

21 December 2018

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

RE: *FTC Hearing #4: Competition and Consumer Protection in the 21st Century*

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

We submit these comments in response to the Federal Trade Commission's request for feedback following *FTC Hearing #4: Competition and Consumer Protection in the 21st Century* on October 23rd and 24th. Specifically, we directly address arguments made during the panel discussion on October 23 – entitled *Competition Policy and Copyright Law* moderated by Suzanne Munck and Elizabeth Gillen from the FTC's Office of Policy Planning.

We want to thank Ms. Munck and Ms. Gillen for arranging a thoughtful panel and guiding the conversation on such a complicated subject matter. As you know, the panel was composed of experts with diverse opinions and perspectives on the current state of copyright law and competition policy:

1. Eric Cady, *Independent Film & Television Alliance*
2. Peter Jaszi, *American University, Washington College of Law*
3. Keith Kupferschmid, *Copyright Alliance*
4. Peter Menell, *University of California, Berkeley School of Law*
5. Tyler Ochoa, *Santa Clara University School of Law*
6. Sean O'Connor, *University of Washington School of Law*
7. Meredith Rose, *Public Knowledge*

Following the October 23rd hearing, the FTC requested additional comments on six issues. We offer our thoughts on three of these questions (in bold below), all of which are very important to CreativeFuture and the creative communities:

1. **Is there a role for the government in advancing or supporting innovation?**
2. **What is the importance of intellectual property – all forms – in advancing, protecting, and supporting innovation?** Does it differ because of industry-specific or other market-based factors, or because of the form of intellectual property?
3. How does modern economic analysis and empirical literature view the relationship between intellectual property and innovation, and the role of government in advancing and supporting innovation? Are there differences that depend on the type of intellectual property, and the protections offered for that intellectual property?
4. How can the FTC use its enforcement and policy authority to advance innovation? What factors should the FTC consider in attempting to achieve this objective?

5. What are emerging trends in patent quality and litigation issues? Should these trends influence the FTC's enforcement and policy agenda?
6. **How should the current status of copyright law and current business practices influence the FTC's enforcement and policy agenda?**

CreativeFuture, Copyright, and Creativity

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.

We have been active in filing comments on these FTC proceedings because our nation's creative economy is under siege by a global digital piracy ecosystem that directly competes with our legitimate marketplaces. Ever-evolving technologies facilitate the unauthorized duplication and distribution of our valuable creative works worldwide – among them, internet platforms, that wittingly or unwittingly serve the interests of illegal enterprises.

In August, we submitted comments to the FTC in anticipation of these hearings on your suggested topics related to competition and consumer protection issues in communication, information, and media technology networks, as well as the role of intellectual property and competition policy in promoting innovation.

Today, we share our thoughts about the current state of copyright law, the state of competition for creatives, and our hope for FTC action to improve the economic outlook for America's creative communities.

Question #1: Is there a role for the government in advancing or supporting innovation?

We believe that the government has a crucial role to play in establishing and enforcing copyright protections that advance innovation by allowing creative individuals to be fairly compensated for their work. Were it not for copyright, creatives could simply not make a living.

The Constitution vests in Congress the explicit authority to promote the progress of science and the useful arts by securing the exclusive rights afforded to creators by copyright. Various government agencies play the critical role of ensuring the effectiveness of those protections, including through enforcement activities like those entrusted to the FTC. Strong copyright protections in U.S. law enable our creative communities to pursue their art as a career. These protections ensure that the years of uncompensated work that are invested in the creation of songs, publications, or films are rewarded with a meaningful return – a return that may then be used to pursue the next work, driving innovation and further enriching our culture and society.

Protecting intellectual property and copyright are crucial to an innovation economy. In fact, they are synonymous with each other. Our opponents would argue that copyright stifles innovation. But without copyright, there would be no financial incentive for creative individuals to dedicate their lives to new and exciting innovations.

Question #2: What is the importance of intellectual property – all forms – in advancing, protecting, and supporting innovation?

Copyright is the core of our creative industries, which are a significant economic driver, contributing more than \$1.2 trillion to America's Gross Domestic Product and employing 5.5 million Americans. The U.S.

core copyright industries are leading exporters, with total foreign sales eclipsing other major U.S. industries – including aerospace, agriculture, and pharmaceuticals.¹ When consumers in other countries enjoy American-made creative products through legitimate platforms properly protected by local laws, job creation and economic growth occur here at home.

Copyright was enshrined in the U.S. Constitution precisely to promote innovation and creativity. The Supreme Court has said that copyright acts as an “engine of free expression.”² The Court has further noted, “The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”³ We believe that intellectual property and copyright are essential elements of future innovation and creative expression.

Copyright is no less an engine of innovation and economic growth than are patents and other property rights. Nor are they less important to economic growth and prosperity than is innovation in communications technologies, including the internet. Creative content and innovative distribution technologies are interdependent.

Question #6: How should the current status of copyright law and current business practices influence the FTC’s enforcement and policy agenda?

For some time, U.S. policy has prioritized the growth of the internet over meaningful accountability, paying little attention to the resulting harms, including to our content industries, through the abuse of the tools provided by large internet platforms. Having been largely immunized from responsibility for this abuse, large internet platforms have had little incentive to combat it, with some even seeking to grow their business through infringing content.

During the past two decades, our copyright-based industries have adapted rapidly to changing markets and consumer demand worldwide, working against the continuing challenge of the global theft of our creative works. But, for many creatives, it feels as if the policy deck is stacked against them, particularly as powerful interests spend unmatched sums of money lobbying the Federal Government to weaken copyright and protect their special immunities at all costs.

The legal framework that protects these platforms stems largely from two ‘90s-era statutes – the 1996 Communications Decency Act (CDA)⁴ and the 1998 Digital Millennium Copyright Act (DMCA).⁵ These statutes were intended by Congress to promote the growth of the then-nascent internet by alleviating the burden of liability on the part of intermediaries for the unlawful acts occurring on their platforms, while also encouraging those intermediaries to act responsibly in addressing abusive conduct. When the internet safe harbor laws were adopted by Congress some two decades ago, the internet was little known to most Americans. These laws contributed to the unprecedented growth of this new industry, producing some of the largest and most powerful companies the world has ever seen.

But, at some point, growth without responsibility becomes a cancer. It is time that the government paid equal attention to harms resulting from the lack of accountability as it does to the benefits of the hands-

¹ International Intellectual Property Alliance, *Copyright Industries in the U.S. Economies*, 2016

² Supreme Court Majority Opinion in *Harper & Row v. The Nation*, delivered by Sandra Day O’Connor

³ *Twentieth Century Music v. Aiken*, 422 U.S. 151 (1975)

⁴ Telecommunications Act of 1996, tit. V, Pub. L. No. 104-104, 110 Stat. 56, 133.

⁵ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

off approach of these 1990s-era policies. Today, the overbroad immunities that the large internet platforms enjoy not only harm innovation in creative fields, but they are likely chilling innovation in Silicon Valley itself. How can start-ups compete with the tiny number of behemoths that have come to dominate the internet?

From the creators' perspective, these outdated, overbroad safe harbor protections hamper effective enforcement by or on behalf of rights holders as they seek to address the facilitation of piracy by the internet platform providers. To cite just one example: in just a few seconds of searching on Google, its YouTube subsidiary, or Facebook, one can readily find thousands upon thousands of copyrighted works and the ability to access them *for free* without the permission of, or any compensation to, those who created, invested in, and marketed them.

In short, our creative communities are victimized by the unfair, deceptive, and anticompetitive practices that continue to be rampant on the internet and that are facilitated by a variety of large internet platforms. There is no doubt that the internet has ushered in a new era of innovation with significant benefits for consumers and many creatives. But ultimately, the current environment of near-zero accountability has not only hurt the creative communities, but also harmed consumers and the public good.

We urge the FTC to continue examining the practices of large internet platform providers, as well as other enterprises, that use the internet to promote all forms of piracy, including illegal streaming services. We believe these practices are rightly within the scope of your "Competition and Consumer Protection in the 21st Century Hearings." It is long past time for the government to address the harms to consumers and to competition by copyright theft in this modern internet environment. It is an environment dominated by the world's most powerful companies that enjoy a legal framework that holds them largely unaccountable for the harms perpetuated through the use of their platforms.

We appeal to the FTC to conduct more urgent scrutiny of consumer protection and competition policy in the modern internet environment, including as it relates to Silicon Valley's largest companies and the ways in which their business practices can adversely impact the interests both of consumers and of the creative industries. Global piracy continues to grow unchecked, facilitated by illegal distribution channels that can immediately deliver our community's content to audiences for free – using legitimate American platforms – without any compensation to artists and creatives. No other industry in the world is forced to compete with an illegal marketplace of goods that is identical to the original and that obtains (and often provides) their product for *free*.

We need look no further than the music industry for an example of the toll piracy can take. With the onset of digital music piracy in the late '90s, the business essentially collapsed in the span of a decade. In the United States, revenues decreased by more than half – from \$14.6 billion in 1999 to \$6.3 billion in 2009. Meanwhile, the economy grew 20% and more music was being consumed than ever before. A huge percentage of that drop was clearly attributable to unfair competition from rampant music piracy services. While some musicians made the transition to the digital age successfully – particularly the subset of artists who excel at live performances, merchandising, and endorsements – many could no longer make a living in music.

Despite this debilitating attack facilitated by the internet, the music business has survived and largely transitioned to digital distribution. Streaming services have started to reverse the financial decline, with streaming revenues accounting for two-thirds of a much smaller U.S. music industry revenue in 2016.

But artists continue to trade dollars for pennies as this digital takeover occurs, with proceeds continuing to be dragged down by piracy. As recently as two years ago, YouTube, one of the largest music streaming destinations in the world, generated less revenue for the industry than the niche market for vinyl records.

In film and television, piracy can create enough harm and uncertainty to deter investors, especially for independently financed films, documentaries, and other works with less than “blockbuster” financial potential – all films that meaningfully increase the variety of content available to consumers. The film and TV industries send almost one billion takedown notices each year to just one company – Alphabet – to flag copyright-infringing links or files on Google and YouTube.

There is another way that piracy directly impacts consumers. The threat of malware can be found in a large number of pirate websites and can result in identity theft, ransomware, and financial loss. A report by the Digital Citizens Alliance⁶ found that at least one in three pirate websites expose consumers to malware. Additionally, malware can facilitate a nefarious practice known as “slaving,” which results in hackers having access to a computer’s camera. The FTC itself considered the malware threat serious enough to issue a consumer warning in 2017.⁷

Finally, there is a new kind of consumer fraud within the piracy ecosystem. Like unlicensed pharmacies, sellers of “streaming piracy devices,” colloquially known as “Kodi Boxes,” use Google and Facebook, among a variety of other services, to find customers and sell them their illicit goods.

These devices are media players that use “Kodi” software, an open-source video platform that can be used to access and organize a user’s content – regardless of its legitimacy. In addition to organizing one’s media library, Kodi-enabled devices can also be loaded with applications known as “add-ons.” These programs facilitate access to pirated content – including live television channels, limitless movies and television shows, and every existing premium broadcast channel from all around the globe.

Advertisements for Kodi boxes, which typically sell for just a few hundred dollars, promise consumers “free television and hundreds of live channels” and advertise their services as “100% legal” – a blatant misrepresentation that lures unsuspecting consumers into commercial transactions with a business that appears to have the trappings of a legitimate commercial enterprise but is anything but.

It is for all of these reasons that we urge the FTC to consider the status of copyright law and the current business practices impacting the creative industries when setting your enforcement and policy agenda. We can think of few undertakings that are more urgent to American commerce, creativity, and innovation.

Responding to the October 23 Panel Discussion: Competition Policy and Copyright Law

Without relitigating the arguments made on October 23 by the various panelists, we would like to make a broad and important point about the proceedings. With the exception of Eric Cady, who spoke on behalf of the independent film and television industry, and Keith Kupferschmid, who represents thousands of

⁶ [Enabling Malware](#), July 2016

⁷ Google and Facebook both have a history of data privacy and data security violations: In 2011, each company entered into an FTC consent decree to settle serious allegations of consumer privacy violations, and both promised that they would protect consumer data going forward. Subsequently, in 2012, [Google agreed to pay \\$22.5 million to settle new FTC charges that it violated the FTC Order by misrepresenting privacy assurances to users](#). And in 2018, the [FTC announced that Facebook was under investigation for violating its 2011 Order through allegedly inadequate consumer data security in connection with the Cambridge Analytica scandal](#).

individual creatives who rely upon copyright, the majority of the panelists were academics or policy experts who argued against what they perceived as the *problems* with copyright law.

It was quite extraordinary to watch, given our expertise in the *importance* of copyright. After all, our organizations are comprised of people who have worked in the creative fields for decades and know exactly why copyright protections are so vital. In this context, hearing panelists who have very little on-the-ground experience talk about the problems with copyright would be like CreativeFuture telling Google or Facebook how to more effectively use the private data of millions to turn a profit. They're already the experts!

Despite the view of this handful of academics, it is not the existence of copyright that creates a *problem* for the 5.5 million Americans who rely upon it to make a living – it is the *lack of adequate enforcement and respect* for copyright that is the problem. Copyright is often rendered meaningless in a Wild West internet ecosystem where platforms are not held accountable for infringement on their sites and instead have built immense businesses made possible in large part by that rampant infringement.

Mr. Cady captured the reality in his opening remarks: “While the internet creates important opportunities for expanded distribution, new audiences, and new revenue streams for independents, it also presents the biggest threat to our industry as online infringement is allowed to flourish without any effective way under current law to prevent or stop the introduction and rapid proliferation of infringing copies across the internet. The result is a distorted marketplace where rightsholders are forced to compete with pirated content made available for free.”

This was a polite way of saying: “*We have an existential threat that we are battling every day.*”

The panelists that followed Mr. Cady responded by talking not about piracy, not about massive destructive infringement of creative content, but rather about *tractors* – and their view that technological protection measures (TPMs) can be an unnecessary burden to consumers. This is a popular anti-copyright argument that academics enjoy using to show that copyright is a problem. But the argument has no relevance to commercial content piracy and is an obvious effort to brush past the real harms. The problems raised by Mr. Cady are those of a global epidemic that is crippling the ability of creatives to be fairly compensated.

We believe these arguments are used primarily to distract from the urgency of the piracy problem to the core copyright industries and the larger problem of zero platform accountability.

We join many others in the creative industries in urging you to address these alarming issues as you consider future enforcement actions. We hope the FTC will take a leadership role in addressing the competitive imbalance threatening the core copyright industries.

Sincerely,



Ruth Vitale
CEO, CreativeFuture