaa.com/report-piracy/>. MPA provides information on protecting creators on its website as well. See <https://www.motionpictures.org/what-we-do/safeguarding-creativity/>.

²⁰ The most recent report is USTR’s Out-of-Cycle “2021 Review of Notorious Markets for Counterfeiting and Piracy” (February 2022), available at: <https://ustr.gov/sites/default/files/IssueAreas/IP/2021%20Notorious%20Markets%20List.pdf> (NM 2021 Report).

not reduce the scope of substantive copyright protections and require appropriate conditions to be met for eligibility, including obligations for ISPs to remove infringing content expeditiously upon obtaining knowledge or awareness of infringing activity and to take measures demonstrated effective in preventing or restraining infringement; (iii) recognize online piracy as a form of cybercrime (consistent with the Budapest Convention and global best practices); and (iv) foster cooperation among all industry stakeholders (including ISPs) in the online supply chain, including the removal of impediments to collaboration.

While systems for notice and takedown of infringing materials are in place in many markets, often a mistaken perception exists that they are the only means of online enforcement. The mere takedown obligation is not sufficient or effective and should not be the only *quid pro quo* for limiting liability. Indeed, the U.S. Copyright Office has said in a report about the U.S. notice and takedown system that such laws must properly “balance the rights and responsibilities of [online service providers] and rightsholders in the creative industries.”²¹ Moreover, some services, including some clearly pirate services, attempt to rely on notice and takedown procedures to avoid proper copyright licensing. Clear primary and secondary liability rules are necessary to discourage abuses and to avoid inaction or license evasion. In addition, governments should require marketplaces and encourage all relevant intermediaries to implement “know your business customers” (KYBC) policies to ensure they keep up to date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers.

Where infringing activity rises to the level of criminal liability, imposing responsibility for aiding and abetting infringement can be an effective remedy against commercial platforms. Proposals granting overbroad immunity to ISPs and other platforms from any civil or criminal liability remain a concern. Separately, any copyright safe harbors should apply to only passive and neutral parties that do not contribute to infringements. Additionally, there are concerns with provisions that immunize parties who induce or facilitate infringement of copyright. Mitigating and preventing online piracy should be a shared responsibility with balanced obligations between online intermediaries and rights holders, particularly because online intermediaries are best positioned to assist with the mitigation and prevention of online piracy. Absent legal incentives to foster the cooperation of ISPs and other online intermediaries, such intermediaries have little interest in fully cooperating with rights holders.

(3) Develop Inter-Industry Cooperation: Because Internet services (including piratical services) are enabled by and interlinked with a wide spectrum of supporting services, combating systematic online infringement of copyright requires the active cooperation of all participants in the e-commerce ecosystem, including: online advertising players (advertisers, ad agencies, ad networks, and the providers of advertising placement and related services); payment processors; hosting providers (including reverse proxy providers and related optimization services); domain name registrars and registries; search engines; and marketplaces and app stores. As entities with a direct stake in a secure and stable Internet and in the healthy growth of legitimate e-commerce,

²¹ US Copyright Office, Section 512 of Title 17, at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

including e-commerce in products and services protected by copyright, cooperation against threats to that security, stability, and health is part of a sound business strategy for all Internet intermediaries. Governments in many countries can do much more than they are currently doing to foster and encourage such cooperation and the development of best practices to advance the common goal of a safer online marketplace. For example, governments should encourage private sector agreements, especially those that provide enforcement rights, to properly reflect the needs of industry stakeholders, and that any remedies outside of a legal framework are available to all copyright owners.

In a positive development, on December 20, 2022, approximately 20 organizations representing companies from the audiovisual and telecommunications sector as well as government representatives and regulators from Uruguay, Venezuela, Colombia, and Argentina signed an agreement to form a global anti-piracy coalition. The “Global Anti-Piracy Pact” aims to improve and better coordinate the efforts of these companies and governments to combat IPTV and audiovisual piracy.²²

Circumvention of Technological Protection Measures (TPMs), Including Stream Ripping

The range and variety of legitimate material now digitally available to consumers, in so many formats and on so many platforms, is possible because of the widespread use of TPMs by content producers and licensed services. TPMs have fostered many of the innovative products and services available online by allowing creators and rights holders to control and manage access to copyrighted works, as well as to diversify products and services and their pricing. In short, new business models depend on these technological controls. TPMs also ensure that works made available in hard goods (DVDs and Blu-ray discs), in the online or mobile environment (including e-books and video games), or through on-demand streaming services or conditional access (e.g., pay-TV, pay-per-view) are not easily stolen and that pirated copies of video games are not playable on console platforms.

²² See “Global Anti-Piracy Pact,” available at: https://certalatam.org/wp-content/uploads/2022/12/CERTAL_Documento-Pacto-Global.pdf (in Spanish). The “Global Anti-Piracy Pact” includes the following requirements: (i) all governments are required to put administrative blocking procedures in place, with countries that do not already have an administrative blocking procedure in place required to incorporate the issue into their 2023 legislative agenda; (ii) governments must guarantee an expedited process to block retransmissions of illegal content over the Internet, whether on demand or live; (iii) governments must establish “effective mechanisms” to demonetize online pirate services; (iv) audiovisual rights holders and distributors who own over-the-top (OTT), Multichannel Video Programming Distributor (MVPD) and Virtual Multichannel Video Programming Distributor (V-MVPD) platforms must commit to actively demand and implement content protection technologies (e.g., “watermarking”) that identify and block user accounts containing illegal content; (v) given the increase in recent years of pirated devices passing through customs in various countries in the region, signatories must cooperate jointly to “reinforce customs controls for the effective seizure and destruction of illegal devices, and, likewise, identify the marketing channels for devices to achieve the removal of offers and identify and punish those who generate them;” and (vi) signatories must develop initiatives, create awareness campaigns, and establish procedures to educate the public and raise awareness of the importance of consuming legal services, and the dangers of consuming illegal services, that offer audiovisual content.

Unfortunately, there are business models built entirely around providing services, or manufacturing and distributing technologies, software, devices, components, or tools to circumvent TPMs to gain unlawful access to the content or to copy it without authorization. One example is stream ripping. Stream-ripping services infringe the making available right and circumvent the TPMs used to prevent download of music streams. These services have proliferated in the last few years, making stream ripping, as noted above, the dominant method of music piracy globally.

Stream-ripping sites, services, and apps enable users to make a permanent, free download of music that was licensed only for streaming on a video website such as YouTube and then allow that consumer to listen to it whenever and wherever they wish, without paying for a licensed download or a premium streaming subscription or accessing the stream on the licensed platform. This harms both legitimate streaming services and channels for authorized downloads. While legal protection of TPMs, where properly implemented, enables effective enforcement actions against distributors of unlawful circumvention technologies, these efforts are often undermined by countries that have yet to implement adequate protections against circumvention activities and services.

Circumventing TPMs to enable the play of pirated games remains far too common, and ESA and its members must constantly combat efforts to circumvent TPMs found in video game consoles. To mitigate the dissemination of circumvention devices, circumvention software, and modified consoles used to enable pirated games, the video game industry regularly requests that online marketplaces remove these listings for sale from their platforms. In 2020, ESA had over 4,500 listings removed from various online marketplaces targeting U.S. consumers. Every year, the video game industry spends millions of dollars taking down illegal circumvention and trafficking operations. Recently, for example, “[t]hree members of an international criminal organization known as Team Xecuter were indicted on charges related to the development and sale of ‘illegal devices that hacked popular video game consoles so they could be used to play unauthorized, or pirated, copies of video games,’ according to a federal indictment filed in Seattle.”²³

Request 5. Please identify the challenges you anticipate in the ongoing fight to prevent counterfeited and pirated goods from entering the stream of commerce and reaching the hands of consumers. Please add information on how those challenges might be addressed.

In addition to the challenges mentioned above, reverse proxy services and the lack of meaningful access to domain name registrant data are ongoing challenges for the creative industries.

²³ Brooke Wolford, *The News Tribune*, “International hackers accused of pirating Xbox, Nintendo, PlayStation games, feds say,” October 2, 2020, available at <https://www.thenewstribune.com/news/nation-world/national/article246183785.html#:~:text=Max%20Louarn%20of%20France%2C%20Yuanning,%2C%E2%80%9D%20according%20to%20the%20indictment> (Last accessed on March 3, 2021).

Reverse Proxy Services

Among many other features, reverse proxy services are a serious concern for IIPA members because they act as a firewall and protect websites by hiding the IP addresses and hosting providers of these websites. While reverse proxy services serve a legitimate purpose, many pirate sites utilize reverse proxy services to hide true hosting information and to transmit large files faster. Such uses make enforcement against these sites extremely challenging. IIPA requests that the U.S. government include reverse proxy services in its efforts to address this widespread, systemic problem and to stop the misuse of such services. IIPA also urges the U.S. government to work with foreign governments to encourage registry operators to take action against pirate websites with domain names that include a country code top-level domain (ccTLD). Many copyright infringing sites also utilize content delivery networks (CDNs). CDNs may be used to efficiently deliver content to users worldwide by placing servers all around the world that store copies of that content to provide high-speed access. However, one feature of the CDN is that it masks the IP address and hosting provider of a website, which may be exploited by infringing sites to avoid detection and enforcement.

Meaningful Access to Domain Name Registrant Data

An additional and persistent challenge for IIPA members in enforcing their rights is the lack of meaningful access to accurate domain name registrant data, which occurs because of Internet Corporation for Assigned Names and Numbers’s (ICANN) failure to establish and implement an effective mechanism for registrars to collect accurate data and for rights holders to access the data for the protection of IP. This lack of access is in part due to: (i) ICANN’s failure to meaningfully enforce a requirement for accurate registrant data collection, (ii) ICANN’s failure to implement approved policies concerning privacy/proxy services, and (iii) ICANN’s over-interpretation of the EU’s General Data Protection Regulation (GDPR), which has almost entirely shut down access to registrant WHOIS data.

Request 6. What patterns and trends have you observed in counterfeiting and piracy during the COVID-19 pandemic? Do you anticipate that these patterns and trends will continue past the pandemic?

Illicit camcording in theaters decreased significantly in 2020 and 2021, because many theaters closed due to the COVID-19 pandemic. With the re-opening of theaters in many markets around the world, illicit camcording has resumed, with illicit audio and video recordings in 2022 up 71% from 2020.

Additionally, the USPTO’s Office of the Chief Economist examined the impact of the COVID-19 pandemic on employment in an Economic Note, with a special focus on those industries that most intensively use various forms of IP.²⁴ The study found that IP-intensive

²⁴ See U.S. Patent and Trademark Office (USPTO), Office of Policy and International Affairs, Office of the Chief Economist, Economic Note, “Employment in IP-intensive industries during the COVID-19 pandemic and beyond,” March 2023, No. 103, available at <https://www.uspto.gov/ip-policy/economic-research>.

industries were resilient related to COVID, experiencing fewer job losses than non-IP-intensive industries.²⁵ Moreover, from January 2021 forward, job growth in copyright-intensive industries was faster than in the other IP industries.²⁶ Out of the copyright-intensive industries, performing and creative arts²⁷ had the most dramatic drop in employment levels but are recovering quickly relative to the other fields (which are software and computer systems design, and professional services), as their employment levels were increasing at a faster rate starting in spring and summer 2021.²⁸

Request 8. Please indicate whether any strategic plans to combat counterfeiting and piracy might include collaboration with private or public parties, and if a strategic plan is not collaborative, please explain why not. If a strategic plan does include collaboration, please describe the anticounterfeiting and antipiracy strategies employed in the collaboration.

The creative industries regularly focus on collaboration with private and public parties in combatting piracy. To address the devastating impact of piracy on the creative industries, employment, and workers, IIPA urges the U.S. government to constructively engage with our trading partners in which piracy thrives, including pushing for laws that deter infringement and encouraging public-private dialogues in these countries that bring together all stakeholders, including rights holders and intermediaries. Online piracy markets operate within a complex ecosystem of providers and intermediaries, including domain name registrars, advertisers, ad placement networks, payment processors, reverse proxy services, and others. Many of the breakthrough advances in enforcement over the years developed out of public-private dialogues, often incorporating the input of the participating industries. In the view of IIPA, a strategic plan that lacks this type of collaboration would be incomplete.

An effective response to online piracy requires the establishment of strong legal incentives for all different types of stakeholders to cooperate with rights holders to battle pervasive infringement and to promote the healthy growth of a legitimate e-commerce marketplace for copyrighted materials. Governments have a critical role to play in encouraging such cooperation, ensuring that their laws are fit for the digital age, and confronting the services that promote, induce, or benefit from infringers who exploit laborers and divert consumers from legitimate providers. Attention to these issues is an essential element in correcting the present dysfunction in the online ecosystem that permits websites dedicated to infringement to continue to operate and be profitable.

IIPA discusses multiple examples in which the private sector has come together in collaborative solutions in the response to request 4, above. In another important example, the fourth wave of Operation 404 against online content piracy was executed by the Brazilian Ministry of Justice and Public Safety (with the support of the cybercrime team (CIBERLAB), enforcement

²⁵ See id. at p. 1.

²⁶ See id. at p. 2.

²⁷ See id. at p. 2, footnote 7 (The “performing and creative arts” category is defined by North American industry classification system (NAICS) numbers to include publishers (NAICS 5111), motion pictures (5121), sound recording (5122), radio and television broadcasting (5151), pay and specialty television (5152), performing arts companies (7111), and independent artists (7115)).

²⁸ See id. at Figure 2, page 2.

authorities from ANCINE, stakeholders from the private sector (Brazilian Pay-TV Association (ABTA), Alianza, and the MPA), and international anti-piracy groups and law enforcement (U.S. Department of Justice, the United Kingdom (UK) Intellectual Property Office, and City of London Police)) in June 2022 and December 2022. Thirty search and seizure warrants were served in 11 Brazilian states, and 226 websites and 461 illegal apps were blocked pursuant to a criminal court order. All of the apps combined had been downloaded more than 10.2 million times. Social media accounts, pages, and search results related to the targets were also delisted.

More recently, ESA participated in Operation 404.5, Brazil’s successful multi-lateral online anti-piracy enforcement campaign. ESA referred five sites dedicated to the illegal sale of UDGs affecting IP in video games and accounting for over one hundred thousand monthly views combined. In total, Operation 404.5 removed 270 illegal websites and streaming applications globally (including site operations in Brazil, Peru, and the UK). The operation demonstrates a high level of public and private sector coordination that serves as a deterrent for infringers or those that are thinking about entering this illegal space.

Whether located online or at a physical location, markets for infringing activity almost always have transnational characteristics. Such characteristics require governments to collaborate and work together across national borders to make lasting progress on this issue. IIPA commends the efforts of law enforcement authorities that have engaged in such initiatives to address cross-border copyright piracy and stresses the need to continue such efforts. Effective takedown of infringing content hosted on such services requires the active cooperation of all participants in the e-commerce ecosystem, both domestically and abroad.

IIPA appreciates the opportunity to provide these comments.

Respectfully submitted,

/Linda Quigley/

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