MOTION PICTURE ASSOCIATION

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TO THE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET
HEARING ON "DIGITAL COPYRIGHT PIRACY: PROTECTING AMERICAN CONSUMERS, WORKERS, AND CREATORS"

QUESTIONS FOR THE RECORD FROM CHAIRMAN DARRELL ISSA

JANUARY 30, 2024

1. During the hearing, instances in which site blocking was applied in an overly broad manner in other countries were raised. Are you aware of any instances where site blocking was undertaken in another country to address piracy (not other illicit activity) and blocking of unrelated sites occurred? And if so, what was the cause of the over-breadth in each of those instances (e.g., technical limitations, errors or ambiguities in orders, human error)?

As noted in my written testimony, "Examples of over-blocking (i.e., blocking of non-infringing sites or material), once cited as the primary argument against site blocking, are virtually non-existent."[1] Nothing in the written or oral testimony of other witnesses at the hearing undermines that conclusion. To the contrary, an examination of the purported examples of over-blocking cited by the Computer & Communications Industry Association ("CCIA") demonstrates that ***none*** of those examples is actually of mistaken blocks of websites pursuant to laws authorizing no-fault injunctive relief to curb copyright infringement.

In its written testimony, CCIA referenced a purported "long history of site-blocking injunctions leading to overreach" including instances that "restrict[ed] access to thousands of websites, without evidence or process."[2] In support of this assertion, CCIA cites to three reports from ***2011*** that discuss *ex parte* domain name seizures—an entirely different process than no-fault-injunctive-relief orders undertaken pursuant to judiciary or administrative processes in which all relevant parties are given notice and an

[1] Written testimony of Karyn Temple at hearing on Digital Copyright Piracy: Protecting American Consumers, Workers, and Creators: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary, 118th Cong. (2023), at 11.
[2] Written testimony of Matthew Schruers, at 6.

opportunity to be heard before any order is issued. For example, the reports discuss an instance in 2011 in which Immigration and Customs Enforcement ("ICE"), as a part of its efforts to prevent access to child sexual abuse material, seized a domain name that resulted in the inadvertent seizure of subdomains that were unrelated to the criminal activity at issue.[3] CCIA also cites to an article that discusses a blog whose domain was unilaterally seized by ICE in 2010 pursuant to an *ex parte* process under an existing forfeiture statute and later released due to an apparent lack of evidence.[4] Not only are these examples more than a decade old, they tell us nothing about the topic at hand: the blocking of piracy sites pursuant to narrow, targeted orders under close judicial and/or administrative oversight that affords abundant due process to all affected parties.

To be clear, the type of no-fault injunctive-relief regimes employed by over 40 countries around the globe, and which MPA urges Congress to consider enacting here in the U.S., bears no resemblance to the *ex parte* domain-name seizures cited by CCIA. Under the no-fault blocking regimes, pursuant to which courts and administrative agencies over the past dozen years have disabled access to more than 90,000 domains used by over 27,000 websites engaged in blatant piracy,[5] the accused pirate sites are notified of the action and have the opportunity to appear in court and contest such designation. Intermediaries to which blocking orders may be issued are also notified and may appear to oppose the order. And, once the court or agency finds that the site is dedicated to infringement, it takes into consideration various factors in determining whether to issue the blocking order, including potential burden on the intermediaries and whether disabling access to the site will have a negative impact on any party (including, e.g., the public's interest in accessing non-infringing material).

After its misleading discussion of domain-name seizures, CCIA then purports to discuss "recent examples of over blocking" throughout the European Union (EU).[6] CCIA cites four examples—***none*** of which involve an order to an ISP to block access to a website that has been found to be engaging in copyright infringement. In its first example, CCIA describes an incident in Austria in 2022 which it describes as involving the "blockage of thousands of innocent websites" pursuant to a "court order."[7] That is false. The situation CCIA references did not involve a court (or administrative) blocking order at all. Rather, based on our understanding of the facts, it was a unilateral decision by an ISP to block access to a website in response to cease and desist letters without first verifying whether the IP address was shared. In another example, from Russia, CCIA describes a 2012 incident where a website was inadvertently blocked "because it shared an IP address with a blocked website."[8] This case, however, had nothing to do with copyright piracy. Instead, the blocking order involved restricting access to a

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[3] Andrew McDiarmid, *An Object Lesson in Overblocking*, CENTER FOR DEMOCRACY & TECHNOLOGY (Feb. 17, 2011), https://cdt.org/insights/an-object-lesson-in-overblocking/; Center for Democracy & Technology, *The Perils of Using the Domain Name System to Address Unlawful Internet Content* 3 (Sept. 2011), https://cdt.org/wp-content/uploads/pdfs/Perils-DNS-blocking.pdf; *CDT Warns Against Widespread Use of Domain-Name Tactics To Enforce Copyright,* CENTER FOR DEMOCRACY & TECHNOLOGY (Mar. 21, 2011), https://cdt.org/insights/cdt-warns-against-widespread-use-of-domain-name-tactics-to-enforce-copyright/.

[4] Cindy Cohn & Corynne McSherry, *Unsealed Court Records Confirm that RIAA Delays Were Behind Year-Long Seizure of Hip Hop Music Blog*, EFF (May 3, 2012), https://www.eff.org/deeplinks/2012/05/unsealed-court-records-confirm-riaa-delays-were-behind-year-long-seizure-hip-hop.

[5] For example, Fmovies, which I demonstrated during my opening statement at the hearing, is a piracy streaming website that has been blocked in 16 countries—the U.K., Australia, India, Indonesia, Malaysia, Singapore, Belgium, Denmark, France, Ireland, Greece, Italy, Portugal, Sweden, Denmark, and Brazil.

[6] Schruers testimony at 7-8.

[7] Schruers testimony at 7.

[8] Schruers testimony at 7.

website that allegedly provided information about the manufacture and use of illegal narcotics.[9] In this matter, the block was apparently undertaken at the direction of the Russian Federal Drug Control Service, a law enforcement agency, along with the government telecommunications regulator, without first verifying whether the targeted website shared an IP address with other websites. A unilateral blocking order issued and implemented by government agencies of an authoritarian state, with no apparent due process provided to the affected parties, says nothing about the no-fault regimes to address copyright infringement in leading democracies such as the U.K., much of Western Europe, Canada, Australia, India, Brazil, South Korea, and Israel, which do provide successful models from which Congress can learn as it considers enacting analogous legislation in the U.S.

The last two examples CCIA cites, each in Germany, do not even claim to be purported examples of over-blocking by ISPs. Instead, CCIA references two cases involving the issue of whether so-called "DNS resolvers" (as distinct from ISPs) are properly the targets of blocking orders, as they would extend in scope beyond the territory of Germany.[10] That issue is not relevant to the question of any alleged over-blocking associated with blocking websites dedicated to piracy pursuant to narrow, targeted orders under close judicial and/or administrative oversight. The reality is that among the 40 countries that have successfully implemented site blocking over the last decade, examples of over-blocking (i.e., blocking of non-infringing sites or material) are virtually non-existent. CCIA's inability to cite even a single relevant example speaks volumes.

2. During the hearing, a distinction was drawn between websites dedicated to piracy and websites, including websites that host user generated content, which at times have infringing material posted along with non-infringing materials. Should site blocking legislation be limited to the former, and if so, what standard or criteria should be applied to distinguish them from the other types of sites?

Site-blocking orders are appropriately targeted only at sites dedicated to infringement. Site blocking is not an appropriate remedy for sites, such as those that host user-generated content, which have large volumes of non-infringing material but also include some infringing material. In defining the category of sites that may be subject to blocking orders, other countries have achieved the right balance by limiting the reach of site-blocking orders to websites that are structurally infringing or whose primary purpose or effect is piracy. As Congress considers how it might articulate a clear and appropriate standard for site blocking in the United States, MPA urges Congress to consider a similar approach and stands ready to assist in ensuring any proposed legislation strikes the right balance.

[9] Eur. Ct. H.R, 23 June 2020, 10795/14, Vladimir Kharitonov v. Russia, https://hudoc.echr.coe.int/fre?i=001-203177.
[10] OLG Köln (Court of Appeal Cologne), 3 November 2023, 6 U 149/22, Universal Music GmbH v. Cloudflare Inc., https://www.justiz.nrw.de/nrwe/olgs/koeln/j2023/6_U_149_22_Urteil_20231103.html; OLG Dresden (Court of Appeal Dresden), 6 December 2023, 14 U 503/23, Sony Music Entertainment Germany GmbH v. Quad9 Stiftung, https://quad9.net/uploads/URT_05_12_2023_en_Korr_MH_en2_2e629b1f7b.pdf.