

**IN THE MATTER OF REQUEST OF THE INTELLECTUAL PROPERTY
ENFORCEMENT COORDINATOR FOR PUBLIC COMMENTS: DEVELOPMENT OF
THE JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT**

COMMENTS OF THE ELECTRONIC FRONTIER FOUNDATION

The Electronic Frontier Foundation welcomes this opportunity to respond to the Intellectual Property Enforcement Coordinator’s (IPEC) request for comments on the Administration’s intellectual property enforcement strategy. We especially appreciate IPEC’s interest in hearing from American consumers and innovators – citizens and creators who are too often excluded from Intellectual Property (IP) policymaking.

The Electronic Frontier Foundation (EFF) is a nonprofit, membership-supported civil liberties organization working to protect consumer interests, innovation and free expression in the digital world. Founded in 1990, EFF represents almost 20,000 contributing members. EFF and its members have a strong interest in promoting balanced intellectual property policy that serves both public and private interests. Through litigation, the legislative process, and administrative advocacy, EFF seeks an IP enforcement system that promotes “the Progress of Science and useful Arts” along with the letter and spirit of the Bill of Rights.

I. EFF’s Recommendations on the Administration’s Enforcement Strategy

A. Criminal Copyright Enforcement Online: Pick the Right Targets, Promote Transparency

Over the past several years, there appears to have been a marked increased in the use of government resources to police allegedly infringing activity online.¹ While we are skeptical that this is the best use of government resources, our primary concern is that these efforts are causing significant collateral damage, and that the government does not appear to be concerned about mitigating that harm. We strongly urge IPEC to ensure that the various agencies involved in IP enforcement reverse course in this regard, and that they be held accountable if they fail to do so.

For example, we are aware that several companies and individuals had their domain names improperly “seized” over the past several years. Efforts to recover those domains have been met with delay and obfuscation. Particularly egregious was the case of the music blog dajaz1.com. Dajaz1 was seized with much fanfare by the Immigrations and Customs Enforcement (ICE) division of the Department of Homeland Security over the 2010 Thanksgiving weekend. It was widely reported at the time that Dajaz1 should never have been targeted, that much of the blog’s content was the author’s own editorial writing, and that many of

¹ See, e.g., David Kravets, *Uncle Sam: If It Ends in.Com, It’s .Seizable*, Wired (March 6, 2012), <http://www.wired.com/threatlevel/2012/03/feds-seize-foreign-sites/> (estimating that Operation in Our Sites has resulted in 750 domain name seizures and noting that “seizures are becoming commonplace under the Obama administration”); Letter from Ron Wyden, U.S. Senator, to Eric Holder, U.S. Attorney General, and John Morton, Director, Immigration and Customs Enforcement (Feb. 2, 2011) (available at http://www.wyden.senate.gov/library?PageNum_rs=5) (calling the surge in domain name seizures “a major shift in the way the U.S. government combats copyright infringement”).

the allegedly infringing links were given to the author by artists and labels themselves – including Kanye West, Diddy, and a vice president of a major record label. More than a year later, ICE returned the domain name to the Dajaz1’s owner, with no explanation. Even worse, during that time Dajaz1 and its attorney were deprived of crucial information on the continued delays in the litigation.

After more than six months of secrecy, the court records were finally released concerning the mysterious takedown. The records showed that one of the key reasons the blog remained censored for so long is that the government obtained three secret extensions of time by claiming that it was waiting for “rights holders” and later, the Recording Industry Association of America (RIAA), to evaluate a “sampling of allegedly infringing content” obtained from the website and respond to other “outstanding questions.”² In other words, having goaded the government into a very public seizure of the blog, RIAA and its members refused to follow up with evidence of illegality. In turn, the government acted shamefully, not returning the blog or apologizing for its apparent mistake, but instead secretly asking the court to extend the seizure and deny Dajaz1 the right to seek return of its property. Dajaz1 was denied its due process. The government has also refused to answer congressional questions about the case.

This seizure raises critical questions about the government’s use of its new powers to shut down lawful speech in the form of domain seizures for alleged copyright infringements. It also demonstrates the basic unfairness of the processes, especially when considered in combination with the secrecy invoked here and possibly in hundreds of other domain name seizures across the country. For nearly a year, the government muzzled Dajaz1.com – denying the blog’s authors the right to speak and the public’s right to read what was published there – and then compounded matters by claiming extreme secrecy and blocking access to information about the case.

Equally troubling, the records suggest that ICE and its attorneys are effectively acting as the hired gun of the content industry at taxpayers’ expense. Instead of relying on rightsholders to determine whether a seizure was appropriate, the government should have been conducting its own thorough investigation. If it had required more evidence *before* conducting the seizure, it could have determined that Dajaz1 wasn’t a proper target. At the very least, when RIAA did not produce timely evidence to back up its accusations, ICE could have re-evaluated and rectified its mistake before a year had passed.

Rojadirecta.com is another example of far-reaching government action gone awry. ICE seized that site in the same “raid.” Operated by the Spanish company Puerto 80, Rojadirecta.com and Rojadirecta.org were seized by U.S. ICE in 2011 despite the fact that a Spanish court found no copyright violation on the sites. It appears that ICE targeted them because they contained links to live sports video streams, but the domain seizures impeded access to *all* of the content on the websites, including obviously non-infringing content like user-created forums, discussions, and technical tutorials. After the seizure, Puerto 80 worked for many months to try to recover the domain, but were shunted from agency to agency without success.

The Second Circuit Court of Appeals is now considering the constitutional issues at stake. Along the way, however, the district court dismissed the underlying case against Puerto 80, finding the government hadn’t alleged a proper legal basis. Thus, as with Dajaz1, the government censored speech, for many months, apparently without bothering to properly prepare a case or provide any appropriate process for recovering the domains.

² See, <https://www.eff.org/deeplinks/2012/05/unsealed-court-records-confirm-riaa-delays-were-behind-year-long-seizure-hip-hop>.

Finally, EFF has been directly involved in protecting the rights of innocent third parties who lost their data when the government issued search warrants on the servers of cyberlocker service Megaupload and seized Megaupload's assets. Through no fault of their own, these individuals have lost access to their property.

When the FBI shut down Megaupload in January of this year, it was one of the 100 most popular websites in the world, with reportedly 150 million registered users. Even knowing this, the government seized the service's domain names and assets, and executed search warrants on its leased servers without plans to return data to Megaupload's innocent users. Approximately two weeks later, the government alerted the private companies who own those servers that the government believed it no longer had control of the servers and the private companies were free to delete all the data residing on them.

To the credit of those companies, they have yet to delete the data. Indeed, there can be no doubt that a substantial portion of that data is in fact legally owned by innocent customers of Megaupload. Currently, those individuals have no way to recover their property.

What is worse, the government's procedure and legal posture in the Megaupload case appears to reflect a broader disregard for the effects its increasing use of domain and other digital seizure mechanisms can have on innocent users. Not only did the government fail to implement a process to allow those consumers access to their rightful data, but it has failed to negotiate and constructively craft such a process in the aftermath.

In short, we see a dangerous pattern, with government agents responding to the interests of copyright owners in outsourcing copyright enforcement, with little regard for transparency or the stifling of lawful speech. This must change, immediately.

B. When the Government Encourages Voluntary Enforcement Agreements, It Should Encourage Due Process

IPEC has played an active role in promoting alternatives to enforcement and legislation, particularly inter-industry agreements designed to discourage online infringement.³ We believe voluntary agreements can be part of the overall IP enforcement strategy. However, where those agreements are going to affect thousands, even millions, of Internet users and companies, close attention must be paid to the interests of users as well as those of copyright and trademark owners. And the best way to ensure that that occurs is to (1) bring users (or their representatives) into the process of crafting and enforcing agreements; and (2) make sure that the process is transparent.

Consider the Memorandum of Understanding (MOU) reached last year between ISPs and major rightsholders to help them police online infringement, educate allegedly infringing subscribers and, if subscribers resist such education, take various steps including restricting their internet access.

The agreement was years in the making, but at no point did the parties consult the millions of subscribers who will be governed by the deal — the same subscribers who elect the politicians, buy the content owners' goods and pay subscription fees to the internet access providers (which are likely to go up as administration costs are passed on — the United Kingdom's graduated response system was estimated to cost \$40 per subscriber). Given that subscribers were not consulted, it is probably not surprising that this deal is not in their interests.

³ See, e.g., 2011 Intellectual Property Enforcement Coordinator Annual Report on Intellectual Property Enforcement, http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_2011_report.pdf.

As a result, the MOU is deeply flawed from the subscribers' perspective. For example:

- Who is in charge? The MOU calls for the creation of a new organization, called the Center for Copyright Information (CCI), to administrate the six-strikes system. CCI will be governed by a six-person executive committee comprised of representatives from content owners and Internet access providers. Subscribers are not represented. Given that the MOU is meant to regulate them, subscribers deserve seats at the table as voting members of the executive committee.
- Internet access providers can punish accused subscribers by interfering with the subscribers' connectivity, including by slowing transmission speeds, temporarily restricting web access for "some reasonable period of time," and conditioning web access on completing a "meaningful copyright education program." These mitigation measures can be imposed solely on the basis of the content owners' assertions, without a judge ever determining that the subscriber did anything wrong. Internet access has become an essential service in the digital age. Thus, just as we restrict the power of utilities to shut off services to their customers, we should not allow content owners to cause Internet access providers to degrade or suspend their services without due process.
- The Internet access providers will treat the content owners' notices of infringement as presumptively accurate – obligating subscribers to defend against the accusations, and in several places requiring subscribers to produce evidence "credibly demonstrating" their innocence. This burden-shift violates our traditional procedural due process norms and is based on the presumed reliability of infringement-detection systems that subscribers have not vetted and to which they cannot object. (The content owners' systems will be reviewed by "impartial technical experts," but the experts' work will be confidential.) Without subscribers being able to satisfy themselves that the notification systems are so reliable that they warrant a burden-shift, content owners should have to prove the merits of their complaints before Internet access providers take any punitive action against subscribers.
- Content owners should be accountable if they submit incorrect infringement notices. A subscriber who successfully challenges an infringement notice gets a refund of the \$35 review fee, but the MOU does not establish any adverse consequences for the content owner that submitted the incorrect notice – even after multiple erroneous or groundless notices. Content owners should be on the hook if they overclaim copyright infringement, or issue notices without sufficient factual and legal basis.
- The MOU contemplates ongoing evaluation of the system through a variety of reports. That seems like a good idea, but neither subscribers nor the general public get to see or comment on those reports. Similarly, the statement of "prevailing legal principles" used to instruct reviewers also should be made public so that subscribers know how reviewers are interpreting U.S. copyright law. Simply put, if subscribers are supposed to treat the system as credible, they need enough information to determine that the system is credible.

We are concerned that voluntary agreements that bypass the legislative and judicial process are all too likely to lack safeguards for end users – particularly where those users are

never asked for input in the creation of those agreements. A better process would be to use freely available tools to solicit public comment – and then take legitimate comments seriously. The process should be transparent and subject to appropriate user oversight. To the extent IPEC is involved in the discussions that lead to these agreements, it should promote and encourage public input and due process safeguards, and otherwise be sure that the Administration represents the full spectrum of public interests involved.

C. Promote Innovation and Competition To Displace Infringement

The answer to maintaining an open, thriving Internet, to incentivizing creation, and to tackling infringement does not lay in legislation or law enforcement action, but rather in fostering innovative (and oftentimes disruptive) business models that allow content creators to get paid and consumers to have easy and efficient access to content. We've seen time and again that consumers are willing to pay at a price point that makes sense for them – this is Economics 101. When new business models emerge, creators and consumers benefit.

To be sure, there are plenty of exciting new content services emerging. For example, take the Humble Indie Bundle, video game developers who have realized substantial success devising a pay-what-you-want scheme for distributing video games. Or artists like Jonathan Coulton, who has, with much success, produced and distributed his own music (and who recently provided this pithy advice to creators who reject new business models but complain about piracy: "Make good stuff, then make it easy for people to buy it. There's your anti-piracy plan.").

Everyday, examples like Humble Indie Bundle, Jonathan Coulton, and others (such as artists like Louis C.K. and Nina Paley, for example) are becoming the norm, not the exception. And, in doing so, they make the best case against those who claim that we need dangerous and overbroad laws to incentivize creation and innovation. Traditional content owners have historically been slow to embrace these new business models. We encourage those companies to choose innovative alternatives and likewise encourage the Administration to reject overbroad legislation to solve problems that likely have a fix in the open market.

Key to encouraging these kinds of alternative business models is creating an environment in which they can thrive. One way to do this is to encourage alternative licenses, such as Creative Commons or voluntary collective licensing schemes. For example, Creative Commons provides licenses that allow artists to communicate, in simple terms, which rights they reserve, and which rights they waive. This allows follow-on creation without the expense of searching for content owners and other licensing fees, when the original author allows it. Creative Commons licenses have already met much success, which shows the market's desire for alternatives to traditional litigious copyright enforcement.

Another way to encourage these business models is by, as stated above, encouraging the participation of content users and entrepreneurs in these types of policy debates. Bringing those entrepreneurs to the table, and finding out not only how they use and plan to use content, but how current copyright law and its enforcement affects their businesses, would benefit not just those individuals, but the economy at large.

Copyright law — and its oftentimes overbroad enforcement — should not deter Americans from creating innovations that allow for sharing in new ways. Unfortunately, current law often discourages such innovation and stifles beneficial competition. We believe that certain amendments to copyright law would go far to remedy this. For example, copyright's statutory damages provisions are in dire need of reform.

In most areas of civil law, we tie damages to actual harm, i.e., what is needed to make the person harmed “whole.” Even in the relatively rare case of punitive damages, intended to punish people who have willfully engaged in illegal conduct, we still require a proportional relationship between damages and actual harm. We do this in part because it is fair, and in part because it allows those whose actions test the law or arise in new circumstances to reasonably evaluate their legal risk. Yet when it comes to copyright, there’s no reasonable way to evaluate the risk: juries can award anywhere from \$750 to \$150,000 per work, and as recent cases demonstrate, there’s no predictability even when the facts are essentially the same.⁴

That lack of predictability causes real harm, chilling speech and innovation. It discourages individuals from raising meritorious defenses to claims of infringement out of fear that they will end up facing insurmountable damages. Because “the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement,”⁵ damages provisions should not discourage meritorious defenses. We encourage IPEC to support sensible copyright laws, including ones that limit damages to harm actually done and to adopt policies that promote innovation and competition, which will most effectively curb infringement.

D. Prioritize Public Safety

IPEC has consistently, and we believe correctly, distinguished threats to public safety from purely economic issues. Protecting citizens and residents from physical harm is the most basic function of government and the most important priority for government resources. To EFF’s membership and most Americans, effectively finding and halting threats to human life and health justifies costs to government and society that are not justified where safety risks are absent. In contrast, resources directed to addressing purely economic risks carry a higher risk of unwarranted interference in the free market and of picking winners and losers among businesses and industries. We encourage IPEC to make health and safety risks from fake or adulterated products the highest priority for the Administration, rather than economic risks from copyright infringement.

IPEC has a broad mandate and can set priorities within its field. Of the concrete government actions listed in the 2010 Joint Strategic Plan, many concerned health and safety risks, such as interdiction of counterfeit drugs and medical devices and securing the pharmaceutical supply chain. IPEC has also made reference to programs to reduce the purchase of counterfeit equipment and parts by the military. As instances where counterfeit products pose a real threat to public safety, these efforts should continue to top the Administration’s IP enforcement agenda. Moreover, these are problems not likely to be solved by the market alone without law enforcement and other government assistance. The costs of these types of enforcement, including costs imposed on businesses and individuals – are generally more justifiable in return for true gains in public safety.

Enforcement of copyright, in contrast, is primarily an economic issue, and thus must come after safety risks in the hierarchy of government priorities. In addition, government intervention in the economy always carries the risk of unintended consequences, and the risk that enforcement will not promote the general welfare but only favor or subsidize particular

⁴ See, e.g., *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011); *Capitol Records, Inc. v. Thomas-Rasset*, Case Nos. 11-2820, 11-2858 (8th Cir.), currently pending.

⁵ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994).

industries. And, as discussed above, we believe that market solutions will be the most effective tools for reducing copyright infringement.

E. Internet Architecture is Off Limits

In recent years, we have watched with dismay and growing concern as proposals for combatting infringement have taken aim at the architecture of the Internet. Worse, some of those proposals have come dangerously close to becoming law.

Case in point: the debate over the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA), its Senate counterpart. Various versions of those bills included dangerous provisions that would have undermined the very infrastructure of the Internet. During the debate surrounding SOPA and PIPA, a group of 83 prominent Internet inventors and engineers sent an open letter to members of Congress⁶ warning that the legislation would “risk fragmenting the Internet’s global domain name system (DNS) and have other capricious technical consequences.” Moreover, they stated:

When we designed the Internet the first time, our priorities were reliability, robustness and minimizing central points of failure or control. We are alarmed that Congress is so close to mandating censorship-compliance as a design requirement for new Internet innovations.

At the time, the director of the Center for Computer Science & Information Technologies at the Sandia National Laboratories issued a similar warning,⁷ writing that:

There are also potential consequences to DNS filtering that might adversely affect proper functionality of the Internet. In particular, it is possible that the resolution of some domain names could be negatively affected by the filtering of other domain names under the provisions of the these bills. Domain names often rely on other names to be resolved, and the failure of these dependencies can cause partial or complete failure of the dependent names.

Of course, SOPA and PIPA are not the law.⁸ And, indeed, the lack of input from experts is often cited as a fundamental failure of the proposed legislation – during debate, many members of Congress expressed concern that the drafting process did not include more engineers conversant in Internet architecture. This led to what is now a quite famous statement by Rep. Jason Chaffetz, R-Utah, asking Congress to “bring in the nerds.”

⁶ <https://www.eff.org/deeplinks/2011/12/internet-inventors-warn-against-sopa-and-pipa>

⁷ <http://www.scribd.com/doc/73106069/Napolitano-Response-Rep-Lofgren-11-16-11-c>

⁸ See <https://globalchokepoints.org/>. EFF’s Global Chokepoints is an online resource created to document and monitor global proposals, such as SOPA and PIPA, to turn Internet intermediaries into copyright police. These proposals harm Internet users’ rights of privacy, due process and freedom of expression, and endanger the future of the free and open Internet. Our goal is to provide accurate empirical information to digital activists and policy makers, and help coordinate international opposition to attempts to cut off free expression through misguided copyright laws, policies, agreements and court cases.

Rep. Chaffetz’s larger point, however catchy, remains salient. There should be no regulation of any activity on the Internet without explicit direction from those who intimately understand how it works. Period. And, in any case, regulation of the Internet’s basic infrastructure should be completely off limits.

II. EFF’s Recommendations on an International Enforcement Strategy

EFF is concerned with the lack of balance, transparency and multi-stakeholder engagement in U.S. IP international enforcement efforts. According to Articles 7 and 8⁹ of the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Right (TRIPS), the enforcement of intellectual property rights must be consistent with the promotion of technological innovation and the transfer and dissemination of technology. As such, EFF believes that IP policies must serve the mutual advantage of producers and users of knowledge. Achieving a balance of crucial interests was a stated goal of the developing countries engaged in the negotiation of TRIPS, and we believe this same objective standard should be held by the United States.

It also concerns us that many efforts within the U.S. enforcement framework — such as the annual Special 301 Reports¹⁰ — ask countries to adopt very particular implementations of international legal standards and interpretations of controversial parts of U.S. law.¹¹ The international pressure set by the Special 301 framework and other strategies also generates great burdens on other countries that end up funneling their national taxpayer funding to IP enforcement activities instead of other crucial national priorities like food security and health.

Copyright holders invest heavily in international enforcement advocacy and anti-piracy campaigns, from legislative lobbying and police efforts to protect theatrical releases to software legalization programs for governments and businesses.¹² These efforts involve a wide range of actors operating at different political and geographic levels, including industry associations, local, national, and international law enforcement, licensing agencies, multilateral organizations like the Organisation for Economic Co-operation and Development (OECD), WTO and World Intellectual Property Organization (WIPO), U.S. government agencies, U.S. and international chambers of commerce (like AMCHAM), and many others. Due to the fact we spend public resources so heavily on IP enforcement, it is imperative that these agencies consider the full spectrum of public interests. These initiatives are generally not open to a multi-stakeholder approach – they are driven by government and private industry. One example of this dangerous type of partnership is the National Intellectual Property Rights Coordination Center (IPR Center). In its own words, “the center employs a true task force model to optimize the roles and enforcement efforts of member agencies, while enhancing government-industry partnerships to support ongoing IPR enforcement initiatives.”¹³

Between and within countries, this model has given rise to a web of interlocking advisory groups and enforcement efforts that blur the lines between public and private power. In the

⁹ http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm.

¹⁰ See, e.g., <http://www.ustr.gov/about-us/press-office/reports-and-publications/2012-2>

¹¹ EFF and Public Knowledge submitted recommendations to address gross deficiencies in the process, including the complete lack of transparency in their standards for determining “adequate and effective [intellectual property rights] protection”. Available at: <https://www.eff.org/node/57053>.

¹² <https://www.eff.org/deeplinks/2010/09/jack-booted-thugs-and-copyright-enforcement>.

¹³ <http://www.iprcenter.gov>.

United States, and supporting U.S. enforcement activities abroad, for example, this is spurred by significant funding made available by the 2008 PRO-IP Act framework.

Besides public-private cooperation in establishing programs for copyright enforcement, the U.S. government has also expanded enforcement efforts in regard to patents through a variety of programs such as the USPTO attachés.¹⁴ The attaché program is considered a collaborative effort among patent offices, as well as programs targeted at training and “sensitization” of the police force, prosecutors and judges¹⁵ in developing countries that are promoted by a full spectrum of corporate, government, and international actors – from WIPO, to Microsoft, to the US Department of Justice and the U.S. Patent and Trademark Office.

These programs can have chilling effects on due process and civil liberties. They raise questions in regard to whether enforcement efforts respect national sovereignty and also in regard to the actual goals and results of such programs.

This industry-biased understanding of the public interest also appears in international trade agreement efforts such the Anti-Counterfeiting Trade Agreement (ACTA) and the Trans-Pacific Partnership Agreement (TPP): they both uphold strong, high-penalty enforcement measures, an unsurprising outcome of a negotiations process lacking transparency and multi-stakeholder participation. These agreements have engaged in the kind of forum shifting and policy-laundering strategies that corner countries into making difficult, harmful trade-offs. This is especially true with the TPP, where U.S.-based interests have forced linkages between IP and other substantive trade issues such as those relating to the environment and agriculture, in a way that compounds the burden for developing nations.

The G-8 Leaders statement on the topic is illuminating. “Given the importance of intellectual property rights (IPR) to stimulating job and economic growth, we affirm the significance of high standards for IPR protection and enforcement, including through international legal instruments and mutual assistance agreements, as well as through government procurement processes, private-sector voluntary codes of best practices, and enhanced customs cooperation, while promoting the free flow of information.” Note that the part that helps users – free flow of information – is relegated to a dangling clause at the end, five words following 50 words about the importance of restrictions.

EFF believes that a broader perspective including the rights of users and the public good should infuse IP enforcement efforts and technical assistance to developing countries. In particular, EFF believes IP enforcement efforts should move beyond securing higher levels of intellectual property protection as an end in itself and should:

- Reflect a true balance between the public interest and rightsholders’ interests;
- Recognize the sovereign rights of nations to implement intellectual property laws and appropriate national enforcement strategies that accord with their national domestic priorities and level of economic development; and
- Take account of the way that existing national laws uphold the public interest by giving the public the right to make some uses of copyrighted and patented work without permission. This means ensuring that new treaties and trade agreements do not close off the ability of governments to use the flexibility built into existing instruments to create appropriate new exceptions to meet their domestic needs (see Article 13 of the Trade Related Aspects of Intellectual Property agreement

¹⁴ <http://www.uspto.gov/ip/global/attache/index.jsp>.

¹⁵ For instance, judges are portrayed as obstacles to stronger enforcement outcomes.

Article 10 of the WCT Article 16 of the WPPT and Article 9 of the Berne Convention, among others).

We also reaffirm the recommendations EFF and other groups have promulgated within the Trans Pacific Consumer Dialogue, specifically:

- *Resolution on enforcement of copyright, trademarks, patents and other intellectual property rights.* DOC No. IP 09-09, DATE ISSUED: June 18, 2009. Available at http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=234&Itemid=40
- Resolution on the Terms of Protection for Copyright and Related Rights, and Measures to Expand Access to Works not Exploited by Copyright Owners DOC No. IP 10-09. DATE ISSUED: 1st July 2009. Available at http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=236&Itemid=40

III. EFF's Recommendations on Threat Assessment: Base Enforcement Priorities on Sound Data

The Obama Administration has made a strong commitment to basing policy decisions on accurate data.¹⁶ EFF is pleased to see that IPEC is endeavoring to uphold that commitment in this comment process, requesting that submissions of data include citations to their source and descriptions of their methodology. We encourage IPEC to hold itself to the same high standards in the 2012 Strategic Plan. Specifically, any recommendations on enforcement priorities and on legislation should be based on data showing the likely costs and benefits of *each* proposal, rather than on generalized notions of the benefits of IP.

The March 2012 report of the Economics and Statistics Administration entitled “Intellectual Property and the U.S. Economy: Industries in Focus”¹⁷ is a case in point. While that report paints a general picture of the U.S. economy as it relates to intellectual property, it does not attempt to measure or predict the effect of any given policy change on economic output or employment. In fact, the report cautions that it “does not contain policy recommendations and is not intended to directly advance particular policy issues.”¹⁸ Nonetheless, the report has been used by industry groups as supposed proof of the contention that if a large portion of our economy and employment are in so-called “IP-intensive industries,” then increased IP enforcement will necessarily lead to economic growth. The report simply does not support such conclusions, because it does not measure the economic cost of enforcement or other policy changes.

Moreover, the report is extremely broad in scope, aggregating data from many very different industries. The vast majority of the employment in “IP-intensive industries,” according to the report, are in “trademark-intensive industries.”¹⁹ Among those industries, an enormous proportion of jobs are in retail sales and construction.²⁰ These data do not and cannot show that increased enforcement of patents and copyrights has created jobs, or will do so.

The Administration should be particularly wary of claims that explicitly or implicitly draw a causal link between increased IP enforcement and job growth, or conversely, between the

¹⁶ In a search of whitehouse.gov, the phrase “data-driven” appeared in 6,420 documents as of Aug. 9, 2012.

¹⁷ <http://www.esa.doc.gov/Reports/intellectual-property-and-us-economy-industries-focus>.

¹⁸ *Id.* at iv.

¹⁹ *Id.* at 39.

²⁰ *Id.* at 36-38.

decision *not* to implement a proposed IP policy change and job *losses*. The 2010 study by the Government Accountability Office found that such conclusions are extremely difficult to draw, and that none of the studies of copyright infringement it considered drew any conclusion linking IP policy proposals to job creation or loss in any valid way.²¹ Drawing unwarranted conclusions from studies, or relying on industry studies for which the underlying data and methodologies are not disclosed, calls the Administration's commitment to data-driven policymaking into question.

IV. Conclusion

EFF appreciates this opportunity to discuss the benefits and pitfalls of a growing focus on intellectual property enforcement by the Administration. We look forward to working with IPEC to increase government support for market-based alternatives to copyright infringement, and to increase transparency, accountability, and due process protections in both government enforcement efforts and government-backed private agreements.

²¹ Government Accountability Office, "Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods," GAO-10-423 (Apr. 12, 2010).