



November 12, 2018

The Honorable Vishal J. Amin
United States Intellectual Property Enforcement Coordinator
Executive Office of the President, Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

via <http://www.regulations.gov>

Re: Development of the Joint Strategic Plan on Intellectual Property Enforcement

Dear Enforcement Coordinator Amin:

Internet Association (“IA”) appreciates the opportunity to submit comments in connection with the *Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement*.¹ IA applauds the Administration’s commitment to “ensure a level playing field for American innovators and creators, where their innovations and creations are respected and protected, and for systems to be in place that allow American businesses to operate in a free, fair and open marketplace.”² As leading U.S. innovators and creators, IA members appreciate the government’s goal and respectfully urges the Administration to consider the issues and challenges raised below.

IA represents over 40 of the world’s leading internet companies.³ We support policies that promote and enable internet innovation and are dedicated to advancing public policy solutions that strengthen and protect internet freedom, foster innovation and economic growth, and empower users. Many of our member companies produce and deliver original content, leading the world in creating innovative internet services and technology-enabled content that bring music, films, and other creative works to worldwide audiences. IA members provide digital distribution for award-winning content, while also creating services that address the challenge of piracy by allowing consumers to legally access content globally. As both producers and users of creative works, as well as leading innovators, our member companies have a strong interest in intellectual property laws and their appropriate enforcement.

Our submission addresses three topics.

- First, we discuss how the internet has transformed the modern economy and how internet services have invested in the creation and lawful distribution of content and in protecting consumers from counterfeit goods;
- Second, we address the critical importance of maintaining the current flexibility of the U.S. copyright regime, including the fair use doctrine and safe harbors for online service providers; and
- Finally, we discuss threats to the competitiveness of U.S. companies resulting from inflexible and discriminatory copyright laws in other countries and from ongoing efforts to undermine intermediary liability protections.

Each of these is discussed below.

I. Internet services have transformed the U.S. economy

¹ 83 FR 46522 (Sept. 13, 2018).

² *Id.*

³ A complete list of IA’s membership can be found at: <https://internetassociation.org/our-members/>.



In the last two decades, U.S. internet services have become a significant driver of the U.S. economy. The internet industry represents an estimated 6 percent of U.S. GDP, totaling nearly \$967 billion, and accounts for nearly 3 million American jobs. Internet services have increased convenience and efficiency in providing both physical goods and entertainment content, revolutionizing the retail and content distribution markets. In 2017, an estimated 1.66 billion people worldwide purchased goods online and global e-retail sales amounted to \$2.3 trillion. According to Deloitte’s annual shopping survey, last year more consumers planned to do their holiday shopping online than at either traditional or mass merchant department stores and expected to spend 51 percent of their budget online, compared with 42 percent in-store.⁴ And video streaming services have now surpassed cable television in number of subscribers.⁵

The enormous success of internet services in these areas has not been without challenges, many of which relate to intellectual property. However, over the past decade, internet companies have provided global sales and distribution for millions of creators and IP owners, have become the largest distributors of legal entertainment content (and largest source of revenue for many content creators), have themselves invested heavily in content, and are actively deterring piracy and counterfeiting on their services.

A. Audio and video content enjoy unprecedented distribution and access

The internet has become a critical means for distribution of and access to content globally. Online video and music have grown rapidly, with users now numbering in the billions. Today, nearly 60 percent of global downstream internet traffic is streaming audio and video from internet services.⁶ Streaming video services have more than 220 million subscribers.⁷ And video sharing sites have more than 1.8 billion monthly users—almost one-half of all people on the internet—who collectively watch over 1 billion hours of video content per day.⁸ As of 2017, the total music audio streaming audience included more than 272 million users, generated \$5.6 billion in trade revenue, and was the leading source of income for record companies.⁹ Total digital revenues – including both streaming and downloads – now account for nearly 80 percent of the recorded music market in the U.S.¹⁰

B. The internet has enabled diversity and democratization of content creation

Internet services also provide a rich spectrum of distribution models for original programming, which results in new opportunities for writers, directors, actors, music makers, and other creative professionals. IA’s members distribute both commercial and user-generated content at an unprecedented scale and through a variety of business models (e.g., subscription-supported, advertisement-supported, single-work purchases, and bulk licenses).

These innovative business models have empowered new artists, authors, musicians, and storytellers to reach audiences without the middlemen and economic barriers imposed by traditional

⁴ Deloitte, *2017 Holiday Survey: Retail in Transition* (2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/consumer-business/us-cb-holiday-survey-report-2017.pdf>.

⁵ Ian Morris, *Netflix Is Now Bigger Than Cable TV*, *Forbes* (June 13, 2017), <https://www.forbes.com/sites/ianmorris/2017/06/13/netflix-is-now-bigger-than-cable-tv/#51ea25e4158b>.

⁶ Sandvine Corp., *The Global Internet Phenomena Report* (October 2018), <https://www.sandvine.com/hubfs/downloads/phenomena/2018-phenomena-report.pdf>.

⁷ Rani Molla, *Netflix now has nearly 118 million streaming subscribers globally*, *Recode* (January 22, 2018), <https://www.recode.net/2018/1/22/16920150/netflix-q4-2017-earnings-subscribers>; Jeff Bezos, *Amazon Shareholder Letter* (2018), <https://ir.aboutamazon.com/static-files/1bfd8929-81a0-46d7-a378-6aff9a203093>.

⁸ Ben Gilbert, *YouTube now has over 1.8 billion users every month, within spitting distance of Facebook’s 2 billion*, *Business Insider* (May 4, 2018), <https://www.businessinsider.com/youtube-user-statistics-2018-5>.

⁹ DiMA, *Digital Media Association Annual Music Report* (March 2018), <https://dima.org/wp-content/uploads/2018/04/DiMA-Streaming-Forward-Report.pdf>.

¹⁰ *Id.*



content distribution models. Free video sharing online has effectively removed any financial barrier to video distribution, allowing anyone to upload videos to be viewed by others, providing hundreds of thousands of small and independent content creators a global distribution platform and a means of monetizing their works.

Moving beyond distribution, internet companies are investing heavily – and successfully – in high-quality original programming. At the Emmys this year, Netflix tied for the most awards overall and Amazon’s “The Marvelous Mrs. Maisel” won eight, the second most of any program.¹¹

C. Internet services have increased revenues to creators and decreased piracy

The massive growth in the online content marketplace is providing substantial benefits to creators and rightsholders. Lawful music streaming is displacing piracy, rapidly increasing revenues for the recording industry.¹² In 2017, the music industry had its third consecutive year of strong growth, with the recorded music market increasing by 12.8 percent in the U.S and by 8.1 percent worldwide.¹³ This was largely due to internet streaming services, with streaming in the U.S. up by 49.8 percent and paid subscription audio streaming revenue by 59.6 percent. Online distribution (*i.e.*, downloads and streaming) now accounts for three quarters of the industry’s total revenues.¹⁴

Video content is also booming, with 487 scripted original series airing in 2017,¹⁵ more than double the number in 2009.¹⁶ In fact, the growth in programming has been so strong – and quality so high – that this has been dubbed the second “Golden Age of television.”¹⁷ This growth has been so rapid that some have even expressed concerns about a “content bubble.”¹⁸

Much of this growth is attributable to streaming services and their impact in displacing piracy.

D. Internet services actively protect customers by combating counterfeit goods

Companies of all sizes have embraced internet services to efficiently sell their goods and services. Millions of small businesses are now able to reach new markets, connect with new customers, and increase their productivity. While the vast majority of goods sold online are genuine, a small number of bad actors continue to misuse online services to try to sell counterfeit goods. Internet companies that

¹¹ Rick Porter, *HBO, Netflix Tie for Top Emmy Hauls, 'Game of Thrones' Leads All Programs*, Hollywood Reporter (September 17, 2018),

<https://www.hollywoodreporter.com/live-feed/2018-emmys-wins-by-program-network-1143213>.

¹² Jack Shepherd, *Music piracy fallen dramatically over last five years thanks to streaming services such as Spotify and Tidal, survey reveals*, The Independent (August 2, 2018),

<https://www.independent.co.uk/arts-entertainment/music/news/music-piracy-uk-spotify-tidal-streaming-services-yougov-survey-a8474436.html>;

Luis Aguiar and Joel Waldfoegel, *Streaming Reaches Flood Stage: Does Spotify Stimulate Or Depress Music Sales?* European Commission: Institute for Prospective Technologies Studies (2015),

<https://ec.europa.eu/jrc/sites/jrcsh/files/JRC96951.pdf>; *Same Script, Different Context: Increased Access to*

Legitimate Content Reduces Piracy, INTERNET ASSOCIATION (Oct. 17, 2014),

http://internetassociation.tumblr.com/post/1002550_72928/same-script-different-context-increased-access;

Copia, *The Carrot or the Stick? Innovation vs. Anti-Piracy Enforcement*, at 8 (Oct. 8, 2015),

<https://copia.is/library/the-carrot-or-the-stick/> (“The evidence strongly suggests that it is greater innovation, in the form of the introduction of new legal services and convenient distribution techniques, that drove the decrease in piracy rates, rather than legislative efforts.”).

¹³ According to IFPI, this “was the third consecutive year of global growth and one of the highest rates of growth since IFPI began tracking the market in 1997.” IFPI, *Global Music Report* (2018) at 10, 15.

¹⁴ *Id.* at 15.

¹⁵ Joe Otterson, *487 Scripted Series Aired in 2017, FX Chief John Landgraf Says*, Variety (Jan. 5, 2018),

<https://variety.com/2018/tv/news/2017-scripted-tv-series-fx-john-landgraf-1202653856/>.

¹⁶ Jon Erlichman, *The 'Golden Age of TV' Has A Lot of People Worried — Here's Why*, Fortune (Jan. 18, 2016).

¹⁷ *Id.*

¹⁸ *Id.*



facilitate online sales understand that their business depends on customers feeling safe making online purchases and have made great strides in deterring the sale of counterfeit products.

For example, more than 40,000 rights owners are able to quickly and easily report instances of alleged intellectual property infringement, including possible counterfeits, through eBay's Verified Rights Owner (VeRO) program. Through this program, launched in 1998, eBay promptly investigates reports of alleged intellectual property infringement.

Etsy has also made addressing intellectual property infringement a priority. User-friendly tools allow rightsholders to submit notices of infringement, and upon receipt of the notice, Etsy's legal support team personally reviews each complaint. In 2016, Etsy responded to 18,857 properly submitted takedown notices, disabling access to 235,201 listings from nearly 60,000 sellers.

Under Amazon's Anti-Counterfeiting Policy, counterfeits are strictly prohibited, and violation of the policy can result in loss of selling privileges, funds being withheld, and destruction of inventory. Amazon has a global team of investigators available 24 hours a day, 7 days a week to respond to and take action on notices of infringement. In 2017, Amazon launched Brand Registry, a service that gives rights owners advanced tools to protect their brands, including powerful text- and image-based search capabilities and automated protections that use artificial intelligence technology to predict and prevent infringement before it happens. Brand Registry utilizes information from brands to proactively remove infringing listings, reducing the burden on rights owners to file notices of potential infringement. More than 100,000 brands are registered with this service, and on average, they're finding and reporting 99 percent fewer suspected infringements than before its launch. Amazon investigates and takes action on more than 95 percent of all notices of claimed infringement received from brands in Brand Registry within eight hours.

Search engines are also helping to address counterfeiting, continuously removing content from their services when rightsholders or reporting organizations identify infringing activities. For example, over the last three years, Google has shut down more than 100,000 AdWords accounts for attempting to advertise counterfeit goods.

IA members have also developed close relationships with law enforcement entities, partnering with them to combat counterfeit goods. Internet companies regularly report misconduct and support ongoing investigations. These companies have proactively created training and education programs to ensure that law enforcement officials understand how the services work, to share information about evolving investigative techniques on the web, and to highlight new trends and emerging challenges relating to counterfeiting. IA member companies also encourage users to report illegal activities to the authorities and actively seek to facilitate such reporting by, *inter alia*, providing educational resources and contact information for the appropriate law enforcement entities.

Innovative prevention and reporting tools created by internet companies and effective partnership with law enforcement and rights holders are vital to addressing counterfeiting. While it is likely impossible for any mass retail firm to guarantee that its inventory is completely free of counterfeit goods, significant progress has been made, and IA members are committed to continued improvement in protecting their customers by effectively combating sales of counterfeit goods.

II. Flexibilities in copyright law are essential to the modern economy

A flexible copyright regime has been essential to the exponential growth and economic vitality of the internet. The existing U.S. framework – including fair use and safe harbors for online service providers – has been immensely successful in ameliorating the legal risks of secondary liability for online service providers while providing rightsholders an effective means of addressing internet infringement. This has enabled both the growth of innovative internet services – and the associated economic growth and job creation – and the dramatic expansion of legal content services, producing a



vibrant online marketplace that benefits creators, rightsholders, distributors, and consumers alike. The U.S. must carefully preserve these aspects of domestic law and actively promote them abroad.

A. Copyright safe harbors are critical for online service providers

The internet is a vibrant and valuable platform in large part because of appropriate intermediary liability laws that permit users and businesses to post material – such as videos, reviews, and pictures – online without creating undue liability for the hosts of the content. These safe harbors are critical to the availability of internet services and to the growth of cloud computing, enabling a multitude of low-cost (or free) internet services. These include not only internet search, but services like email, navigation, cloud storage, user generated content sites, online retail, and social media. Without such protection, many of these services would be at risk of substantial – and potentially crippling – liability.

It is impossible to overstate the importance of the DMCA safe harbor. Copyright is a strict liability regime with a unique statutory damages framework and a judicially developed construct of secondary liability. Absent protections that limit liability for service providers, this framework would result in astronomical claims for statutory damages against internet companies, often for the very functions that enable the internet to function. As stated by Santa Clara University Law Professor Eric Goldman, “Without the [safe harbors] provided by Congress, YouTube would not exist in its current form and probably would not exist at all.”¹⁹

B. The fair use doctrine is vitally important to internet services and users

Internet services require fair use to crawl the web for search results, store copies of this content, and create algorithms that improve relevance and efficiency of responses to user search queries.²⁰ Fair use also allows short ‘snippets’ of text or thumbnails of pictures to be used under limited circumstances by aggregation services. Social media services and other user-generated content services similarly require fair use to enable people to post and share news stories, videos, and other content.

Fair use is also critical for cloud computing services. Faster broadband speeds, cheap storage costs, and ubiquitous, multi-device connectivity to the internet have shifted storage of content from a user’s personal computer to the “cloud.” Cloud-based storage allows a user to keep copies of their content in a remote location that gives them access to such content anywhere they are connected to the internet. Fair use enables this data portability and the cost, convenience, and security benefits of cloud storage. In sum, fair use allows key functions that are essential to the operation of the internet and to many widely adopted business-critical technologies and consumer services.

C. The U.S. should preserve and defend flexibilities in copyright

As demonstrated by the U.S. experience, flexible copyright laws that include fair use and the DMCA safe harbor are able to protect the interests of rightsholders while encouraging investment in new technologies and giving individuals the freedom to innovate. Experience also shows that – in the long-term – one-sided intellectual property and enforcement policies do not to serve the interests of the public, internet businesses, or rightsholders. For this reason, the U.S. government should defend and promote these aspects of copyright law both domestically and internationally.

III. Discriminatory copyright laws harm U.S. companies abroad

As U.S.-based companies increasingly engage in trade or conduct business outside the U.S., they more frequently experience challenges arising from the absence of appropriate intermediary liability laws in other countries’ copyright regimes. IA’s concerns in this regard center on two areas of

¹⁹ David Kravets, *Happy birthday YouTube! The Digital Millennium Copyright Act sends its love*, Ars Technica (April 22, 2015).

²⁰ How Stuff Works, *How Internet Search Engines Work*, available at <http://computer.howstuffworks.com/internet/basics/search-engine1.htm> (last visited Nov. 9, 2018).



fundamental importance to the internet industry as well as to the U.S. economy more generally: first, a significant number of countries have recently adopted or are currently considering copyright amendments that would undermine critically important intermediary liability protections; and second, the lack of a fair use exception in many jurisdictions – combined with the overzealous assertion of rights by some – has emerged as a significant potential impediment to advances in the field of artificial intelligence (AI), which many believe will be the most important technology of this century.

A. The U.S. should oppose erosion of intermediary liability protections

A number of jurisdictions have adopted or are currently considering changes to IP laws that undermine the existing safe harbor framework and erode intermediary liability protections for internet businesses. Examples of this include efforts to explicitly narrow the scope or availability of safe harbors, the imposition of new legal obligations on internet companies to filter content and actively monitor user activities for potential infringement, and the adoption “ancillary rights” intended to bolster rightsholders’ bargaining position by imposing additional liability and restrictions on internet companies. Other countries have failed even to adopt intermediary liability protections, in some cases despite clear trade obligations to do so.

In the past, those who sought repeal of intermediary liability protections claimed that doing so was necessary to deter piracy. With global piracy rates falling (and revenues from lawful online distribution of content rapidly increasing), they can no longer credibly claim that restrictions on intermediary liability make it impossible to effectively address internet piracy. This has forced advocates to come up with a new argument to justify their goal. In recent years, opponents have switched to arguing that imposing additional liability on intermediaries is necessary to address a purported “value gap” – *i.e.*, the notion that rightsholders do not receive a fair portion of the economic value generated by the use of copyrighted content online. Particularly in their advocacy abroad, proponents of this view frequently employ protectionist rhetoric, suggesting that imposing new burdens, costs, and restrictions on intermediaries is an appropriate response to U.S. “technological imperialism” and that disadvantaging U.S. internet companies will weaken their bargaining position and enable local industries and rightsholders to negotiate more favorable terms and extract more value from them.

As various commentators and scholars have noted, these arguments are neither grounded in logic nor supported by economic analysis or empirical data.²¹ In the words of one academic, the “idea of a ‘value gap’ echoes a discourse almost exclusively fabricated by the music and entertainment industry” and is merely “a marketing-driven, industry-led narrative” that is both “counter-intuitive and disconnected from empirical evidence.”²²

In reality, both experience and the available evidence suggest that proposed reforms such as those summarized above are not only ineffective in improving the financial lot of rightsholders, but often have the opposite effect, harming the very stakeholders they were supposed to benefit. For example, it is well documented that the adoption of ancillary rights (commonly referred to as a “snippet tax”) has “proved to be a complete disaster in both Germany and Spain, failing to put a penny into the pockets of those press publishers [who advocated the reform] – and in the Spanish case, causing losses of millions of euros.”²³ Rather than enabling publishers to extract additional revenue from internet services, adoption of ancillary rights resulted in news aggregation services being partially or entirely discontinued in both countries. Several, including Google News in Spain, simply shut down. The result was a sharp drop in both revenue and internet traffic for publishers, diminished access to news information for consumers, and decreased diversity, choice, and competition among online services.

²¹ See, e.g., Giancarlo F. Froisio, *Reforming Intermediary Liability In The Platform Economy: A European Digital Single Market Strategy*, Nw. U. L. Rev. Colloquy (2017), https://scholarlycommons.law.northwestern.edu/nulr_online/251.

²² *Id.*

²³ David Meyer, *EU Lawmakers Are Still Considering This Failed Copyright Idea*, Fortune (Mar. 24, 2016), available at <http://fortune.com/2016/03/24/eu-ancillary-copyright/>.



Proposals to narrow or eliminate intermediary safe harbors are similarly misguided and counterproductive. A recent study conducted by the economic consulting company NERA concluded that weakening intermediary liability protections would significantly reduce economic activity in the internet sector, costing the U.S. economy 4.25 million jobs and nearly half a trillion dollars over the subsequent decade.²⁴ The study also indicates that the negative impact extends far beyond established internet companies, causing significant harm to internet startups – which would face higher market entry costs and increased difficulty securing funding – and to consumers – who would experience higher costs, fewer choices, and decreased quality of services.

Unfortunately, efforts to undermine intermediary liability protections are becoming widespread, particularly in Europe. Notable examples include the controversial EU copyright proposal that would impose filtering obligations and a “link tax” on internet services²⁵ and proposals by several European countries that would make services directly liable for content uploaded by users. This trend is also evident in recent decisions from courts in several European countries, which have inappropriately denied online service providers the benefit of intermediary liability protections in multiple cases and have imposed infringement liability for merely linking to copyrighted material posted on a third-party website.²⁶

As discussed previously, the commercial internet could not survive without intermediary liability protections. . As such, copyright proposals of the type described above (some of which have already been adopted) are deeply concerning to IA and its members. The fact that foreign policymakers’ support for them appears to be based, at least in part, on protectionist motivations and a desire to weaken the competitiveness of U.S. internet companies adds to this concern.

For a decade and a half, the U.S. has been a strong proponent internationally of both strong copyright laws and effective intermediary liability protections, advocating the adoption of both by other countries and incorporating key provisions of U.S. law – such as the DMCA safe harbor framework – into its trade agreements. IA urges the office of the IPEC in its policy coordination role, as well the other relevant departments and agencies within the U.S. government, to strengthen this policy of promoting intermediary liability protections—by encouraging countries that have not yet adopted intermediary liability protections to do so and by forcefully objecting to efforts by major trading partners to disadvantage U.S. companies by undermining existing protections. Failure to promote and defend such laws threatens the continued success of the U.S. internet industry and impairs U.S. companies’ global competitiveness.

B. The U.S. should ensure copyright laws do not impede artificial intelligence innovation

Artificial intelligence (AI) has been described by technology, business, and political leaders as the most important technological development of our time. Unfortunately, copyright has emerged as a significant potential impediment to AI advances.

In machine learning – the most prominent branch of AI – a computer is “trained” using massive amounts of data. Achieving accurate results can require starting with a data set of hundreds of millions of examples. Often, these examples will be in the form of photos, videos, audio recordings, or documents that are subject to copyright protection. This is not a problem with respect to the computer

²⁴ NERA Economic Consulting, *Economic Value of Internet Intermediaries and the Role of Liability Protections* (June 5, 2017) (available at <https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf>).

²⁵ James Vincent, *EU approves controversial Copyright Directive, including internet ‘link tax’ and ‘upload filter’*, *The Verge* (Sept 12, 2018), <https://www.theverge.com/2018/9/12/17849868/eu-internet-copyright-reform-article-11-13-approved>.

²⁶ *C--GS Media BV v Sanoma Media Netherlands BV et al.*, ECLI:EU:C:2016:644, European Court of Justice (8 September 2016).



analysis itself because, just as it is not infringement for a human to read a document or look at a picture, it is not infringement for a computer to analyze a copyrighted work. However, compiling data sets and training an AI with them often requires making one or more incidental copies of the data (and may also require some manipulation or alteration) which can subject AI researchers to copyright infringement liability in many jurisdictions.

Just as copyright law does not allow owners to sue a person for reading a book in a library or for thinking about the plot of a movie after seeing it, it should not enable owners to bring suit based on a computer having analyzed and extracted underlying data or concepts from that same book or movie. So long as access to copyrighted works has been lawfully obtained, copyright law should permit them to be used freely to train an AI so long as this does not displace sales in their traditional markets.

Under U.S. law, the fair use doctrine will generally protect such activities, allowing researchers to continue their work in AI without undue fear of liability. However, U.S. companies that conduct part of their research and development work abroad or provide AI-related products or services internationally face potential litigation and liability in countries that lack analogous fair use protections.

A number of major jurisdictions – including Japan and the European Union – have already recognized this problem and have adopted copyright exceptions to protect the use of data in AI. Several more – such as Singapore and Australia – are currently considering such provisions.

In light of the enormous investments U.S. companies are making in this field and its importance to global competitiveness and continued technological and economic dominance, the U.S. should take a strong leadership role in promoting policies that enable the advancement of artificial intelligence. To that end, Internet Association urges the government to advocate the adoption of copyright laws that protect AI research – and the leading U.S. institutions and companies conducting that research – from undue threats of infringement litigation for the use of lawfully obtained copyrighted material.

IV. Conclusion

Internet Association sincerely appreciates the opportunity to provide comments and suggestions on priorities for the IPEC Joint Strategic Plan. We commend the Administration for its goal of ensuring a level playing field for U.S. companies competing in foreign markets and respectfully urge the office of the IPEC and other relevant U.S. departments and agencies to employ the government's many legal, diplomatic, and trade tools in addressing the challenges posed by inflexible and discriminatory foreign copyright laws.