

DATE: July 2, 2010

TO: Copyright Alliance members

FROM: Patrick Ross

RE: Summary of July 1 PTO-NTIA workshop on copyright

This was the second of four public events sponsored by the Commerce Department's Internet Policy Task Force. It was titled *USPTO-NTIA Symposium: Copyright Policy, Creativity & Innovation in the Internet Economy* and ran all day at the Ronald Reagan Center. It was webcast, and an archive of that webcast will eventually appear here -- <http://www.ntia.doc.gov/internetpolicytaskforce/copyright/webcast.html>

The Task Force has already held one on online privacy and has issued a Notice of Inquiry on that topic. It will later be hosting events on cybersecurity and Internet freedom.

This event followed months of "listening sessions" involving "stakeholders" in the copyright debate, including copyright owners (some CA members) and others viewed by the Commerce Department as stakeholders.

Given that the format of the day was stand-alone speeches by government officials (with no Q&A) and panels consisting mostly of presentations without much give-and-take, this summary will largely consist of highlighting key points of each speaker, following the order of the agenda. I start with the key takeaway below:

Takeaway

Several key Administration members spoke, including Commerce Secretary Locke, U.S. IPEC Victoria Espinel, NTIA Dir. Larry Strickling, PTO Dir. David Kappos, and Commerce Gen. Counsel Cameron Kerry. Each emphasized the critical importance of enforcement of copyright, including online, and then pointed out the critical importance of maintaining "balance" in copyright enforcement, respecting freedom of expression and free flows of information. Several officials referred to an **upcoming Notice of Inquiry on copyright** that will be issued this month. No indication was given on what specific questions would be asked, or what the deadlines for response would be. A summary paper from the Commerce Department would follow that Nol, possibly with legislative or other recommendations.

Opening Remarks

Lawrence E. Strickling, Asst. Secy. of Commerce for Communications and Information (NTIA Director) -- previously chief regulatory and compliance officer with Broadwing Communications, worked for other telecom companies including VP for Ameritech

Aiming to protect "free and open Internet." Cited Biden saying creativity is greatest export. Streaming/locker sites have among highest traffic, show camcorderd movies, this type of piracy is "theft, pure and simple," again citing Biden. "But we must find a balance for the free flow of information." Cites Strategic Plan, Administration is committed to enforcement, must be flexible to recognize changes online. Says only 1% of US online when DMCA was written. Says safe harbor was critical to Internet growth, but the "digital piracy of copyrighted works remains a major problem." Administration will encourage collaborative efforts among stakeholders.

Panel One -- The Levels & Impact of Domestic Online Copyright Infringement

Panelists Keith Epstein, AT&T; Joshua Friedlander, RIAA; Peter Menell, UC Berkeley School of Law; Piotr Stryszowski, OECD

Moderator USPTO Administrator for External Affairs Arti Rai -- former Duke law professor, chair of IP Committee of Administrative Law Section of ABA, clerked for Marilyn Patel of US Dist. Court for Northern District of CA, was with US DoJ Civil Division, was on advisory board for Public Knowledge

Rai says she is obsessed with data, wants that from panel, admits bias to PhD panelists Menell and Stryszowski

Menell: "The Digital Millennium Copyright Act is referring to the last millennium." Fair amount of empirical data that copyright industries significantly affected by piracy. He researches three "buckets" - 1) Professional creators and distribution companies. 2) Consumers; they should want constant flow of improved content, so copyright is important, they can lose sight of longer-term benefits. 3) Online service providers and hardware manufacturers; less sensitive to rightsholders, feel "in the crosshairs" on indirect liability. For content industries, piracy means lost sales, increased enforcement costs, reduction in quality of work (product placement revenue, etc.). Consumers benefit from free but we want improved works, and piracy brings risks of malware, etc. Online services fear chilling of innovation, but that "isn't always a bad thing"; cites restrictions on automobile technology for safety, says "when you chill certain types of innovations you encourage other innovations," new solutions to problems.

Friedlander: Cited NPD data on piracy, noting highest rates among core music fans (youth. Slight decrease in P2P, spike in cyberlocker pirate sites. Illegal downloads 84%, legal 16% in US, higher outside US. Decrease in revenue for musicians tracking decrease in overall industry revenues.

Epstein: With DMCA Congress didn't intend ISP to determine legal vs. illegal. At time, tech was simpler, DSL in testing, broadband "just a flicker." AT&T passes on notices from copyright owners to end users, and assists if owner wishes to file suit. A lot of data traveling, 9.7 petabytes (9,700 terabytes) every day, more in private lines. Filesharing volume remains consistent but decreasing as percentage of traffic, due to rapid rise in streaming. Some of that locker sites, some legal. Suspects some infringement moving "underground," not trackable by ISP. *Epstein later said as to ISPs blocking sites, they don't want to decide which ones, but perhaps DoJ could identify them for ISPs.*

Stryszowski: Measurement data hard to find for online infringement. Internet has no borders, many countries collect no data, thus see no quantifiable harm from piracy, thus don't collect data. Sees sentiment that "sharing is caring, and caring is good" in France. Problem of measuring "yesterday's market." Challenge with methodology of online infringement, such as percentage of lost sales.

Rai cited argument she hears that maybe we should just accept that there is little data when making policy (she suggests that's not her take). Data is useful, Menell says, but is skeptical economists can analyze, given that with copyrighted works there is also the issue of ensuring "quality" of work, not just quantity. As for DMCA interpretation, he wonders if it's wise to "grandparent in freedom not to inspect packets." Stryszowski says global value chains rely on "critical" IP, so measurement is important, but traditional supply/demand models don't work. Friedlander said lack of solid data shouldn't be excuse "to ignore what's obvious in front of us." Rai said we need to sort good data from bad.

Keynote -- Internet Policy Task Force

Commerce Secy Gary Locke -- two-term governor of Washington state, oversaw China practice for Davis Wright Tremaine

Cites rise in online piracy of music, books, game subscriptions. Facing "epidemic" of piracy, also cites Biden's use of word "theft." Challenge of keeping up with pirates, now using cyberlockers and streaming; traditional models of enforcement "don't work." Mindful of benefits of robust flow of information, must find "right balance in policy recommendations." DMCA was good balance, safe harbor key in Internet growth. Important to look to see if policies are right today, look at role of ISPs and how DMCA is working now.

Panel Two -- Emerging Infringement Areas

Panelists Ken Doroshov, ESA; Scott Martin, Paramount Pictures; Harlan Yu, Princeton U computer science PhD candidate, with Freedom to Tinker (Ed Felten)

Moderator Deputy Asst Secy of Commerce for Communications and Information (NTIA) Anna Gomez -- former VP/Govt Affairs for Sprint Nextel, Deputy Chief of International Bureau and Chief of Network Services Div of Common Carrier Bureau for FCC, was senior legal advisor to FCC Chmn Kennard; staff counsel for US Senate Communications Subcommittee (Commerce); Deputy CoS of National Economic Council for Clinton

Gomez: Copyrighted works driver of technology and broadband. Asks Martin to elaborate on pirate streaming and cyberlocker sites.

Martin: Incredible growth, more than doubling in a year, 10 of 20 top sites didn't exist 12 months ago, original 10 still strong, new sites growing. Top four sites 55 billion page views annually -- rapidshare, hot file, megavideo, megaupload. Not just movies but TV shows, books, games, software. Paid membership required for optimal performance. Also ad-supported leech sites, ICE took some down Wednesday, including ZML.com and its 21 million monthly page views. Issue with payment processors, advertisers. Now on "living room wall" with ease of Internet video on TV sets. In 5 years 500 million will watch Internet on TV. Two graduated response models, just sending notices or sending notices with consequences. Former not effective.

Yu: Choice of going after users or hosting sites.

Martin: Site blocking is an in between solution, can block at ISP level.

Doroshov: On console side, threat is mod chips and copying devices that allow unauthorized games to play. For downloads, P2P still predominant -- BitTorrent, eDonkey -- streaming not yet a problem, but private hack servers are simulating online game experiences. Prosecuting an enormous challenge. Sites often lack policies to deal with repeat infringers (taken down, goes right back up).

Yu: Cites worst case scenario: as pirate P2P, streaming and cyberlocker sites shut down, infringers create anonymous proxy servers with strong VPN and encryption, no log storage, pay to get good bandwidth, and file-share undetected.

Martin: Some infringers will go underground, but not in numbers like we're seeing on streaming sites. These are fast, spare hard drives, viewed as safe, McAfee says streaming as dangerous as P2P.

Yu: Digital natives are learning these tools (proxy servers, encryption, etc.). Problem will be much tougher.

Doroshov: All of that may happen, but problem is significant now. Possible future futility not a persuasive argument against enforcement now.

Yu: Agreed. Many won't be sophisticated enough to do his scenario.

Martin: Notes from Google it takes four clicks to streaming *Twilight*. Eliminating those sites eliminates a "huge" percentage of piracy.

Gomez: Asks Yu how does enforcement affect "other goals" of the Internet.

Yu: Fears heavy-handed enforcement will endanger freedom of anonymous speech.

Martin: Piracy threatens new business models with differentiated pricing. From Dulles he could buy a car, rent a car, use a limo service or take a cab. With no price differentiation he's forced to buy a car.

Doroshov: His industries innovating, microtransactions, etc., but piracy impacts that.

(q from audience on role of ICANN)

Yu: Could see some role, taking down domains and rogue registrations.

(q on judicial training needed for judges on issues such as injunctive relief)

Ken: merit in that

Keynote -- Protecting Online Copyrighted Works

Undersecretary of Commerce for IP (PTO Director) David Kappos -- former VP for IP with IBM, member of board of directors of AIPLA

Critical to protect content online, while striking "delicate balance." Twenty stakeholder meetings held. Sec. 512 of DMCA (safe harbor) is a balance. Asks how prescient Congress was with DMCA, and how effective safe harbors are? Then says Notice of Inquiry coming this month. That will lead to a Commerce Department digital copyright report. Good that legal sales are increasing, because copyright industries substantially contribute to the economy. Online services, in turn, provide access for consumers.

Panel Three -- Emerging Services and Business Models for Legitimate Distribution of Copyrighted Works

Panelists Thomas Hesse, Sony Music; Brian Napack, MacMillan; Eugene Mopsik, ASMP; Lance Kavanaugh, YouTube; Jonathan Band, Policybandwidth.

Moderator Mark Berejka, Senior Policy Advisor to Secretary Locke

Hesse: Cites digital sales statistics, note 63% of acquired music in US is pirated. Growth in mobile music, but apps can be on Android phones to pirate. Heavy burden on copyright owners to police.

Napack: Traditional books and textbooks increasingly legal in e-book format, on multiple devices. MacMillan in one year has gone from 1% digital sales to 12%. Journals also going online. Kindle and iPad are drivers. But digital piracy is a real and present threat. With PDF readers, Kindles and iPads are "pirate-ready." Every NYT bestseller is on rapidshare for free, found via Google search. Most writers struggle to make a living, a 10% swing in revenues for them can mean difference between writing or not writing. This is critical for creativity of the nation. Need support from government; IPEC plan encouraging. Need more effort on state, federal, local and international level. Ecosystem of authors, editors, agents, publishers and booksellers needs to be preserved to promote innovation and creativity.

Mopsik: Echo Napack on impact on authors, true for photographers as well. Most are sole practitioners. Image takers yes, but increasingly videographers as well. Need a licensing model for digital; that right usually thrown into traditional contracts for no compensation. Online identifiers are stripped. Photographers must be able to license after use, that is where income comes from. Fighting "rising tide" of information-wants-to-be-free ethos; people don't recognize images online as copyrighted. Cites PLUS Coalition making PicScout-searchable registry, but needs buy-in of other parties. Need copyright reform, such as small claims copyright court, clarity in registration (what is published or unpublished? maybe a bulk rate or annual subscription for registration?). Fair use should only be noncommercial. Protect photographers, "they create the visual heritage of our country."

Kavanaugh: Speaking as technologist, not lawyer. "From the beginning, YouTube has respected copyright." (Yes, he said that.) They put in 10 minute limit. Now they have Content ID system, can block, monetize or track. Gives owner choice related to their content uploaded by others. (very short remarks)

Band: Representing libraries, Library Copyright Alliance. Libraries are buying books in e-book form, lending them according to licensing rules, through services such as Overdrive. Interest in libraries on ability to produce derivative works, in open access journals. Preservation is difficult when libraries don't own the copies; would like 1201 ruling from US Copyright Office on this issue. Wants to know what libraries can do digitally with "old" books in stacks.

Berejka: Ran out of time, hopes to hear more on issues raised in NOI comments, notes interest in (1) need for standards, (2) more efficient copyright registration, (3) microtransactions. Wants to know "what is role of government to nudge along" private deals.

Keynote

U.S. Intellectual Property Enforcement Coordinator Victoria Espinel

Cites many meetings leading up to strategic plan. Committed to working together with Commerce Dept. and other agencies. Target markets that traffic in infringement. Looking to see if law is hindering action against foreign-based web sites. Praised "Operation in our Sites" with ICE, others Wednesday that involved nearly 100 agents and involved seizing domain names. Quotes Obama on importance of innovation and creativity, Biden calling creative works our greatest export.

Panel Four -- Intermediary Responsibilities and Current Roles

Leslie Harris, Center for Democracy and Technology; Sarah Deutsch, Verizon; Thomas Rubin, Microsoft; David Green, NBCU

Moderator Daniel Weitzner, NTIA Assoc. Administrator for Policy -- former policy director for World Wide Web consortium, co-founder and deputy director of Center for Democracy and Technology, former deputy policy director of Electronic Frontier Foundation (EFF)

Harris: Goes back prior to DMCA to Communications Decency Act (Sec. 230) in praising immunity and safe harbor contribution to Internet growth. Hard to argue that should be "unraveled," we wouldn't have web 2.0. "In the main, the bargain has worked." Not defensible to change immunity for copyright when there are other illegal activities online.

Deutch: Cited personal experience in drafting safe harbor in DMCA. Now VZ partnering with content owners, has "a share of responsibility" in copyright protection. DMCA strikes right balance, but VZ willing to do more than required. Believes in educating consumers, they forward notices from copyright owners. Need to enforce copyright wisely and carefully.

Rubin: Describes formation of user-generated-content (UGC) guidelines including MS, other UGC sites and copyright owners in spring of 2007, multi-month process of compromise. Infringement slows growth of legitimate services.

Green: Panel focusing on intermediaries, not all intermediaries fall under DMCA. Espinel said important to have government encourage private solutions, means government will be watching. Believes in Internet that is "less polluted," praises ICE action, signals that "not all sites are created equal." Loves folks being rerouted to DHS. UGC principles a "terrific example of shared interest." Cites recent good experience with YouTube -- user posts video, YouTube has data and blocks NBCU with notice to user, user can click to protest, NBCU can decide whether it believes it should be down, YouTube makes final decision, NBCU can go to court. NBCU has gone to court exactly "nonce." Very short clips or mashups allowed, would welcome day only problem was mashups. YouTube traffic spiked with SNL Lazy Sunday video with 7 m YouTube views (unauthorized upload), 2008 Tina Fey impersonation of Sarah Palin not on YouTube, 10 m plus hits on NBC.com and Hulu, with a "little bit of ads"

Weitzner: How about motivation and incentives

Harris: Voluntary initiatives are the answer. Avoid slow erosion of law. Generally liked what she heard, but not everyone at the table (of discussion on principles, etc)

Deutsch: says her ISPs licensing deals leading to notice forwarding

Rubin: broader discussion possible, but danger of never reaching consensus. Notes UGC principles required content owners to allow fair use, also principles left open to revision over time

Green: Voluntary doesn't make sense. Sites can be blocked; notes AT&T's Epstein in first panel suggested DoJ could tell AT&T what sites to block. You might need legislation; universities seeing rules put in place today (July 1) regarding broadband networks and file sharing as a result of Higher Education Act, universities resisted action before that

Harris: Opposes mandatory filtering for IP, deluding ourselves if thinking that is option. We promote Internet freedom globally, looks bad when telling sites here to shut down. Glad there is no three-strikes provision proposed in U.S. Believes copyright owners are acting against their own interest if they seek mandates on enforcement.

Deutsch: Would need to be change in law for ISPs to block access to sites. ISP can't do that legally now.

Green: Government took down sites yesterday. Doing so gives no aid and comfort to China. Done through court order on domain name server.

Panel Five -- Large Scale Protection Efforts: Infringement Detection, Fair Use, False Positives, and Recurring Infringers

Panelists Susan Cleary, Independent Film & Television Alliance; Maryanne Grant, MPAA; Corynne McSherry, Electronic Frontier Foundation

Moderator Justin Hughes, senior advisor to Under Secretary of Commerce for IP -- formerly Cardozo Law School professor of IP, worked during Clinton for PTO on Internet-related IP, testified before Congress in 2002 that a distinction needed to be made between commercial "piracy" and in-home copying and sharing http://judiciary.senate.gov/hearings/testimony.cfm?id=197&wit_id=341

Hughes: No one in 1998 could have anticipated scale of infringement today, but 512(i) of DMCA allows for termination of subscribers

McSherry: We need intermediaries for free speech and fair use. Slide show of UGC video taken down that she said should not have been, a video of Uri Geller, a video featuring NBC News content, a fake Goldman Sachs press release, a Billy Idol video with dubbed vocals. The 10-14 days before videos sometimes reposted is an eon in Internet age. Challenging takedown can lead to loss of anonymity. Had slide that said this: "Can we make the Internet *safer* for fair users? Yes." (Italics are my own.) Encourages "dolphin hotline" such as Viacom has, where within two days company will look to see if video should go back up.

Grant: Many forms of online theft. MPAA seeks to provide education. Legislation is useful, cites Higher Education Act, but no substitute for talking directly to consumer. Lots of assessments of P2P through data mining, analyzing kind of content, regions, times of day, ISPs, etc. Lots of evidence that just notices without graduated response threat doesn't change behavior. Technology now can achieve 100% accuracy on finding content through filtering of ISPs; full movie used as comparison, verified manually, compared to database, "absolute certainty." False positives virtually zero. Graduated response gives opportunities for users to ask questions, can influence behavior.

Cleary: Independent films' financing harmed by piracy. Distribution agreements reached in markets, those taken to bank for loans. Inability to reach market deals because of competition with piracy prevents loan issuances. Challenges McSherry that DMCA notices easier in email age, says email cumbersome if small shop sending 100,000. Raises concern with statement by VZ's Deutsch on previous panel that they do more for those content owners they partner with, her members don't have opportunities to partner with ISPs.

McSherry: Voluntary solutions are the answer; users should be at table.

(Hughes asks if cost of tracking/notices under DMCA is going down for rightsholders)

Grant: Programs are expensive

Cleary: Costs down some

Grant: Standards help get costs down

(Q about whether false positives going down)

McSherry: Don't know; filtering doesn't recognize fair use.

Keynote -- Toward a Comprehensive Internet Copyright Policy

Cameron Kerry, General Counsel, Commerce Dept. -- former Boston communications lawyer, clerk for Elbert Tuttle of US Appeals Fifth Circuit, has taught adjunct at Suffolk Law School, advisor to 2004 Democratic presidential campaign

Copyright important to agency's mission, quotes Lincoln on patents, says same is true for copyright. Administration supports performance rights for musicians on terrestrial radio. Important to have new business models for content delivery. Goal of not stifling innovation and free flow of information. Advocates of fair use shouldn't fear when government speaks of enforcement of intellectual property rights. Notes counterfeit movies, fake pharmaceuticals, piracy is detriment to exports and creations of our artists. Find the right balance. Long passage about struggle of journalism and newspapers (first mention of the topic that day) and role press plays in democracy. Cites Pew study that most news shared on social networks from mainstream media. Ad revenue down for newspapers, solution not obvious, maybe some role for government policymakers to sustain role of journalism; this is a "fundamental reason" to hold these forums. Look for NoI, key is to not do more harm than good. Need to strike balance.