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## COMMENTS ON VOLUNTARY BEST PRACTICES STUDY

**Docket number PTO-2013-0036**

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The Center for Democracy & Technology (CDT) submits these comments to the U.S. Patent and Trademark Office in response to the June 20, 2013 request for public comments on the Voluntary Best Practices Study (FR Doc. No. 2013-14702, extended by FR Doc. No. 2013-17166). CDT is a non-profit, public interest organization dedicated to keeping the Internet innovative, open, and free. CDT works with a broad range of stakeholders to ensure that Internet policy continues to develop in ways that reflect core civil liberties values and promote innovation. On copyright matters, CDT seeks balanced policies that respect the rights of content creators without curtailing the Internet's tremendous potential for fostering free expression and innovation.

We offer the following observations and recommendations in support of a full and balanced assessment of the effectiveness, accuracy, and fairness of voluntary, cooperative initiatives to reduce infringement.

### **1. Limited transparency poses serious challenges for empirical assessment.**

The transparency of voluntary initiatives varies, but it is generally subject to significant limits. For example, as far as CDT has been able to determine, the cooperative initiative of credit card and payment systems has no public website and the best practices that were apparently agreed to in 2011 have not been publicly disclosed. In terms of public information, there is a brief description of the voluntary agreement in the 2011 annual report of the U.S. Intellectual Property Enforcement Coordinator (IPEC), and individual company websites provide some information about their practices (see, for example, <http://corporate.visa.com/about-visa/security-and-trust/intellectual-property-rights.shtml>). CDT is not aware of any public information regarding how the initiative is operating in practice.

At the other end of the spectrum, the Copyright Alert System (CAS) launched by major Internet Service Providers and copyright owners features a public-facing website that provides information about the initiative and even includes the full text of the Memorandum of Understanding (MOU) establishing it. Even in this case, however, information regarding the actual operations of the system, including the data reported to and compiled by the Center for Copyright Information (CCI) under section 9 of the MOU, is likely to remain non-public. Section 9.C of the MOU makes this clear: "CCI shall keep confidential all records

and data relating to the Notice Process and Copyright Alert Programs. None of the records and data relating to the Notice Process and Copyright Alert Programs shall be made publicly available by CCI without prior approval by a majority of the Executive Committee.”

Limited transparency makes it very difficult to conduct outside oversight or scrutiny of the programs in question – or of the data participants may provide as evidence of effectiveness. Participants may choose to report some results, but there is no ability for independent third parties to offer alternative interpretations or evaluations. Moreover, there is a significant risk that participants with access to operational information may “cherry pick” data or statistics to suit their own purposes. Given the “black box” nature of the data, it is not clear how claims regarding the operation of the initiatives may be independently assessed.

At a minimum, PTO should require that where quantitative information is provided by initiative participants, the sources and methods used to collect and compile the data should be open enough to permit independent review and analysis. This is particularly true since, in many cases, infringement-related statistics may be highly sensitive to assumptions. As the GAO noted in 2010, assumptions about whether and how much infringement substitutes for legal sales can greatly influence estimates of the economic costs of piracy. The baselines chosen for comparisons could similarly influence estimates of infringement trends. Openness about methods and assumptions should be essential for any quantitative information to be considered.

## **2. Assessments should include careful inquiry into the existence and effectiveness of procedural safeguards, transparency, and the actual incidence of errors, collateral damage, or imposition of disproportionate sanctions.**

Assessments should not focus exclusively on the impact voluntary initiatives may have on infringement. As the Administration observed in the Federal Register notice soliciting these comments, the goal of voluntary initiatives should not be to reduce online infringement in any manner possible, but rather to find approaches that are “consistent with due process, free speech, privacy of users and competition.” The notice likewise calls for initiatives to be as “transparent as possible.” Any full analysis of how voluntary initiatives are working in practice, therefore, needs to examine how the systems are performing with respect to these other considerations. In other words, assessments need to ask questions about how well the initiatives avoid unfairness, mistakes, and unintended impairment of interests such as free expression, privacy, and competition.

Limited transparency, as noted above, complicates this inquiry. Participants are unlikely to highlight possible risks or downsides of their voluntary initiatives by affirmatively releasing information about instances in which the process may have been misapplied or harmed innocent parties. PTO will likely need to seek specific information from initiative participants.

In terms of quantitative information, PTO should ask for the following types of data about each initiative's operation (though some adaptation might be needed to reflect differences in the different initiatives):

- The number of notices/complaints received from rights holders alleging infringement;
- The percentage(s) of those notices/complaints that led to specific action(s) against alleged infringers, and the percentage of notices/complaints that did not;
- The number of disputes regarding both notices and actions; and
- Data about how those disputes were resolved, and at what stage.

Non-quantitative information would be important to collect as well. PTO should also seek information about the following:

- What procedural safeguards are in place to ensure due process, prevent mistakes or abuse, and protect values such as free expression, privacy, and innovation? In particular, what are the opportunities for investigation or challenges to allegations of infringement? Is the process able to take account of factors such as potential hardship, unintentional violations, or impact on innocent third parties? What is the experience with these procedural safeguards in practice?
- To what extent does the process target only straightforward cases of infringement, where the unlawful infringement is flagrant and clear? There is a strong argument that voluntary programs are not appropriate venues for pursuing cases that present legally complex or unsettled questions. How does each initiative ensure that it will not wade into borderline or disputable cases?
- Are the results or decisions of the process transparent? In particular, is there adequate explanation to affected parties, so that they can challenge or complain about results or decisions they believe are unfair?
- Does the process include mechanisms to track mistakes and troubleshoot? That is, if and when the process is misapplied, is there a way for the system to learn from the mistakes and adjust? For example, is there a process for flagging parties who carelessly or abusively submit unwarranted complaints, to bar them from further participating in the program? Are there other examples of the process being modified or fine-tuned in response to problems that crop up?
- Is there any anecdotal evidence of mistakes, abuse, or collateral damage? Are there any known examples of the imposition of disproportionate sanctions – that is, relatively minor violations resulting in overly harsh penalties? Have there been any specific incidents or complaints along any of these lines, expressed either publicly or privately to those implementing the voluntary program?
- To what extent were representatives of consumer and innovation interests involved in the development of the initiative, or in its ongoing operation or oversight? (Recall that the 2011 OECD Communique on Principles for Internet

Policy-Making concluded that “multi-stakeholder processes should involve the participation of all interested stakeholders.”)

**3. Assessments should not place too much weight on statistics regarding the persistence of piracy. Other metrics, such as those measuring the reach or success of educational messages delivered to consumers, may better reflect the impact of some initiatives.**

Statistics indicating substantial ongoing infringement should not be taken as evidence that voluntary initiatives are unsuccessful, for several reasons.

First, voluntary initiatives are just one of many factors that may influence the level of infringement activity. The online content marketplace is in a high state of flux, with competition and innovation disrupting traditional business models and distribution channels. Infringement levels may well be influenced more by gaps or mismatches between consumer demand and current supply (i.e., lawful offerings) than by anything being done with respect to enforcement. For example, recent reports have suggested that when CBS/Showtime curtailed online access to its programming in connection with its retransmission consent dispute with Time Warner Cable, infringement rates for certain popular shows jumped in the affected markets. Overall infringement levels offer no easy way to isolate the impact of voluntary enforcement initiatives from that of other factors.

Second, neither voluntary initiatives nor any other plausible enforcement techniques have a realistic prospect of substantially eliminating infringement. Modern information technology is here to stay and will continue to give users powerful tools for copying and disseminating data. Inevitably, some people will choose to misuse those tools to engage in infringement. It will therefore *a/ways* be possible for parties arguing for ever-stronger enforcement tools to point to statistics demonstrating that infringement persists. But the goal of voluntary initiatives, like enforcement in general, should be realistic: not eliminating piracy, but rather encouraging the bulk of the population to decrease participation in infringement compared to participation in lawful markets. Infringement may persist and may remain stubbornly substantial (especially in the eyes of rightsholders), but if more and more of the public is turning to legal distribution channels, real progress can be achieved and creators can thrive.

Third, many voluntary initiatives carry a significant educational component. That is, they are not (or not exclusively) aimed at preventing immediate infringements from occurring, but rather at influencing user perceptions and understandings of infringing websites or behaviors. The impact of educational efforts may well be gradual; people may not change behavior overnight. Over time, however, efforts to stigmatize or otherwise communicate the illicit nature of some websites or distribution channels could well bear fruit. In the long run, success in the fight against infringement is likely to depend more upon public attitudes and behavior choices than enforcement policies.

If part of the goal of voluntary initiatives is to influence public attitudes and perceptions, then assessments of such programs should consider metrics more directly related to the educational purpose. For consumer-facing initiatives, relevant metrics might include the number of users served educational messages. Numbers on recidivism (e.g., how often such messages are sent multiple times to the same party due to unchanged behavior)

would be enlightening as well, if available. For initiatives with less direct interface with consumers, relevant metrics might include the number of piracy websites stripped of the mainstream advertising or payment options that consumers would likely perceive as indicators of legitimacy.

In short, a full assessment should consider a variety of data regarding the reach and impact of voluntary initiatives, including their educational impact.

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CDT appreciates this opportunity to comment and would be happy to discuss these issues further as the effort to study these voluntary programs proceeds.

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