



**BEFORE THE
FEDERAL TRADE COMMISSION**

**Competition and Consumer Protection in
the 21st Century**

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments on the role of intellectual property in promoting innovation to the Federal Trade Commission for its hearings on competition and consumer protection in the 21st century. The Copyright Alliance previously submitted comments in August, and Copyright Alliance CEO Keith Kupferschmid participated on the October 23 panel. These comments are intended to supplement those previous remarks.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization 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 represents the copyright interests of more than 1.8 million individual creators. Some of the most important people we at the Copyright Alliance work with are our individual creator members. As we work to tell their stories and protect their rights and interests, we continue to keep in mind that the foundation of copyright is built on the creativity and ingenuity of individual creators—creators like photographers, coders, songwriters, composers, bloggers, garage bands, artists, authors, indie filmmakers, and numerous others who make a living through their creativity.

The Copyright Alliance also represents the copyright interests of over 13,000 organizations in the United States, across the spectrum of copyright disciplines. When most people think of copyright, they conjure up images of the many movie studios and record labels that we represent. But copyright protection is crucial to so many more organizations ranging from book, magazine, and newspaper publishers to software and video game companies. Then there are the host of organizations we represent on copyright issues whose reliance on copyright

law may not be apparent—whether it’s a sports league that energizes fans across the country, or a database company, or a code or standards making organization whose work impacts millions of Americans on a daily basis.

Economic Contributions of the Copyright Industries

There is one thing that unites all these very different individuals and organizations—their reliance on copyright law. It’s copyright law that incentivizes them to continue to create and helps ensure that they are rewarded for their creative efforts by protecting the fruits of their creativity. It’s copyright law that protects their basic freedom to pursue a livelihood and career based on creativity and innovation and to protect their investment in the creation and dissemination of copyrighted works for the public to enjoy. It’s copyright law that safeguards their rights afforded to them under Article I, Section 8, Clause 8 of the Constitution to “...secur[e] for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” It’s copyright law that promotes America’s culture around the globe, whether it’s a blockbuster movie, a platinum record, the newest app, or a world-renowned photo that captures a moment in time. And it’s copyright law that is core to protecting our First Amendment rights of freedom of expression. In short, copyright law is the legal framework that supports American ingenuity, creativity, culture, and freedom of speech.

But copyright law is not only critical to the success and prosperity of the creative community, it is also critical to the success of the U.S. economy. 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.¹

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.²

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.³ 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 realized regardless of whether the film or TV show is successful.

¹ Stephen E. Siwek, Int’l Intellectual Prop. Alliance, Copyright Industries in the U.S. Economy: The 2018 Report

² Stephen E. Siwek, Recording Indus. Ass’n of Am., The U.S. Music Industries: Jobs & Benefits (2018).

³ Motion Picture Ass’n of Am., The Economic Contribution Of The Motion Picture & Television Industry To The United States (2017), https://www.mpa.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 fact, the importance of robust copyright protection for software is more important now than ever before. Today most software is created collaboratively, making continued reliance on other forms of intellectual property (IP), like trade secret, not as viable an option. In some cases, copyright is the only viable form of protection—especially where patent protection is uncertain in scope and durability following the Supreme Court's decision in *Alice Corp. v. CLS Bank Int'l*.⁴

In its 2014 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 wages for software developers of \$108,760—more than twice as much as the \$48,320 average annual wage for all US occupations. And that is in large part due to our strong framework of IP protection. If copyright for software is diminished by overly broad fair use applications or denial of protection, the software industry will be forced to retrench to a closed model—no longer sharing code, and instead relying on proprietary contracts to keep code protected. That's a step in the wrong direction.

The economic premise of copyright is that protecting property rights in creative and expressive works will promote innovation. This premise is reflected in the language of the Constitution and is supported by the FTC's *Antitrust Guidelines for the Licensing of Intellectual Property*, published with the Department of Justice, in which the FTC explained how intellectual property and antitrust law work toward the same goals:

The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without providing compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers.

In sum, the FTC and DOJ recognize the protections afforded by copyright law as pro-competitive. They note that the ability to license content can have pro-competitive effects for both the copyright holder and the licensee by increasing the value or utility of the copyrighted content, and thereby encouraging the copyright holder's investment in it, as well as by improving the product or service of the licensee.

⁴ 573 US 208 (2014).

Evolving Business Practices and New Technologies

All sectors that rely on copyright have seen—and continue to see—great transformations due to evolving business practices, new technologies, and shifting consumer preferences. The one constant, however, is the importance of robust and meaningful copyright protections. Indeed, copyright protection becomes even more important as consumers shift from business models built around ownership of physical goods to business models built around access to copyrighted works in digital formats.

Technological Protection Measures

Consumers today have a wealth of ways to access and enjoy all sorts of copyrighted works, and creators have many new platforms to reach their audiences. This access to so many new works in new ways is in part possible because of the protections afforded to technological protection measures (TPMs) by copyright law. The prohibitions on circumventing TPMs found in Section 1201 of Title 17 advance two interrelated goals: (i) they help minimize the risk of infringement in a digital environment, and (ii) they promote the development of legitimate distribution channels and make the process of obtaining permissions easier. As a result, Section 1201 has played a pivotal and sustaining role in the lives, businesses, and creative accomplishments of the Copyright Alliance’s members.⁵

Our members use TPMs to offer audiences new experiences such as the opportunity to add new features and interact with other users of entertainment products; share and experience creative works with others; convert works purchased in earlier formats to state of the art formats; acquire updates; license clips for new uses, create custom content and playlists; and play video games on a variety of consoles and handheld devices as well as online.

Because of the protections afforded by copyright and TPMs, the creative industries are able to shift the way they deliver content to satisfy the demand of their users, fans, and consumers. For instance, in order to adapt to the shift in the way people consume entertainment, the TV and movies industries have shifted more to direct-to-consumer models to meet consumer’s consumption needs and to combat piracy.⁶ The creative industries are trying to be in all of the places that people want to consume content, and this business model would not be possible without copyright protection and the protections afforded to TPMs.

Similarly, over the years, the music industry has embraced the internet and the growing capabilities of technology to make music more widely available and more easily accessible to music fans. Perhaps more than any other creative industry, the music industry has shifted more

⁵ Provisions prohibiting the circumvention of TPMs are an international obligation under the WIPO Copyright Treaty, Article 11, and the WIPO Performers and Phonograms Treaty, Article 18, both of which the U.S. is a party to. The U.S. is also obligated to prohibit circumvention of TPMs under various bilateral free trade agreements it has entered into.

⁶ For example, the market used to be made up of DVD sales but after a market decrease in physical sales, home spending has been transformed to many different video-on-demand (VOD) platforms.

of its content to digital, a shift that would not have been possible without the power that copyright and TPMs protection gave creators in negotiations and in deterring piracy.

Without the legal protections afforded to TPMs, the transformations in business models would not be possible. Because of the importance of TPMs to innovation and competition, the Copyright Alliance has urged the continued inclusion of provisions prohibiting their circumvention in free trade agreements negotiated by the U.S., with only narrow and predictable exceptions to those provisions.⁷ We were pleased to see the inclusion of high-standard provisions consistent with U.S. law in the final text of the USMCA and hope to see similar provisions in future trade agreements.

Harmonizing Criminal Penalties for Infringement

While the use of TPMs to create innovative new ways to deliver content is an example of a success story, unfortunately there are also areas of the law that have not always kept up with these evolving business practices and new technologies. For example, currently criminal penalties for infringement of the public performance right (e.g., streaming) is at most a misdemeanor. On the other hand, the same level of infringement of the reproduction (e.g., downloading) and distribution rights can result in felony charges for willful and egregious infringement. Criminal penalties for copyright infringement should not differ depending on whether a work is made available to the public to download or to stream.

Streaming has become an even more vital business model for creative works. Legitimate platforms, like Apple Music, Spotify, Amazon Music Unlimited and Soundcloud offer a variety of business models at varying price points. According to the Recording Industry Association of America (RIAA), streaming services now account for 75% of all U.S. music revenue, representing the single largest source of revenue.⁸ And streaming video subscriptions such as Netflix are projected to reach revenues of \$10 billion annually by 2018. Given the increasing popularity of streaming, misdemeanor penalties are simply not sufficient to deter large-scale infringers.

The Continual Challenges of Piracy

Over the years, the creative community has embraced the internet and the growing capabilities of technology to make their copyrighted works more widely available and more easily accessible to consumers and fans. Unfortunately, with each step forward, there are bad actors one step behind that exploit these new capabilities through new forms of piracy.

⁷ See Copyright Alliance comments to the U.S. Trade Representative, Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico at 3 (2017), <https://copyrightalliance.org/wp-content/uploads/2017/06/CA-USTR-NAFTA-FINAL.pdf>.

⁸ Recording Indus. Ass’n of Am., Mid-year 2018 RIAA Music Revenues Report (2018), <https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report-News-Notes.pdf>.

Piracy is the antithesis of competition. Because copyright and other forms of IP are easier to steal than physical property, the absence of effective IP protection threatens competition by allowing others to exploit works without compensating the creators, reducing the commercial value of the creators' work and weakening incentives to invest—all to consumers' detriment. Piracy also eliminates the ability to produce high-quality and high-value content as a competitive advantage and removes pricing as a competitive advantage, since the marginal cost of piracy approaches zero.

While established channels of piracy, such as peer-to-peer filesharing and cyberlockers, still remain popular, emerging threats such as illicit set top boxes and stream-ripping services are gaining ground fast. 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.
- 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.

Similarly, 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.⁹ According to reports, only one percent of all releases account for the majority of sales revenues.

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.

Online Piracy

Unfortunately, existing law that are intended to thwart piracy are largely proving to be insufficient. Creators and copyright owners face persistent challenges protecting their work online. While the notice and takedown provisions of the Digital Millennium Copyright Act (DMCA)¹⁰ 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

⁹ *Gold & Platinum's Top Certified Songs & Albums Midway Through 2018*, Recording Indus. Af Am., (July 5, 2018), <https://www.riaa.com/gold-platinums-top-certified-songs-albums-midway-2018/>.

¹⁰ 17 USC § 512.

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” by incentivizing “service providers and copyright owners to cooperate to detect and deal with copyright infringement” online.¹¹ 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 the DMCA was enacted twenty years ago, 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.

For example, as reported by the MPAA in comments to the U.S. Copyright Office, in three months during the fall of 2015, Disney sent about 35,000 takedown notices directed to illegal copies of *Avengers: Age of Ultron*—which was still in theaters at the time—to a single site.¹² That is more than 10,000 notices a month, more than 300 a day, directed to a single movie on a single file hosting site. Similarly, in the three months in the spring of 2015, Fox sent more than 57,000 takedown notices to a single file hosting site for the film *Kingsman: The Secret Service*. That’s 19,000 notices a month, to one site, for the same movie. Were the DMCA working as intended, one would expect the number of notices to the site to decrease over time. Yet we see the opposite. For instance, in the *Kingsman* example, on April 30, Fox sent 697 takedown notices. On July 21, three months later, it had to send 881 notices to the same site for the exact same work. In no universe is this an effective way to address piracy.

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. 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.

This is one area where the FTC may be able to help. The Copyright Alliance is an ardent supporter of the use of cross-industry collaborative efforts to address the problem of online infringement (i.e., voluntary initiatives). Such initiatives reduce and equitably apportion the burden of reducing infringement, removing profit from infringement, and educating users about legal alternatives. Given the changing face of piracy and the overall perception of online lawlessness this leads to, in conjunction with the need for increased platform accountability, responsibility and cooperation and the FTC’s authority to promote competition and to protect consumers, we think this is an area that is ripe for FTC to play a role.

¹¹ H.R. Rep. No. 105–551 (1998).

¹² Motion Picture Ass’n of Am. comments to U.S. Copyright Office at 14 Section 512 Study (2016).

Illicit Streaming Devices

Online piracy is just part of the problem. An emerging piracy problem is the growing threat of illicit streaming devices (ISDs). The most prevalent ISDs 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.¹³

Distributors of ISDs make it easy to stream and download infringing content at the push of a button. Their products work essentially as devices that allow you 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 displays a headline that asks, “Frustrated with overpriced cable bills?”, and contains 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 are 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,¹⁴ many of these ISDs 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 ISDs 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 that increasingly produce their own works.

Piracy of motion picture and TV programming through ISDs 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

¹³ Sandvine, Spotlight: the “fully loaded” Kodi ecosystem (May 2017), <https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-kodi.pdf>.

¹⁴ Will Maxson, *Free movies, costly malware*, Fed. Trade Comm’n Consumer Info. (April 12, 2017), <https://www.consumer.ftc.gov/blog/2017/04/free-movies-costly-malware>.

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.

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 ISDs threaten this entire creative ecosystem. It decreases the revenue “pie” that serves to stimulate further creativity and improve the livelihoods of creative professionals.

This is another area where the FTC should be able to help. The FTC has extensive powers under section 5 of the FTC Act to police unfair and deceptive trade practices. These powers authorize the FTC to pursue instances of false and deceptive advertising and promotional schemes. To the extent these distributors of ISDs advertise their ISDs as 100% lawful or afflict consumers with damaging malware, the FTC should consider pursuing them for misleading and impairing consumers and harms competition.

Stream-Ripping

In the music space, the newest threat is stream-ripping. Stream-ripping is a process by which everyday listeners can “rip” a file from a streaming platform and convert it into a downloadable file, and apps that facilitate this process are rapidly growing in popularity. According to the Global Music Report 2018, published by the International Federation of the Phonographic Industry (IFPI), “stream-ripping is the fastest-growing form of infringement,” surpassing even file-sharing.¹⁵ The study also found that an estimated 416 million visits to stream ripping sites occurred in January 2018. The difficulty in combatting this problem is that there are no infringing links or content to pinpoint and eliminate. Instead, stream-ripping targets *legitimate* copies of music and creates illegal reproductions. As stream ripping platforms are targeted and shut down, the hope of that more users will move toward the numerous legitimate music streaming platforms available on the market today.

Piracy is Especially Harmful to Small Creators

Small creators, like photographers, illustrators, graphic designers, authors, songwriters, artists and bloggers, YouTubers, and many other individual creators and micro and small businesses are also harmed by piracy. According to the Professional Photographers Association, 70% of all professional photographers have been victimized by copyright infringement multiple times in the past five years.¹⁶ What makes this even more problematic is that because the federal courts have exclusive jurisdiction over copyright claims and federal litigation is so expensive and

¹⁵ Int’l Fed. Of the Phonographic Indus., Global Music Report 2018: Annual State of the Industry at 42 (2018), <https://www.ifpi.org/downloads/GMR2018.pdf>.

¹⁶ Survey conducted by Professional Photographers of America, The Importance of Copyright to Everyday Photographers (Oct. 16, 2015).

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 \$350,000.¹⁷ 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.¹⁸ Thus, even if an 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.

A good example of this problem is "Rob," who is a freelance professional photographer in San Francisco who was hired by an online visitors' magazine to create a still life image to illustrate an article on local bars and pubs. A competing website infringed Rob's photograph to promote their magazine without permission or compensation. Rob's client was upset that the image they had commissioned was used by their competitor and accused Rob of selling his image to the competition without authorization. Though Rob tried to explain that the image was stolen, his client, nevertheless, stopped working with Rob out of concern that he was untrustworthy. Rob attempted numerous times to contact the infringing party by phone in order to be paid for the unauthorized usage and to demand that the infringing company remove the image from their website. Eventually Rob reached someone from the infringing company, who refused to pay for the unauthorized usage. Due to this infringement, Rob was never hired by his client again. Rob considered suing the infringer in Federal Court (his only recourse) but concluded it was too expensive to do so.

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.

¹⁷ Am. Intellectual Prop. Law Ass'n, Report Of The Economic Survey 2011 at 35 (2011).

¹⁸ U.S. Copyright Office, Copyright Small Claims at 9 n.35 (2013).

Conclusion

We thank the Federal Trade Commission for the opportunity to comment and are pleased to answer any further questions the Commission may have about our statement or provide any additional information it may find helpful.

Respectfully submitted,

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