

## CROSS-INDUSTRY VOLUNTARY MEASURES TO REDUCE ONLINE PIRACY

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### ABSTRACT

Piracy of copyright works has reached huge levels as a result of increasing internet bandwidth and availability, creating challenges for enforcement. In addition to conventional enforcement methods, a combination of increased legitimate online offerings and effective voluntary measures are essential to diminish the overall levels of online infringement. Unlike laws and regulations, voluntary measures can quickly be adapted to address changing forms of online piracy. Such measures benefit not only right holders, but also internet intermediaries, service providers, governments and individual users of the internet. Voluntary measures should therefore be encouraged by governments as an important means of addressing online copyright piracy.

### I. ONLINE PIRACY ENFORCEMENT CHALLENGES

1. Before the digital age, authors and their authorized licensees were able to exercise a reasonable amount of control over the country-by-country use of their works. Infringement occurred, but it was generally territorially limited. Where infringing copies were produced in one country for distribution in another, right holders could often rely on customs authorities to stop the import and/or enforce against local distributors of such infringing analog copies.
2. But it is not just the borderless and instantaneous nature of the internet that strains enforcement of copyrights. More often than not today, the key components and operations of a single pirate website are spread among several different countries. It is not uncommon, for example, that the operator of a pirate streaming site is living in one country, but the site is hosted by a service provider located in a second country. The files of the infringing content to which a pirate site connect are frequently hosted on a cloud service provider in a third country. Pirate sites often use Content Delivery Networks (CDNs) and reverse proxy services located in a still different (e.g., fourth) country. And the domain name under which the site operates may be controlled by a domain name registry located in a fifth country. Clearly this new paradigm of infringement strains the foundational notion of territoriality of copyright law and increases the difficulty of effectively enforcing copyrights.

### II. VOLUNTARY MEASURES TO REDUCE ONLINE PIRACY

3. Given the challenges described above, encouraging internet intermediaries, service providers and businesses to stop doing business with websites engaged in large scale copyright infringement has become a key strategy in the fight against online piracy. Some have referred to this as the “follow the money” approach. But this strategy involves more than gaining the

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\* The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO, and do not necessarily reflect the position of the Motion Picture Association of America (MPAA) or its member companies.

cooperation of payment processors and online advertisers. Hosting providers, domain name registries and registrars, CDNs, cloud storage services and even internet access providers and search engines all can serve a constructive role by adopting measures to prevent their platforms and services from being abused for copyright infringement.

#### A. PAYMENT PROCESSORS

4. Substantial progress has been made in the area of voluntary measures with major payment processors. Mastercard and Visa, two of the world's largest processors, have actively engaged with the Motion Picture Association of America (MPAA) to implement effective policies to prevent their services and systems from being used by websites dedicated to copyright infringement. Furthermore, both Visa and Mastercard accept referrals from the MPAA for cyberlockers<sup>1</sup> dedicated to infringement that appear to accept payment from Visa and/or Mastercard. PayPal also accepts such referrals and was one of the first payment processors to terminate services to infringing cyberlockers. Operators of pirate websites frequently resort to a myriad of tactics to circumvent the terminations. Nevertheless, Mastercard, Visa and PayPal proactively monitor the space in addition to their ongoing cooperation with respect to right holders' referrals. As a result of the foregoing voluntary measures, a substantial drop in user traffic to many cyberlockers has occurred.

#### B. ONLINE ADVERTISERS

5. Online advertising is another area where progress has been made. In 2012, the leading associations of advertisers and advertising agencies in the United States pledged to exclude operators of copyright theft websites from partaking in the revenue streams provided by advertising for legitimate products and services<sup>2</sup>. But given the complexity of the online advertising ecosystem, more needed to be done to stem the substantial flow of advertising revenues to pirate sites. Therefore, a number of major players in that ecosystem - notably the Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA), and the Internet Advertising Bureau (IAB) - have joined together with MPAA members, other right holders, and technology platforms to launch the Trustworthy Accountability Group (TAG)<sup>3</sup>. TAG's Brand Integrity Program Against Piracy aims to help advertisers and their technology partners screen out websites that present unacceptably high risks of engaging in copyright or trademark infringement, thus helping to implement a "follow the money" strategy for depriving operators of pirate sites advertising revenue. TAG has great potential to provide a voluntary, industry-led solution to help choke off the huge advertising revenue that makes online copyright theft financially viable today.

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<sup>1</sup> One of the most succinct definitions of "cyberlocker" is the following: "Unlike legitimate cloud storage services whose clients are people and businesses that need to store, access, and share data, the cyberlocker business model is based on attracting customers who desire anonymously to download and/or stream popular, copyright infringing files that others have posted. The cyberlocker business model is designed around content theft. In fact, cyberlockers generally pay or provide various incentives to those who distribute popular infringing content and discourage the use of their services for reliable data storage." See p. 1 "Behind the Cyberlocker Door: A Report on How Shadowy Cyberlocker Businesses Use Credit Card Companies to Make Millions" A NetNames Report for Digital Citizens Alliance <https://www.netnames.com/assets/shared/whitepaper/pdf/dca-netnames-cyber-probability-1.compressed.pdf> September 2014

<sup>2</sup> See <https://www.ana.net/content/show/id/23408> April 2012

<sup>3</sup> See generally "Fight Internet Piracy," Trustworthy Accountability Group (TAG), at <https://www.tagtoday.net/piracy/>.

6. Other countries have adopted different vehicles for assisting online advertisers to stop doing business with pirate websites. In the United Kingdom (UK), Operation Creative and the Infringing Website List (IWL) have already achieved results. Operation Creative is a partnership among the Police Intellectual Property Crime Unit (PIPCU) of the City of London Police, right holders and the UK advertising industry. It allows right holders to identify and report, with detailed evidence packages, copyright infringing websites to PIPCU. PIPCU then independently evaluates the websites and attempts to contact the website operators to correct behavior. If the website persists in its infringing conduct, then PIPCU adds the website to the IWL. Advertising agencies have access to the IWL via an online portal and use it as a resource to identify websites on which they may choose not to place advertising because of such websites' infringing nature. Operation Creative and the IWL have resulted in a 73 per cent reduction in advertising from the top UK advertising companies appearing on copyright infringing websites<sup>4</sup>. An interesting and valuable feature of Operation Creative and the IWL is the facilitating role of the government and the credibility that PIPCU's involvement brings to the effort. Recently, the MPAA has worked with governments and local advertisers in Hong Kong and Viet Nam to launch IWLs in those countries.

### C. DOMAIN NAMES

7. One of the most direct ways to disrupt a pirate website is to suspend its domain name. The MPAA has worked with domain name registries on voluntary measures to suspend the domains of websites engaged in clear and pervasive copyright infringement. In 2016, the MPAA entered into a Trusted Notifier arrangement with Donuts, the registry of the largest number of new top level domains (TLDs). Under this voluntary agreement, MPAA can refer websites engaged in clear copyright infringing activity that are operating under TLDs administered by Donuts after MPAA attempts to contact the hosting provider and registrar of the pirate website to resolve the matter. In addition, under the Trusted Notifier arrangement MPAA submits to Donuts an evidence package and a statement that the referred website has been subject to human review by MPAA<sup>5</sup>. The Trusted Notifier arrangement has worked well and TLDs of pirate websites have been suspended pursuant to it. A similar Trusted Notifier arrangement has been reached with Radix, a Dubai based registry and Asia's largest new generic TLD registry, which operates .online, .tech, .space, .web and several other TLDs<sup>6</sup>. Furthermore, the MPAA has entered into more informal voluntary notification arrangements with other TLD registries. As a result, to date more than 25 TLDs of pirate websites have been suspended pursuant to these voluntary measures. While pirate sites can, and usually do, migrate to new TLDs, the jumping to different domains creates friction.

<sup>4</sup> See "Operation Creative Sees 73 Percent Drop in Top UK Advertising on Illegal Sites" <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/pipcu-news/Pages/Operation-Creative-sees-73-per-cent-drop-in-top-UK-advertising-on-illegal-sites.aspx>, August 2015.

<sup>5</sup> See Donuts and the MPAA—Striking the Right Balance, <http://www.donuts.domains/donuts-media/blog/donuts-and-the-mpaa-striking-the-right-balance>, February 2016.

<sup>6</sup> See Radix and the MPAA Establish New Partnership to Reduce Online Piracy, <http://www.prnewswire.com/news-releases/radix-and-the-mpaa-establish-new-partnership-to-reduce-online-piracy-579359971.html>, May 2016.

#### D. HOSTING PROVIDERS

8. Hosting providers are another group of internet intermediaries upon which pirate websites rely. For cyberlockers, the loss of hosting can be devastating because these sites depend on substantial amounts of server capacity. For streaming and linking sites, the takedown from a hosting provider is less damaging and these sites often will rapidly reappear on less or non-cooperative hosting providers because these sites are “light” and do not actually store the pirate content files themselves. Nevertheless, the loss of hosting can be disruptive since it is a critical intermediary upon which all pirate websites depend.

9. In MPAA’s experience, voluntary cooperation from hosting providers with respect to terminating services to websites engaged in piracy usually follows after a court has ruled that the particular hosting provider must terminate service to one or more identified pirate websites. This is particularly true in Europe given its legal regime of allowing right owners to go to court and seek injunctive relief from intermediaries and service providers with respect to online piracy without the need to prove any liability — either direct or secondary — on the part of such intermediaries. This legal regime has been invaluable in setting a foundation for collaboration between right holders and service providers in Europe. As a result, trusted referral programs are in place between the MPAA and a number of hosting providers across Europe.

#### III. INCENTIVES TO ENGAGE IN VOLUNTARY MEASURES

10. Reducing the scope of and damage from online piracy constitutes a clear incentive for copyright owners to seek voluntary measures. But what benefit do service providers, internet intermediaries, payment processors, online advertisers and the like see in undertaking such measures?

11. Several factors have persuaded these parties to engage in voluntary measures to collaborate with copyright owners. First, many companies do not wish to be associated with those engaged in illegal activities, including copyright pirates. Moreover, turning a blind eye to doing business with pirate websites can result in damaging repercussions. In the United States of America (USA), for example, intermediaries have been named as unindicted co-conspirators in criminal copyright prosecutions. In addition, service providers and internet intermediaries frequently view voluntary collaboration with right holders as a better alternative to the possibility of government regulation or costly litigation over potential copyright infringement liability (direct or secondary) and/or loss of safe harbor protections. Indeed, voluntary collaboration between right holders and service providers and internet intermediaries yields mutual benefits of creating an internet ecosystem that is more hospitable for legitimate commerce and safer for consumers<sup>7</sup>.

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<sup>7</sup> Users of pirate websites are 28 times more likely to be exposed to malware. See report by Digital Citizen Alliance, “Digital Bait: How content theft sites and malware are exploited by cybercriminals to hack into internet users’ computers and personal data.” <https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/0f03d298-aedf-49a5-84dc-9bf6a27d91ff.pdf>, December 2015.

#### IV. HOW GOVERNMENTS CAN ENCOURAGE VOLUNTARY MEASURES AND THE BENEFITS OF DOING SO

12. Governments can encourage the pursuit of voluntary measures by copyright owners and internet intermediaries and other service providers to reduce online piracy in several ways. They can hold hearings to explore how pirate websites are supported by local internet intermediaries and service providers (such as payment and advertising services) and encourage collaboration with copyright owners to end such support of pirate websites. Governments can also enact high-level laws or regulations that embrace “responsibility without liability,” such as Europe has adopted in Article 8.3 of the EU Copyright Directive<sup>8</sup>. Further, governments can task law enforcement agencies to work with internet intermediaries and service providers to encourage them to adopt voluntary measures to cease doing business with pirate sites. The UK government’s work via PIPCU, as described above, serves as an example.

13. When effective voluntary measures are undertaken to reduce online piracy, governments win as do citizens at large. For governments, effective voluntary measures result in fewer demands on law enforcement with respect to illegal piracy and potentially less need for legislation or regulation. In addition, because effective voluntary measures often reduce the need for litigation, they result in a reduction of demands on the judicial system. Finally, as online piracy diminishes legitimate online commerce in copyrighted works grows<sup>9</sup>, which yields tax and other business related benefits to governments. For consumers, reducing online piracy reduces the risks from malware and privacy attacks.

#### VIII. CONCLUSION

14. No single silver bullet exists to end online piracy. Vigilant law enforcement actions and targeted civil litigations remain critical tools to address the most severe cases and to create the necessary legal precedents. Given the massive scale of online piracy, however, a combination of increasing legitimate online offerings and effective voluntary measures are key to diminish overall levels of online infringement. Voluntary measures are not necessarily restricted to national borders and have the required scalability to offer a viable path to reduce the ease and profitability of online piracy. Unlike laws and regulations, voluntary measures can quickly be adapted to address changing forms of online piracy<sup>10</sup>. Moreover, as this paper has described, voluntary measures create a classic win-win scenario, as they benefit not only right holders, but also internet intermediaries, service providers, governments and individual users of the internet. Voluntary measures should therefore be fostered by governments as an important means of addressing the scourge of illegal online copyright piracy.

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<sup>8</sup> See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

<sup>9</sup> See, for example, the study by Carnegie Mellon University that found that site blocking of 19 pirate sites in the United Kingdom (UK) led to an increase in legitimate online consumption. “Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior” <https://techpolicyinstitute.org/wp-content/uploads/2016/04/UK-Blocking-2-0-2016-04-06-mds.pdf>, April 2016.

<sup>10</sup> For example, Amazon, eBay and Facebook all recently amended their policies/terms of service to prohibit the sale and advertising of devices loaded with pirate applications that facilitate the streaming of infringing content. See <http://variety.com/2017/digital/news/facebook-bans-kodi-piracy-devices-1202445930/>, May 2017. These changes emerged in part from ongoing collaborative exchanges between right holders and all three online platforms.