



April 7, 2019

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, D.C. 20580

RE: *FTC Hearing #12: The FTC's Approach to Consumer Privacy*

Dear Chairman Simons and Commissioners Phillips, Chopra, Slaughter, and Wilson:

We respectfully submit these comments in regards to *FTC Hearing #12: The FTC's Approach to Consumer Privacy* – in advance of the hearings taking place on April 9 and 10, 2019.

Effective privacy protections are extremely important to all Americans, including those in the creative communities. Well-balanced legislation and/or rulemaking should be the goal. Those who profit from breaches of consumer privacy and those who profit from online theft of creative works should not be shielded from meaningful accountability by laws designed to fulfill our public commitment to protecting consumer interests.

Copyright Alliance, CreativeFuture, IFTA, Copyright, and Creativity

The Copyright Alliance is a nonprofit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators.

CreativeFuture is a coalition of American creatives that includes over 540 organizations and companies and over 220,000 individuals. We make our living creating in film, television, music, book publishing, and photography.

The Independent Film & Television Alliance (IFTA) is the global trade association of the independent motion picture and television programming industry. IFTA represents and provides significant entertainment industry services to more than 140 member companies in 19 countries, consisting of independent production and distribution companies, sales agents, and financial institutions engaged in production finance.

Strong copyright protections give creatives the freedom to pursue their art as a career, not just as a hobby. Strong copyright creates the possibility that the years of uncompensated work often required to create a song, craft a film, or code a program can be rewarded with a meaningful return.

The creative industries are a significant economic driver, contributing more than \$1.3 trillion to GDP and employing 5.7 million Americans. U.S. core copyright industries are a leading exporter, especially when compared to other major U.S. industries – including aerospace, agriculture, and pharmaceuticals. When consumers worldwide enjoy American-made creative products, job creation and economic growth occur here.

But rampant online theft is diminishing the value of this creative economy – and the unintended consequences of certain actions theoretically intended to protect privacy can impede our communities from being able to conduct investigations and enforcement against those who engage in infringement.

We have been active in filing comments on various FTC proceedings to draw the Commission’s attention to the harm caused to our nation’s creative industries by a global digital piracy ecosystem that directly and unfairly competes with our legitimate marketplaces. Ever-evolving technologies facilitate the unauthorized duplication and distribution of our valuable creative works worldwide. As such, our communities must rely on new and innovative enforcement mechanisms to counteract the growth of digital copyright infringement.

Today, we share our brief thoughts about how data privacy should protect consumers while also facilitating innovation and competition. Our hope is that any FTC action on privacy will not inadvertently harm America’s creative communities.

In this digital age, privacy concerns for Americans and, indeed, all people who use the internet are valid. Governments worldwide are addressing these concerns through legislation and enforcement action upon companies that handle their users’ data carelessly.

We believe that privacy-focused legislation, regulation, and enforcement-related actions should strike careful balances, ensuring effective protection of consumer privacy while also ensuring that enforcement of other rights (including copyright) and deterrence of illegal activity are not hindered.

We cite actions taken in response to the European Union’s *General Data Protection Regulation* (GDPR) as a prime example where this balance has not been achieved.

Coming into force in May 2018, the GDPR is landmark consumer privacy regulation that set a privacy benchmark to which some other governments now aspire. Unfortunately, the misapplication of certain aspects of GDPR may lead to the preservation of the privacy of online criminals, in addition to law-abiding consumers, by limiting access to WHOIS registrant data.

The Internet Corporation for Assigned Names and Numbers (ICANN) is a nonprofit multinational organization that oversees the domain name system for the internet. Their WHOIS database provides information regarding domain name registrants and is maintained by domain name registrars and registries pursuant to agreements with ICANN. It allows consumer protection authorities and those in the law enforcement community, as well as a wide range of people and organizations with an interest in combating harmful online activity, such as those in the creative communities, to obtain the necessary information regarding domain name registrants behind such harmful activity in order to pursue meaningful enforcement actions.

Reliable access to robust WHOIS data is a crucial component of intellectual property enforcement and any significant criminal and civil investigations, including the ability of private entities to present robust referrals to law enforcement agencies that are often constrained by limited resources.

WHOIS data has been an invaluable tool for law enforcement and those within the creative communities who work to protect their IP [since the dawn of the modern commercial internet](#). Additionally, consumers and businesses use WHOIS data to ensure the legitimacy of websites. Law enforcement and consumer protection authorities rely on the WHOIS data to [combat illegal conduct online](#) – such as identity theft, fraud, and the illicit sale of opioids.

This misapplication of GDPR principles in European jurisprudence has led [the Department of Justice \(DOJ\) to express concern](#) over its long-term effects. As the DOJ observes, “the GDPR may be interpreted to impede the ability of law

enforcement authorities to obtain data critical for their authorized criminal and civil law enforcement activities.” Misapplication of GDPR to restrict WHOIS data has also [thwarted attempts to investigate and mitigate cyber-attacks](#), according to a joint analysis of more than 300 survey responses by ICANN’s Anti-Phishing and Messaging, Malware, and Mobile Anti-Abuse working groups.

Domain name providers are refusing to continue to make WHOIS data publicly available as a result of a [temporary WHOIS specification](#) that ICANN adopted in May 2018. This [is harming investigations](#) of cyber-attacks. In a [survey of 55 law enforcement agencies worldwide](#) by ICANN’s Public Safety Working Group, and conducted by the FTC’s Counsel for International Consumer Protection, 98 percent of respondents said that the WHOIS system aided their investigative needs before initial implementation of the GDPR. Since GDPR took effect, that number has plummeted to 33 percent.

Because of the global nature of the internet, ICANN’s current interpretation of GDPR and the reaction of domain name registries and registrars is likely to harm creators and consumers outside of Europe. Additionally, their interpretation is threatening the security and stability of the internet, which ICANN, as stated in its bylaws, is responsible for ensuring.

This is extremely troubling for the creative communities – which depend on enforcement efforts by government agencies and their own internal investigations to limit or stop the online digital theft of their goods. A misapplication of GDPR principles in the United States would be painfully detrimental to the 5.7 million Americans who depend on copyright to make a living – as yet another tool that aids in mitigating this theft is stripped away under the guise of privacy protections.

We urge the Federal Trade Commission to ensure that their investigatory authority is used to build a record that addresses the impact of any proposed rules or legislative recommendations. Such impact, as discussed above, may unintentionally benefit criminals by making them more difficult to identify and stop by both law enforcement agencies and affected private sector interests, including the creative communities themselves.

The people who make up the creative communities understand the importance of oversight when it comes to the rampant privacy violations that are so common online – but not at the expense of allowing piracy website operators to continue to violate the law without consequence.

Thank you for your consideration.

Sincerely,



Keith Kupferschmid
Chief Executive Officer
Copyright Alliance



Ruth Vitale
Chief Executive Officer
CreativeFuture



Jean Prewitt
President and Chief Executive Officer
Independent Film & Television Alliance