

Statement of

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**“Digital Copyright Piracy: Protecting American Consumers, Workers, and Creators”**

Subcommittee on Courts, Intellectual Property, and the Internet

Committee on the Judiciary, U.S. House of Representatives

December 13, 2023

Chairman Issa, Ranking Member Johnson, and Members of the Subcommittee, my name is Matt Schruers, and I serve as President of the Computer & Communications Industry Association (CCIA), which represents Internet, technology, and communications firms.<sup>1</sup> CCIA was founded in 1972 to promote open markets, open systems, and open networks in the computer and telecommunications industry.

## I. Introduction

The increasingly diverse and digital sector has become a cornerstone of the U.S. economy. According to figures published by the U.S. Department of Commerce last week, the digital economy contributed \$2.6 trillion to the U.S. economy in 2022, or 10% of U.S. GDP.<sup>2</sup> The digital sector is one of the fastest-growing industries powering the U.S. economy, with American technology companies growing their GDP contributions by an average of 7.1% annually from 2017 to 2022 after adjusting for inflation, greatly outpacing growth in the overall economy.<sup>3</sup>

A thriving economy goes hand in hand with a strong labor force and the digital sector is a key contributor, employing more than 8.8 million U.S. workers<sup>4</sup> who received over \$1.3 trillion in compensation in 2022.<sup>5</sup> Those large-scale benefits to the U.S. economy driven by American technology leadership can be seen across the country. Today, the tech industry is a key driver of the success of small businesses, with 95% of small business owners using technology developed by leading tech providers,<sup>6</sup> and 100% of surveyed startups using three or more digital tools in their operations.<sup>7</sup>

Content-producing industries are also thriving amid this digital revolution. For example, the recording industry produced \$26.2 billion in revenue in 2022,<sup>8</sup> higher than any other year in the 2000s. The global movie industry recorded \$99.7 billion in revenue in 2021, breaking records notwithstanding global COVID lockdowns.<sup>9</sup> The video game industry broke \$200 billion in

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<sup>1</sup> CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit [www.cciainet.org](http://www.cciainet.org).

<sup>2</sup> Digital Economy, U.S. Bureau of Economic Analysis (Dec. 6, 2023), <https://www.bea.gov/data/special-topics/digital-economy>; U.S. Digital Economy: New and Revised Estimates, 2017–2022, U.S. Bureau of Economic Analysis (Dec. 6, 2023), <https://apps.bea.gov/scb/issues/2023/12-december/1223-digital-economy.htm>.

<sup>3</sup> *Id.*

<sup>4</sup> New Digital Economy Estimates, 2017–2022, [https://www.bea.gov/system/files/2023-12/DigitalEconomy\\_2017-2022.xlsx](https://www.bea.gov/system/files/2023-12/DigitalEconomy_2017-2022.xlsx).

<sup>5</sup> U.S. Digital Economy: New and Revised Estimates, 2017–2022, *supra* n.2.

<sup>6</sup> *Empowering Small Business: The Impact of Technology on U.S. Small Business* (2023), <https://americaninnovators.com/empowering-small-business/>.

<sup>7</sup> CCIA Research Center, *Tools To Compete: Lower Costs, More Resources, and the Symbiosis of the Tech Ecosystem* (Jan. 25, 2023), <https://research.cciainet.org/reports/tools-to-compete/>.

<sup>8</sup> IFPI Global Music Report: Global Recorded Music Revenues Grew 9% In 2022 (Mar. 2023), <https://www.ifpi.org/ifpi-global-music-report-global-recorded-music-revenues-grew-9-in-2022/>.

<sup>9</sup> Global Theatrical, Home Entertainment, and Pay TV Market Rebounds to \$328.2 Billion, New MPA Report Shows (Mar. 2022), <https://www.motionpictures.org/press/global-theatrical-home-entertainment-and-pay-tv-market-rebounds-to-328-2-billion-new-mpa-report-shows/>.

global revenue in 2022.<sup>10</sup> Digital disruption has dramatically reshaped content industries for the better.

Products provided by CCIA members connect and empower users around the world, enabling work, study, commerce, and entertainment for millions. Whether finding information or connecting with friends and family, countless people across the world use digital tools to find and share information.

At the same time, a small minority misuse digital tools to infringe intellectual property rights. The digital sector, including CCIA's member companies, are committed to addressing this online infringement. We must ensure that the creative sector is incentivized to bring works to market, and that the public can access creative copyrighted works through legitimate channels.

History and research have shown that the most effective way to prevent infringement without shutting down legitimate and constitutionally protected speech is to ensure that consumers have options to lawfully access content when and where they want it.<sup>11</sup> We know that as access to legitimate services increases, infringement decreases.<sup>12</sup> CCIA members play a critical role in this by enabling and facilitating artists and creators to reach audiences everywhere. Digital technologies afford instantaneous and often free-to-the-user opportunities to engage with audiences around the world, in ways not possible without the Internet.

Yet infringers persist, and this raises the question as to how we can mitigate online infringement without impairing legitimate online commerce and communication—or the Constitution.

## **II. Addressing Copyright Infringement Is a Shared Goal**

A collaborative approach that brings together stakeholders—including IP owners, online services, and consumers—is key to effectively addressing copyright infringement at scale, while also fostering expression and creativity. These three categories of stakeholders—rightsholders, service providers, and individual users—increasingly overlap and intersect. Many Internet services and individual users are themselves key parts of the creative economy; digital services have become critical avenues for content discovery and distribution, and millions of American creators earn income from distributing their personal creations online, collectively earning billions of dollars.<sup>13</sup>

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<sup>10</sup> PwC, *Perspectives and insights: Global Entertainment and Media Outlook 2023–2027* (June 2023), <https://www.pwc.com/gx/en/industries/tmt/media/outlook/insights-and-perspectives.html>.

<sup>11</sup> João Quintais & Joost Poort, *The Decline of Online Piracy: How Markets – Not Enforcement – Drive Down Copyright Infringement*, 34 Am. U. Int'l L. Rev. 807-76 (2019), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1992&context=auilr> (decline in piracy “is linked primarily to increasing availability of affordable legal content rather than enforcement measures. Where content is available at affordable prices, in a convenient manner, and in sufficient diversity to address demand, consumers are willing to pay for it.”).

<sup>12</sup> Joost Poort *et al.*, *Global Online Piracy Study* (IViR (Institute for Information Law) July 2018), <https://www.uva.nl/binaries/content/assets/uva/en/news-and-events/global-online-piracy-study---ivir--ecorys-july-2018.pdf>.

<sup>13</sup> Robert Shapiro & Siddhartha Aneja, *Taking Root: The Growth of America's New Creative Economy* (2019), <https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf>.

### **a. Digital Service Efforts to Mitigate Copyright Infringement**

Leading online intermediaries engage with rightsholders extensively and have established programs that encourage information sharing between stakeholders to enable the identification of and enforcement against infringement.<sup>14</sup>

Enforcement solutions vary depending on their respective environments. While larger services may invest heavily in complex, highly automated systems, smaller or more resource-constrained services (e.g., startups and SMEs) often rely upon manual efforts. All responsible services consider IP matters in their content moderation processes, however, and choose strategies appropriate for their particular ecosystems.

These efforts require participation and collaboration from all stakeholders. Digital services cannot be expected to tackle infringement proactively in a vacuum; they need information and cooperation from rightsholders. As there exists no comprehensive database of what has been licensed to whom, only rightsholders know with certainty what material online is properly licensed, particularly when “infringing” content is often uploaded by rightsholders as a marketing ploy.<sup>15</sup>

Some websites invest considerably in elaborate systems that provide rightsholders with additional tools to protect content, in addition to notice-and-takedown compliance. These voluntary, additional layers of protection can expedite action against alleged infringement, and often provide rightsholders opportunities not just to remove infringing content, but also to track and monetize their works online.

In addition to aiding copyright enforcement, these voluntary measures can generate billions of dollars in revenue for rightsholders. For example, YouTube’s Content ID paid out more than \$9 billion to rightsholders from ads alone as of December 2022, and paid more than \$50 billion to creators, artists, and media companies in ad revenue over three years as of June 2022.<sup>16</sup> With Content ID, rightsholders can opt to remove the content, but may also claim the right to monetize it, in which case advertisements are placed adjacent to said content and rightsholders receive a share of the revenue stream associated with those advertisements. In the latter half of 2022, rightsholders chose to monetize more than 90% of Content ID claims.<sup>17</sup> Meta also recently announced a new Music Revenue Sharing feature of its Rights Manager tool in collaboration

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<sup>14</sup> See CCIA Comments to the Department of Commerce, Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations, Docket No. DOC-2019-0003 (July 29, 2019), <https://www.cciagnet.org/wp-content/uploads/2019/07/DOC-2019-0003-0001-CCIA-Comments-Counterfeiting-Pirated-Goods-Trafficking-Report.pdf>; CCIA Comments to the U.S. Patent & Trademark Office, In re Future Strategies in Anticounterfeiting and Antipiracy, Docket No. PTO-C-2023-0006 (Aug. 23, 2023), <https://ccianet.org/wp-content/uploads/2023/08/CCIA-Comments-to-USPTO-on-Anticounterfeiting-and-Antipiracy.pdf>.

<sup>15</sup> Zahavah Levine, *Broadcast Yourself*, YouTube Blog (Mar. 18, 2010), <https://blog.youtube/news-and-events/broadcast-yourself/>.

<sup>16</sup> YouTube, Copyright Transparency Report, [https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22\\_2022-7-1\\_2022-12-31\\_en\\_v1.pdf](https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2022-7-1_2022-12-31_en_v1.pdf).

<sup>17</sup> *Id.*

with partnerships across the music industry.<sup>18</sup> The inclusion of an advertising option benefits all key constituencies, since users and creators' disputed content remains online, while the rightsholder also receives previously unrealized revenue.

Some companies offer multiple tools tailored to different types of creators. The more powerful the copyright management tool, the bigger the risk of abuse or misuse. Companies must therefore balance these concerns so that the risk of abuse and misuse is as low as possible. Companies calibrate access to tools to the needs of different rightsholders and creators, which may differ in, for example, the types of content they own, the volume of requests they submit, their ability to dedicate time and resources, their understanding of copyright law, and the complexity of their licensing arrangements.<sup>19</sup>

Unfortunately, even major rightsholders have mismanaged these powerful tools, resulting in unfair or inaccurate claims on legally uploaded content. Given the outsized negative effect that misuse of these tools has on the broader ecosystem, companies work to ensure that they match rightsholders with the solution that best suits their needs and the resources they can dedicate to responsibly managing the tool.

## **b. Concerns Regarding Free Expression, Abuse**

Content filtering by automation is not always effective or accurate. In particular, “off-the-shelf” filtering technologies tend to be focused only on specific classes of works, and cannot necessarily provide meaningful protection to content on sites whose users can create many different types of works. Automated tools are also unable to take into account context or nuance of individual uses, so may result in over-removal of non-infringing, fair uses. These false positives merit particular attention because any unjustified content filtering or takedown may suppress lawful expression.<sup>20</sup>

Tools intended to reduce infringement also regularly receive fraudulent and abusive notices. Over-reaching claims of copyright infringement that in fact are fabrications intended to remove content considered undesirable by the claimant are common. Publicly documented examples that digital services and users have experienced include extortion schemes tied to the notice-and-takedown process;<sup>21</sup> blatant disregard for fair use;<sup>22</sup> notice-and-takedown abuse as a business model, such as reputation-related removals masquerading as copyright;<sup>23</sup> abuse to target

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<sup>18</sup> Meta, *Music Revenue Sharing: A New Way For Creators to Earn Money Through Facebook Videos* (July 25, 2022), <https://about.fb.com/news/2022/07/music-revenue-sharing-for-video-creators-on-facebook/>.

<sup>19</sup> For example, for Google's YouTube, everyone has access to its webform. YouTube has also developed additional tools such as Copyright Match and Content ID which users can apply for if they meet eligibility criteria and their works are audiovisual.

<sup>20</sup> See, e.g., EFF, *Automated Copyright Filter Can't Detect Infringement or Irony* (2020), <https://www.eff.org/takedowns/automated-copyright-filter-cant-detect-infringement-or-irony>.

<sup>21</sup> Julia Alexander, *YouTube gets alleged copyright troll to agree to stop trolling YouTubers*, The Verge (Oct. 15, 2019), <https://www.theverge.com/2019/10/15/20915688/youtube-copyright-troll-lawsuit-settled-false-dmca-takedown-christopher-brady>.

<sup>22</sup> Brief for Amici Curiae Automattic, Google, Tumblr, & Twitter, *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2015), [https://www.eff.org/files/2015/10/30/lenz-automattic\\_google\\_twitter\\_tumblr\\_amicus.pdf](https://www.eff.org/files/2015/10/30/lenz-automattic_google_twitter_tumblr_amicus.pdf), at 7-11.

<sup>23</sup> Andrea Fuller, Kirsten Grind & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), <https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001>.

competitors in online marketplaces;<sup>24</sup> and flawed automated systems that broadly target unrelated content.<sup>25</sup> Some companies receive floods of batch notices from large rightsholders directed to short clips of content in which music is incidental as a means to force them to negotiate.<sup>26</sup> Abuse and trolling also occurs often in the litigation context.<sup>27</sup> Therefore, services balance their work to protect intellectual property rights with their work to protect users' free expression online.<sup>28</sup>

### c. The Best Strategy Against Piracy Is Facilitating Legitimate Access

Studies consistently show that piracy rates fall when consumers have broad access to lawful means of digital media consumption,<sup>29</sup> such as when legitimate services like Spotify and Netflix enter new markets.<sup>30</sup> Ultimately, the most effective way to prevent infringement is to ensure that members of the public, most of whom want to pay for content, can lawfully consume works digitally whenever and wherever they want.

In fact, U.S. policymakers have recognized that “the availability of licensed offerings is an important element in combatting online infringement. Providing consumers with attractive legal avenues to enjoy copyrighted content in the manner of their choosing decreases the lure of illegitimate services.”<sup>31</sup> By facilitating many options for consumers to lawfully consume content, digital services are a key component in the piracy prevention landscape.

## III. Site Blocking Is Not Possible Without Stifling Speech and Due Process

Policymakers should be wary of validating one proposed approach to online enforcement: site blocking. The blunt instrument of architectural regulation is particularly inappropriate for policing subject matter like copyright. Authoritarian regimes hostile to the open and democratic character of the Internet frequently resort to architectural information controls, and while they

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<sup>24</sup> Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, N.Y. Times (May 23, 2020), <https://www.nytimes.com/2020/05/23/business/omegaverse-erotica-copyright.html>.

<sup>25</sup> Ernesto Van der Sar, *Bizarre DMCA Takedown Requests Censor EU ‘Censorship’ News*, TorrentFreak (Aug. 11, 2018), <https://torrentfreak.com/bizarre-dmca-takedown-requests-censor-eu-censorship-news-181011/>.

<sup>26</sup> See Jennifer Urban *et al.*, *Notice and Takedown in Everyday Practice* (2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628), at 72.

<sup>27</sup> Eric Goldman, *A SAD Scheme of Abusive Intellectual Property Litigation*, 123 Colum. L. Rev. Forum 183, note 2 (2023), <https://columbialawreview.org/wp-content/uploads/2023/11/November-2023-Forum-Goldman-final.pdf> (discussing “an underreported system of abusive intellectual property (IP) litigation,” as well as a string cite of “prior work on mass-defendant intellectual property enforcement”).

<sup>28</sup> *How Google Fights Piracy* (2018), [https://blog.google/documents/27/How\\_Google\\_Fights\\_Piracy\\_2018.pdf](https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf) at 8 (“fabricated copyright infringement allegations can be used as a pretext for censorship and to hinder competition. Google is committed to ensuring that it detects and rejects bogus infringement allegations, such as removals for political or competitive reasons, even as it battles online piracy.”); Meta, Rights Manager: Protecting our users, <https://rightsmanager.fb.com/#user-protection> ((explaining how Meta’s tools “help ensure that lawful expression, such as fair use and other copyright exceptions, are protected.”)).

<sup>29</sup> Karl Bode, *Studies Keep Showing That the Best Way to Stop Piracy Is to Offer Cheaper, Better Alternatives*, Vice (Feb. 26, 2019), [https://www.vice.com/en\\_us/article/3kg7pv/studies-keep-showing-that-the-best-way-to-stop-piracy-is-to-offer-cheaper-better-alternatives](https://www.vice.com/en_us/article/3kg7pv/studies-keep-showing-that-the-best-way-to-stop-piracy-is-to-offer-cheaper-better-alternatives).

<sup>30</sup> See, e.g., Scoop Media, *Netflix is killing content piracy* (Feb. 26, 2019), <https://www.scoop.co.nz/stories/BU1902/S00685/netflix-is-killing-content-piracy.htm>; Copia Institute, *The Carrot Or The Stick? Innovation vs. Anti-Piracy Enforcement* (Oct. 8, 2015), <https://copia.is/library/the-carrot-or-the-stick/>.

<sup>31</sup> Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (July 2013), <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>, at 77.

need no excuse to regulate online speech, any U.S. efforts to do so will certainly encourage similar activities abroad, for less noble purposes. As a leading exporter of digital services over the Internet, the U.S. has the most to lose from increased extraterritorial regulation on online intermediaries. In the long run, whatever benefits may accrue to U.S. rightsholder interests as a result of more aggressive content regulation may be lost to the broader economy by hamstringing the export of U.S. technology.

Overblocking is a very real concern raised frequently by technologists, including Internet luminaries earlier this year.<sup>32</sup> The impact on speech and lack of due process is not speculative.<sup>33</sup> There exists a long history of site-blocking injunctions leading to overreach.<sup>34</sup> This includes examples of overblocking restricting access to thousands of websites,<sup>35</sup> without evidence or process.<sup>36</sup>

It is simply not possible to craft a uniquely American, speech-protecting site-blocking regime. While other countries may have certain types of programs or vendors that promise network-level enforcement, that doesn't mean that it is technically—or Constitutionally—possible to implement site-blocking without substantial collateral damage.<sup>37</sup>

#### **a. DNS and Internet Architecture in Brief**

Site blocking proposals generally start with the Domain Name System (DNS). DNS is similar to the Internet's phonebook; it is essentially a naming database that links IP addresses with more accessible text-based domain names. DNS resolution can be provided by an ISP, or a third party who may differentiate their product with features to protect users from dangerous sites and content.

While ISP-provided DNS resolution tends to be limited to a single local or national market, DNS resolver services like those operated by some CCIA members are generally global providers that provide universal resolution services regardless of where users are located. These tools are

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<sup>32</sup> Vint Cerf, *et al.*, *Concerns over DNS Blocking* (June 23, 2023), <https://medium.com/@vgcerf/concerns-over-dns-blocking-988ef546a100>.

<sup>33</sup> Glyn Moody, *Good And Bad News On Attempts To Implicate DNS Services For Copyright Infringement At The Domains They Resolve*, Techdirt (Dec. 7, 2023), <https://www.techdirt.com/2023/12/07/good-and-bad-news-on-attempts-to-implicate-dns-services-for-copyright-infringement-at-the-domains-they-resolve/>.

<sup>34</sup> Andrew McDiarmid, *An Object Lesson in Overblocking*, CDT (Feb. 17, 2011), <https://cdt.org/insights/an-object-lesson-in-overblocking/>; CDT Warns Against Widespread Use of Domain-Name Tactics To Enforce Copyright (Mar. 21, 2011), <https://cdt.org/insights/cdt-warns-against-widespread-use-of-domain-name-tactics-to-enforce-copyright/>; Center for Democracy & Technology, *The Perils of Using the Domain Name System to Address Unlawful Internet Content* (Sept. 2011), <https://cdt.org/wp-content/uploads/pdfs/Perils-DNS-blocking.pdf>.

<sup>35</sup> Ernesto Van der Sar, *U.S. Government Shuts Down 84,000 Websites, 'By Mistake'*, TorrentFreak (Feb. 16, 2011), <https://torrentfreak.com/u-s-government-shuts-down-84000-websites-by-mistake-110216/>.

<sup>36</sup> Cindy Cohn & Corynne McSherry, *Unsealed Court Records Confirm that RIAA Delays Were Behind Year-Long Seizure of Hip Hop Music Blog*, EFF Deeplinks Blog (May 3, 2012), <https://www.eff.org/deeplinks/2012/05/unsealed-court-records-confirm-riaa-delays-were-behind-year-long-seizure-hip-hop>.

<sup>37</sup> Alissa Starzak & Marwan Fayed, *The unintended consequences of blocking IP addresses*, The Cloudflare Blog (Dec. 16, 2022), <https://blog.cloudflare.com/consequences-of-ip-blocking/>; Patrick Nemeroff, *Latest copyright decision in Germany rejects blocking through global DNS resolvers*, The Cloudflare Blog (Dec. 5, 2023), <https://blog.cloudflare.com/latest-copyright-decision-in-germany-rejects-blocking-through-global-dns-resolvers/>.

currently unable to carry out DNS-level blocking on a country-by-country basis — only globally. Blocking domain names at this level could in many instances render content inaccessible to all users worldwide based on its alleged illegality in a single jurisdiction. Requests to block content that is illegal in one jurisdiction may be seen as undesirable censorship in another.

Technical expert groups like ICANN<sup>38</sup> and Internet Society<sup>39</sup> have strongly advised against DNS-level filtering or blocking and instead urged that content-level decisions be made at the network edge and not at the Internet’s infrastructure core.

## **b. Recent Examples of Overblocking**

The European Union’s website blocking system provides an instructive example of unintended consequences. On paper, the EU has rather high-level and seemingly proportionate laws for website blocking. However, EU member state laws often lack granularity and do not specify how a site should be blocked, or by whom. Some of the technical ways to block access to illegal content are incredibly broad. There is little transparency into blocking orders, with few ways to know when a site is being blocked by court order, a fact that raises due process, accountability, and free expression concerns, and can even have national security implications.<sup>40</sup>

- In Austria, a 2022 blocking order resulted in a partial Internet outage in the country for two days, with the blockage of thousands of innocent websites. The court order targeted 14 websites that copyright holders argued were infringing copyright. But the order served on the local ISP linked back to 11 IP addresses run by a content delivery network (CDN) provider and commonly used by thousands of websites. This ultimately resulted in thousands of collateral sites being silenced despite doing nothing wrong — “a temporary casualty of the failure to build legal remedies and systems that reflect the Internet’s actual architecture.”<sup>41</sup> A local regulator ultimately concluded that IP address blocking would no longer be allowed.<sup>42</sup>
- A 2019 case in Germany involved a rightsholder’s attempt to obtain an order requiring blocking through a public DNS resolver. A court originally granted the order, resulting in blocking access to the entire website for all users around the globe, not just the webpage which hosted the alleged violating copyright content. This is because DNS can only block access at the domain name level — not specific pieces of content, individual webpages, or even subdomains. On appeal, a court eventually found that DNS resolvers are not an appropriate tool for seeking to address online infringement—also pointing out that blocking through a public resolver is not effective.<sup>43</sup>
- In 2020, the European Court of Human Rights considered a case involving a site that was blocked in Russia because it shared an IP address with a blocked website. The court

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<sup>38</sup> ICANN Security and Stability Advisory Committee Advisory on Impacts of Content Blocking via the Domain Name System (2012), <https://www.icann.org/en/system/files/files/sac-056-en.pdf>.

<sup>39</sup> Internet Society Perspectives on Domain Name System (DNS) Filtering (2018), <https://internetsociety.org/wp-content/uploads/2018/10/Perspectives-on-Domain-Name-System-Filtering-en.pdf>.

<sup>40</sup> Cerf, *supra* n.32, <https://medium.com/@vgcerf/concerns-over-dns-blocking-988ef546a100>.

<sup>41</sup> Starzak & Fayed, *supra* n.37.

<sup>42</sup> Andy Maxwell, *IP Address Blocking Banned After Anti-Piracy Court Order Hit Cloudflare*, TorrentFreak (Aug. 11, 2023), <https://torrentfreak.com/ip-address-blocking-banned-after-anti-piracy-court-order-hit-cloudflare-230811/>.

<sup>43</sup> Nemeroff, *supra* n.37.



concluded that the indiscriminate blocking of lawful content of the site “amounts to arbitrary interference with the rights of owners of such websites.”<sup>44</sup>

- Informed by instances such as these, a German appeals court recently concluded that DNS resolver services should not be subject to liability or a duty to block based on a notice in a case involving the Quad9 Foundation, a Swiss non-profit DNS resolver.<sup>45</sup> The court also explained how such blocking “should only be considered as a last resort.”<sup>46</sup> In particular, the decision highlighted the copyright owner plaintiff’s failure to pursue less sweeping remedies against the individual direct infringers.

As these experiences from countries throughout Europe demonstrate, responding to infringement at the infrastructure level means overblocking is inevitable. The German *Quad9* decision just last week concluded that website blocking must be a remedy of last resort.<sup>47</sup>

Given differences between the U.S. and EU legal systems, any new legislative proposal in the United States should maintain remedy limitations for online service providers, as in the Digital Millennium Copyright Act, where any duty to block is subject to provisions in 17 U.S.C. § 512 (j), whereby a court must weigh a four-factor balancing test. Unfortunately, courts and attorneys for rightsholders in *ex parte* proceedings can’t always be entrusted with formulating sufficiently tailored blocking orders.

The Internet is a complicated network, and taking an action in one place can have an unintended consequence elsewhere. The most effective way of targeting rogue websites, with the least amount of collateral damage, is to pursue those sites in the jurisdiction where they are located, and to promote the licensing of lawful content. Any blocking, even if intended narrowly, runs the substantial risk that access to other legitimate speech will be blocked as well.

#### IV. Conclusion

CCIA members are committed to mitigating intellectual property infringement, and invest significant time and resources in doing so. Digital services do not want their products used for infringing purposes. But they also want to ensure that copyright enforcement does not block lawful commerce and speech. Experience teaches that the twin goals of ensuring that creator compensation and appropriate public access are best served by promoting a diversity of legitimate options for accessing media, while avoiding overbroad enforcement mechanisms.

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<sup>44</sup> Starzak & Fayed, *supra* n.37.

<sup>45</sup> Glyn Moody, *Good And Bad News On Attempts To Implicate DNS Services For Copyright Infringement At The Domains They Resolve*, Techdirt (Dec. 7, 2023), <https://www.techdirt.com/2023/12/07/good-and-bad-news-on-attempts-to-implicate-dns-services-for-copyright-infringement-at-the-domains-they-resolve/>.

<sup>46</sup> 14 U 503/23, 05 O 807/22, 5 Dec. 2023 [Ger.], *available at* [https://quad9.net/uploads/URT\\_05\\_12\\_2023\\_en\\_Korr\\_MH\\_en2\\_2e629b1f7b.pdf](https://quad9.net/uploads/URT_05_12_2023_en_Korr_MH_en2_2e629b1f7b.pdf) (English translation).

<sup>47</sup> Quad9 Turns the Sony Case Around in Dresden (Dec. 6, 2023), <https://quad9.net/news/blog/quad9-turns-the-sony-case-around-in-dresden/>.