



Counterfeiting and Piracy Undermines the Incentive to Create

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That counterfeiting and piracy causes significant harm to creators and creative industries is unquestioned, and the U.S. Government Accountability Office has affirmed that in a [new report](#). The report is a bit thin on substance, but that appears to be intentional. While Congress in the PRO-IP Act of 2008 called for GAO to quantify the impact of counterfeit and pirated goods on the economy, GAO “concluded that it was not feasible to develop our own estimates or attempt to quantify the economic impact of counterfeiting and piracy on the U.S. economy.” There are also some questionable comments made to GAO that are repeated in the report, such as the notion that taking a copyright owner’s work without permission or compensation is a benefit to that owner. Still, a reader of the study cannot escape the fact that infringement significantly decreases the incentive copyright gives to creators to produce those works we find of such value.

The U.S. Intellectual Property Enforcement Coordinator – a position also resulting from the PRO-IP Act – is conducting a comprehensive review of data. The US IPEC’s call for public comments as part of her review was to help develop a Joint Strategic Plan to fulfill PRO-IP’s mission, which GAO summarizes as an effort “to strengthen the effectiveness of U.S. government efforts to protect the intellectual property (IP) of U.S. industries and IP rights holders. In the PRO-IP Act, Congress noted that U.S. IP industries have created millions of highly skilled, high-paying U.S. jobs and continue to represent a major source of creativity, innovation, economic growth, and competitiveness.”

The U.S. IPEC has a lot to work with, including the [23-page filing by the Copyright Alliance](#) that contains a sweeping cross-section of studies and proprietary industry data from numerous industries, including motion pictures, music and software — discussed in the GAO report — but also photography, newspapers and other industries, as well as a focus on individual artists and creators.

The GAO states up front that their review is mostly the result of interviews with a few “experts,” many of which were academics who have not been professional artists or creators or ever worked in a creative industry. The study also contains some calculation errors.* As mentioned above,

there are a few troublesome statements that GAO quotes (anonymously) from those interviews which are discussed below, but it is important to focus on the many positives from study:

- ***The problem of piracy is “sizeable”***: While the study notes that calculating the exact impact of counterfeiting and piracy is “extremely difficult,” it also concludes that “research in specific industries suggest that the problem is sizeable, which is of particular concern as many U.S. industries are leaders in the creation of intellectual property.” As our submission to the US IPEC demonstrates, the levels of harm to the U.S. economy and job creation calculated are staggering; even if those figures were a bit lower, they would still call for dramatic response by the U.S. government. Of course, GAO notes that a complication in these calculations is “the illicit nature of counterfeiting and piracy.” It is entirely reasonable to assume the actual amount of counterfeiting and piracy in all copyright industries is far higher than has been measured or estimated. In fact, GAO notes that “technological changes and increased sophistication among counterfeiters have affected [IP] businesses significantly.” In other words, the thieves keep getting more clever, offering more robust stolen works while becoming more difficult to track.

- ***IP drives innovation and creativity***: The study cites a paper titled *The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism* by William J. Baumol. GAO summarizes it, noting that “IP protection appears to be one of the factors that has helped to generate the enormous growth in the world economy and in the standard of living that has occurred in the last 150 years. This economist pointed out that the last two centuries have created an unprecedented surge in growth compared to prior periods. Among the factors attributed to creating the conditions for this explosion in economic growth are the rule of law, including property rights and the enforceability of contracts.” You could end the discussion right there; surges in economic growth good, dilution of rule of law, property rights and enforceability of contracts (all caused by infringement) bad.

- ***IP gives creators property rights***: GAO states definitively that “IP rights protect the economic interests of creators of these works by giving them property rights over their creations.” I think the [more than 12,000 artists and creators who have signed a letter](#) urging the President and Vice President to respect their property rights would agree, as would any copyright industry participant. Kudos to GAO for acknowledging the reality of IP as a property right worthy of protection.

- ***Online piracy is rampant***: Kudos as well for noting that “[a]nother significant aspect of IP infringement is the piracy of digital copyrighted products, which is not captured by CBP [Customs and Border Protection] data. The development of technologies that enable the unauthorized distribution of copyrighted works is widely recognized as leading to an increase in piracy. The rapid growth of Internet usage, in particular, has significantly contributed to the increase. Digital products are not physical or tangible, can be reproduced at very low cost, and have the potential for immediate delivery through the Internet across virtually unlimited geographic markets. Sectors facing threats from digital piracy include the music, motion picture, television, publishing, and software industries. Piracy of these products can occur through methods including peer-to-peer networks, streaming sites, and one-click hosting services.” GAO could have also included the visual arts industries among those significantly harmed from digital infringement.

• ***Piracy has a multiplier effect:*** When measuring the economic harm caused by piracy and counterfeit goods are possible, it is important to note GAO’s endorsement of the fact that piracy has a multiplier effect that ripples throughout the economy. Indeed, the report explicitly acknowledges that “the effect of counterfeiting and piracy goes beyond the infringed industry.” More could have been said on this point, however. For example, motion picture piracy harms not just the bottom line of studios but also skilled laborers in many unions. Those laborers’ unions rely on industry revenues to fund health and pension funds for their members.

• ***There are many ways to measure infringement:*** The GAO is right when it notes that “[t]here is no single methodology to collect and analyze data that can be applied across industries to estimate the effects of counterfeiting and piracy on the U.S. economy or industry sectors.” Given the myriad business models across creative industries and the multitude of forms creative works can appear in, that is a given. That’s why the Copyright Alliance compiled a comprehensive cross-section of copyright industries in its [report to the US IPEC](#).

• ***Federal copyright enforcement expenditures boost tax revenues:*** The report accurately notes that one harm stemming from piracy is the loss of tax revenue resulting from the hit on the U.S. economy. It lists copyright enforcement as a cost, however. A more robust analysis would have recognized that copyright enforcement is an investment, as was demonstrated in a [study](#) that was highly touted as PRO-IP worked its way through Congress. That study – co-authored by Laura D’Andrea Tyson, former Chair of the US President’s Council of Economic Advisers during the Clinton Administration — concluded that for every dollar spent by the U.S. government on increased IP enforcement, federal tax revenues would increase by as little as \$2.90 to as much as \$9.70.

Now as to some of the “expert” analysis provided to GAO that GAO dutifully includes in the report:

• ***Piracy saves consumers money (!):*** One puzzling aspect is the argument that a consumer benefit of counterfeiting and piracy is saving money: “Some consumers may knowingly purchase a counterfeit or pirated product because it is less expensive than the genuine good or because the genuine good is unavailable, and they may experience positive effects from such purchases.” Let’s look at that. One, online infringement generally doesn’t involve a purchase, and revenues from purchases of infringing works go to not-good people off the economic grid (GAO appropriately notes the [RAND study](#) showing the ties between infringement and organized crime). Yes, if I download an infringing copy of “Little Miss Sunshine” I don’t have to buy a DVD or pay an on-demand service, but this GAO study is a document addressed to U.S. lawmakers. Taken to the extreme, one could argue that consumers should maximize their “positive effects” by only acquiring pirated works. If policymakers don’t want any new works produced, or the economic output and job creation related to that production, then they can follow that path.

• ***Consumers benefit through prerelease of works (!):*** On the point above, GAO later notes that: “Consumers may purchase movies that have yet to be released in theaters and are unavailable in legitimate form.” Nothing is more harmful to creative industries than release of their works before they reach the legal market. For this reason, Congress several years ago made the pre-

release of a motion picture a federal felony. Yes, this practice occurs, but it not only erodes the ability to produce creative works, it also deters efforts by copyright owners to find new, innovative and consumer-friendly ways to distribute works. (See the Copyright Alliance series on innovative business models, [In Syn©.](#))

• ***Copyright owners benefit from sampling not of their choosing (!)***: One questionable argument made to GAO that was included in the report is the suggestion that IP industries receive “potentially positive benefits from the knowing consumption of pirated or counterfeit goods.” The report goes on: “For example, consumers may use pirated goods to ‘sample’ music, movies, software, or electronic games before purchasing legitimate copies, which may lead to increased sales of legitimate goods.” (Italics added.) Fortunately, GAO also notes that there is no reliable data finding that IP industries see a net benefit from such “sampling,” but what GAO could have noted is that sampling is a business model as old as copyright itself. In motion pictures, it’s called a trailer. In music, it’s the 30-second stream on iTunes, or the free streams or downloads offered by many independent recording artists. It’s a video game that allows you a few free levels before you have to pay, or gives you basic free play with the ability to purchase enhancements. In photography it’s the ability to view a complete, low-resolution image and decide if you’d like to license a high-resolution image. In other words, sampling can drive legal sales, but the rightsholder decides how much they’d like to share. It’s a phenomenally successful approach, but it is successful precisely because the copyright owner has the power of choice.

• ***The U.S. Constitution focused only on inventors, not authors (!)***: One oddity of the report is that, at times, the authors seem to forget that copyright is one of the IP rights under U.S. law. The background section opens such: “The importance of patents and other mechanisms to enable inventors to capture some of the benefits of their innovations has long been recognized in the United States as a tool to encourage innovation, dating back to Article I of the U.S. Constitution and the 1790 patent law.” (Italics added.) Article I actually gives rights to “Authors and Inventors,” and that right given to authors was to encourage the production of creative works and resulted in copyright law, also dating to 1790 (one of those “other mechanisms,” presumably.) This odd omission of copyright also occurs at times when the study cites economic harm from counterfeiting and piracy. GAO notes that counterfeiting can lead to a reduction in investment in R&D; presumably they are referring there to patent infringement. Counterfeiting in creative works leads to a disincentive to create a work to begin with, the very reason the right was given to creators in the Constitution.

We at the Copyright Alliance are eager to see the Obama Administration pursue its commitment to implementation of both the letter and spirit of the PRO-IP Act, and applaud the U.S. IPEC as she gathers data and begins coordination across the U.S. government. And we welcome the GAO confirming that counterfeiting and piracy harm economic development and creative industries.

* I mentioned some questionable data in the study. For example, on page 7 a table sourced as “GAO analysis of CBP data” refers to customs data, specifically “DHS Seizures of IP-Infringing Goods, Expressed as a Percentage of Total Domestic Value of Goods Seized Annually, Fiscal Years 2004-2009.” GAO made a common math error in calculating the average percentage of totals across those six years. In four of those six years, DHS reports that media constituted 4% of total IP-infringing seizures. In another year, the total is 2%. In 2005, there is no reported data.

GAO then added up the five reported years, assigned a percentage of zero to 2005, divided across six years, and concluded that the “Reported percentage of 2004-2009 totals” is 3%. In fact, one must throw out 2005 due to the lack of data. When you add up the remaining five years and divide by five, you get a total of 3.6%. Not a huge difference, but I cite this example to show the importance of closely examining report data.

This article was originally posted on Copyright Alliance:

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