

**IN THE MATTER OF COORDINATION AND STRATEGIC PLANNING OF THE
FEDERAL EFFORT AGAINST INTELLECTUAL PROPERTY INFRINGEMENT:
REQUEST OF THE INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR
FOR PUBLIC COMMENTS REGARDING THE JOINT STRATEGIC PLAN**

**COMMENTS OF PUBLIC KNOWLEDGE, ELECTRONIC FRONTIER FOUNDATION,
AMERICAN ASSOCIATION OF LAW LIBRARIES, MEDICAL LIBRARY
ASSOCIATION, SPECIAL LIBRARIES ASSOCIATION, AND U.S. PIRG**

The above-listed commenters appreciate the opportunity to submit this filing in response to the Intellectual Property Enforcement Coordinator's (IPEC) request for public comments on the issue of coordination and strategic planning of the federal effort against intellectual property infringement.¹

The social and economic effects of Intellectual Property (IP) enforcement policy are a complex set of interrelating factors involving many areas of commerce. In ensuring effective enforcement of IP laws, the IPEC should recognize the complexity of this IP "ecosystem," protecting not only against violations of the law, but unintended consequences of particular enforcement methods and strategies. Well-intentioned efforts to prevent infringement have in the past caused significant harms to innocent parties. For instance, efforts in 2005 to prevent infringement of certain music CDs instead resulted in hundreds of thousands of computers being infected with severe security vulnerabilities.² Therefore, in assessing the needs of IP enforcement, the IPEC should not only analyze the harms caused by infringement of IP, but also weigh the various costs and benefits of different enforcement mechanisms and objectives. Because of the complexity of these issues, any recommendations for changes in policy should be restrained and carefully considered, especially should they extend beyond the policies and practices for enforcing existing laws.

Even under existing laws, there is potential for collateral damage to be inflicted on innocent users, technological innovators, and creators who adapt existing material. In preparing and implementing the Joint Strategic Program (JSP) for IP enforcement, the IPEC should concentrate efforts on those violations that cause the greatest harm in clearly settled areas of law, to avoid chilling creative and economic activity in emerging fields. The IPEC should also be open to novel and creative solutions that work within the existing system of balance. For example, IPEC might wish to consider whether facilitating legal access to content through mechanical licensing at reasonable rates would prove a better way to discourage infringement

¹ Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Enforcement: Request of Intellectual Property Enforcement Coordinator for Public Comments Regarding Joint Strategic Plan, 75 Fed. Reg. 8137, (Feb. 23, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-3539.pdf>

² See Deirdre K. Mulligan & Aaron Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident*, 22 BERKELEY TECH. L. J. 1157 (2007); Bruce Schneier, *Real Story of the Rogue Rootkit*, WIRED, Nov. 17, 2005, <http://www.wired.com/politics/security/commentary/securitymatters/2005/11/69601>.

and benefit the industry as a whole than the blunter solutions often recommended by the entertainment industry.

The complexity of the IP ecosystem increases dramatically when we also account for international relationships. Initiatives to enforce domestic IP overseas not only require an expenditure of political capital with other countries; they can, if handled clumsily, actively subvert the United States' foreign policy agenda. For instance, overly restrictive trade rules on pharmaceuticals can undermine public health goals in reducing the incidence of AIDS and other diseases. Laws and technologies intended to curtail online copyright infringement are easily repurposed to bolster government censorship. In addressing foreign outreach on IP enforcement, the IPEC should therefore work to coordinate IP enforcement efforts with the broader foreign policy objectives of the United States. Trade partners should also be reassured that enforcing IP is not merely a pretext for the U.S. to engage in protectionist practices at their expense. In order to foster confidence in the fairness of international IP systems, outreach and technical assistance should promote systems of IP enforcement that emphasize both strong protections and careful limitations to IP laws. Showing the flexibility and fairness built in to IP laws can increase respect for enforcing those laws in the first place.

In furtherance of these general principles, Commenters have also addressed several supplemental questions, in particular: agreements that have worked to reduce infringement, technologies that should be analyzed in identifying infringing goods, training for local enforcement and public education, and strategies to reduce demand for infringing goods.

The IPEC should consider the cost of enforcement and account for the varied nature of intellectual property rights

- a. *The IPEC should conduct a cost-benefit analysis of public enforcement of private intellectual property rights*

The Request asks for submissions from the public regarding the costs to the U.S. economy resulting from infringement of intellectual property rights. While measuring these costs is a critical step in directing enforcement efforts, a comprehensive plan requires not only measuring the costs of infringement, but also the costs and benefits of different enforcement methods. Such an analysis would aid the IPEC in carrying out the mandate of the PRO-IP Act – prioritizing allocation of law enforcement resources for IP enforcement.³ It would also enable the IPEC to recommend that resources be focused on violations likely to cause the greatest harm.

A cost-benefit analysis is particularly necessary because of the nature of federal IP enforcement. Copyrights and patents are private rights that confer exclusive rights on private actors as a reward for creativity or innovation and enable these actors to benefit financially from the results of these endeavors.⁴ Enforcing these rights is primarily the responsibility of rights

³ H.R. REP. No. 110-617, at 26-28 (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr617.110.pdf.

⁴ Agreement on Trade Related Aspects of Intellectual Property Rights, pmbl., ¶ 4, April 15, 1994, 108 Stat. 4809, 869 U.N.T.S. 299, available at: http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

holders,⁵ and any public expenditure of resources that would benefit private interests should be weighed in a rigorous cost-benefit analysis.⁶ This is particularly true because additional expenditures for IP enforcement would tax existing law enforcement resources.⁷

To this end, any cost-benefit analysis of IP enforcement should also include an assessment of the costs of enforcement measures. In particular, the IPEC should be cautious of calls for enforcement mechanisms from certain classes of IP holders mindful only of their own interests and not those of other participants (such as users, consumers, intermediaries, and technology developers) in the IP system. Many measures may have effects not only upon infringers but also upon other sectors of the economy. Many innovative industries, such as consumer electronics manufacturers and the providers of online services, make products and services that can be jeopardized by overbroad enforcement. This is particularly true in industries where copyright limitations and exceptions are necessary for legal trade and commerce. For instance, the doctrine of fair use enables the various markets in audio and video recording devices.⁸ Nevertheless, rights holders have often claimed that new implementations of these technologies enable infringement and that their makers and distributors are secondarily liable for their customers' infringement.⁹ The risks to the economy from chilling effects, which cause people and businesses to refrain from lawful activity for fear of legal costs, should be accounted for.

Similarly, the necessary cost-benefit analysis should consider the potential adverse effects of applying enforcement measures on an individual scale. The express purpose of the PRO-IP Act is to "make commercial scale IP theft less profitable and easier to prosecute."¹⁰ In implementing enforcement practices, care should be taken to ensure that resources better suited

⁵ See 17 U.S.C. §§ 501 (private enforcement of infringement); 506 (criminal enforcement only for "willful" infringement for commercial gain, or of high value products, or of prerelease materials); *Leo Feist, Inc., v. Young*, 138 F.2d 972, 975 (1943) (copyright infringement is a tort). See also *Davis v. Passman*, 442 U.S. 228, 241, 99 S. Ct. 2264, 60 L.Ed.2d 846 (1979) ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner."); *New York Times Co. v. United States*, 403 U.S. 713, 731 n.1 (1971) (free speech concerns when the government restricts speech are not present when copyrights are privately enforced).

⁶ See Morris A. Singer, *The Failure of the PRO-IP Act in a Consumer-Empowered Era of Information Production*, 43 SUFFOLK U. L. REV. 185, 213, (2009).

⁷ The Congressional Budget Office (CBO) estimates that implementing the PRO-IP act will require an additional \$435 million over the next five years. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, H.R. 4279 PRIORITIZING RESOURCES AND ORGANIZATION FOR INTELLECTUAL PROPERTY ACT OF 2008, 2, May 5, 2008, available at: <http://www.cbo.gov/ftpdocs/91xx/doc9197/hr4279.pdf>. See also Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective* 13, INTELLECTUAL PROPERTY RIGHTS AND SUSTAINABLE DEVELOPMENT, ISSUE NO. 22, 2, (2009), available at: <http://ictsd.org/downloads/2009/03/fink-correa-web.pdf> (citing the Financial Times which reported that greater spending on counterterrorism in the U.S. after September 11, 2001 had left fewer resources for fighting crime, reportedly causing rates of crime to go up in many U.S. cities.)

⁸ See Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831 (2006) (explaining that the safe harbor created in favor of time shifting by the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) enabled the introduction of devices such as iPods, MP3 players, DVRs and many others to the market.).

⁹ Anny Shin, *Music Labels Sue XM Over Recording Device*, WASHINGTON POST, May 17, 2006, at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/16/AR2006051601826.html>

¹⁰ H.R. REP. No. 110-617 at 23, (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr617.110.pdf.

to combating large-scale infringement are not misapplied to less apposite cases of individual infringement. For instance, if the PRO-IP Act's seizure and forfeiture provisions are applied against individuals, those penalties may harm those not involved in the violation. The Act allows the seizure and forfeiture of "property used, or intended to be used, in any manner or part, to commit or facilitate the commission of an offense." While it can be appropriately applied to seize the equipment of a commercial-scale infringer, the literal language of the Act can also be interpreted as allowing the forfeiture of a family computer implicated in one individual's digital copyright infringement. Unlike the removal of machinery owned only by a defendant and serving only to violate copyright law, seizure of a multi-user, multi-use home computer would harm everyone in the household. On an aggregate level, significant economic harm can result from inapposite enforcement of laws intended for a different class of defendants.

Commenters are encouraged by the request that parties supply methodologies for any supplied studies, including the costs of existing policies (in the form of infringement or other costs) and the benefits of any proposed changes. Providing the data and methodology behind a study, and not just its ultimate conclusions, is critical when those studies are used to affect national policy and law. In one particular example, a study backed by the Motion Picture Association of America estimated that 44% of its domestic losses came from college students downloading movies. This evidence was used as support for legislative provisions that particularly targeted colleges and universities for enforcement, despite the fact that the study's authors later admitted that the estimate was a gross exaggeration, with the new estimate being that only 15%, not 44%, of revenue was lost to college students.¹¹ Studies used to inform the IPEC's decisions should be subjected to sufficient scrutiny so that such errors do not occur.

b. *Harms from infringement of various intellectual property rights should be clearly defined and differentiated*

Harms caused by various IP infringements have varied effects – in terms of harm to consumers, rights holders, and the economy. IP infringement is alleged to lead to threats to public health and safety, the financing of organized crime, and job losses.¹² However, not all types of infringements of all types of IP rights cause all of these harms. Thus, enforcement resources should be targeted at those violations that cause the greatest harm without placing all IP infringements in the same category. For example, the primary harm caused by trademark infringement is consumer confusion as to the source of a good or service. Harms to public health and safety certainly can result from the use of counterfeit goods, but those harms are the result of substandard goods or goods whose ingredients are misidentified. The harm to the public is due to whether the quality or the components of the product, and not its manufacturer, are mislabeled. This is equally true when the properly identified and sourced components of a product violate a patent—though an patent holder's rights have been violated, no threat to the public emerges absent other, more serious problems best addressed by food, drug, and consumer product safety regulators.

¹¹ Associated Press, *Revised MPAA piracy study puts less blame on students*, L.A. TIMES, Jan. 23, 2008, available at <http://articles.latimes.com/2008/jan/23/business/fi-download23>; Andy Guess, *Downloading by Students Overstated*, INSIDE HIGHER ED, Jan. 23, 2008, available at <http://www.insidehighered.com/news/2008/01/23/mpaa>.

¹² H.R. REP. No. 110-617 at 20-22.

Furthermore, many kinds of trademark infringements have no harmful effects on health and safety. Indeed, their general adverse impact on the economy is questionable. For instance, trademark infringement of luxury products does no harm to the consumer. As one report notes, enforcing such trademarks creates positive effects for the brand owner and the consumer of the genuine products, but the welfare enhancing effect on the economy in general is ambiguous, given the negative effects on the consumers of the infringing goods,¹³ who frequently are aware that they are not purchasing the genuine articles.¹⁴

Consumers can also be the victims of abuse of intellectual property law. This kind of abuse can itself be illegal,¹⁵ and causes the same kinds of harms that infringements cause. For example, rights holders overstate the scope of their rights when they demand that non-infringing fair uses of their works be stopped, or use trademark law to attempt to limit criticisms of their products.¹⁶ Some have falsely claimed “rights” over non-protectable material.¹⁷ Thus, the IPEC should consider whether enforcement measures designed to reduce the harms caused by abuse of intellectual property law should be pursued.

Similarly, copyright infringement may not have the same effect for all works.¹⁸ For instance, a fan who creates an unauthorized derivative work starring characters from Star Wars may, depending on the circumstances, be infringing copyright and trademark law. However, the actions of such fans can hardly be put in the same category as that of large-scale commercial infringers.

¹³ Fink, *supra* note 7, at 12.

¹⁴ *Id.* at 16.

¹⁵ In general, knowingly false claims about the scope of legal rights can be forms of fraud or extortion. At times, IP abuse-specific causes of action, defenses, and violations have been identified. 17 U.S.C. § 506(c) (criminal liability for false copyright notice); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948) (copyright abuse can prevent recovery against infringement); Kevin J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine*, 27 HARV. J.L. & PUB. POL’Y 609 (2004).

¹⁶ For example, in the ongoing *Lenz v. Universal Music Corp.*, C 07-3783 JF (N.D. Cal.), Universal Music sent a notice claiming that a 29-second home video of a toddler dancing (taken by the toddler’s mother and posted on YouTube for her friends and family to see) violated copyright because a Prince song was playing in the background. EFF, *Lenz v. Universal*, <http://www.eff.org/cases/lenz-v-universal> (EFF represents the mother). The Chilling Effects Clearinghouse helps track similar copyright abuses; see <http://www.chillingeffects.org/about>. New examples of the abuse of trademark law, which is intended to prevent “passing off” and other forms of consumer confusion, to limit speech pop up frequently. See, e.g., Paul Alan Levy, *Apparently, Citizens United Doesn’t Believe in Free Speech for the Anti-Corporate Side*, PUBLIC CITIZEN CONSUMER LAW & POLICY BLOG, <http://pubcit.typepad.com/clpblog/2010/03/apparently-citizens-united-doesnt-believe-in-free-speech-for-the-anticorporate-side.html> (Citizens United using trademark law to prevent criticism of the recent *Citizens United* Supreme Court decision); Paul Alan Levy, *Trademark Abuse by Jones Day to Suppress Free Speech*, PUBLIC CITIZEN CONSUMER LAW & POLICY BLOG, <http://pubcit.typepad.com/clpblog/2008/09/trademark-abuse.html> (law firm Jones Day using trademark law to prevent it from being mentioned by a news and consumer information website).

¹⁷ E.g., Major League Baseball has tried to assert ownership over facts about baseball. See *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F.Supp.2d 1077, 1100-03 (E.D. Mo. 2006) (rejecting this claim).

¹⁸ Horace E. Anderson Jr., “Criminal Minded?: Mixtape DJs, The Piracy Paradox, and the Lessons for the Recording Industry,” 76 TENN. L. REV. 111, 120-121 (2008).

- c. *Any recommendations for changes in law should be restrained and account for the broad effects they may have on the balance of IP law*

The scope of recommendations requested is broad, encompassing not only enforcement policy, but also agency regulations and even legislative changes. Commenters are concerned about the breadth of this scope, and the effects on the legal landscape of the various aspects of intellectual property law if laws are framed purely, or even primarily, from a perspective of the needs of enforcement authorities. While the PRO-IP Act requires the IPEC to submit the JSP (including the required reporting on prioritization, information gathering and coordination, and international outreach), it only asks the IPEC to make statutory recommendations “if any, and as appropriate.” This emphasis suggests a necessarily conservative approach in suggesting any possible changes to law.

Although changes in substantive law (such as the elements for secondary copyright liability or the definitions of the rights enumerated in section 106) certainly have significant effects on enforcement efforts, they also by their nature affect the entire sector of law within which they reside, leading to innumerable consequences both intended and unintended. Even changes to more specific areas of law, such as copyright damages and other remedies, can have significant practical effects on the outcome of potential litigation and thus the practical legal landscape. Increasing copyright statutory damages, for instance, can discourage legitimate innovators from risking massive liability in defending their legitimacy in court, resulting in fewer transformative works or media technologies coming to market.

We therefore urge the IPEC to limit any recommendations for statutory changes to those amendments that would aid the core objectives of the Joint Strategic Plan to encourage interagency information sharing and coordination, reducing waste and duplication in enforcement efforts, and creating a robust and open system for international cooperation.

More fundamental changes to the substance of intellectual property law would undoubtedly affect far more than enforcement efforts, and should be considered in forums with a broader mandate to consider all of their consequences. However, should the IPEC’s office take a broader view of its scope for recommendations, we believe that enforcement efforts can be improved through methods other than the usual emphasis on increased penalties and simplified evidence-gathering procedures, and that potential changes could include simplification of licensing procedures, reforms for statutory damages, measures to prevent the improper use of enforcement-minded provisions like the notice-and-takedown procedures of the Digital Millennium Copyright Act, and clarifying 17 U.S.C. § 107 to reflect that certain noncommercial personal uses, such as device-shifting, are not infringements of copyright and thus inappropriate subjects of “enforcement.”

Recommendations

- a. *Enforcement should be focused on bad actors*

Enforcement should target infringements that are willful and blameworthy, or pose the greatest threats to health, safety, or the economy. In order to minimize both the harms caused by infringement and the collateral damage of enforcement inflicted upon technological innovators

and individual consumers, the JSP should recommend that those infringements that are most clearly the result of willful law-breaking for commercial gain, or that threaten public safety, be pursued first.

The highest priority should be placed on violations that are of particularly high risk to public health and safety. For instance, counterfeit drugs that deceive consumers about their strength and contents are more of a threat than those merely claiming a different manufacturer, to say nothing of unauthorized generics that infringe only a patent. Though all may harm the pharmaceutical industry's profits, substandard drugs are more likely to pose an imminent threat to those who use them, than drugs that merely infringe a trademark, or patent-infringing generics that, while doing economic harm, pose no threat to anyone's safety.

This is not to say that authorities should not pursue purely economic harms. But with these, the JSP should recommend that they apply a cautious balancing of the harms caused by the infringement against the costs of enforcement. In civil actions, potential plaintiffs automatically balance the costs of enforcing their rights through litigation against the harm caused by the violation and the costs in time and resources of the action. This is not a flaw of the private enforcement system, but a fundamental feature that helps ensure that socially and economically efficient norms develop and *de minimis* harms are not pursued. By contrast, when the state or any other third party pays the costs of enforcement, a party can request enforcement even when the cost of enforcement outweighs the costs of the infringement: a socially undesirable outcome.

Thus, when determining enforcement priorities, the government should be guided by three principles. First, it should only seek to prevent private economic harms when the costs of enforcement do not exceed the harm caused. Second, it should pursue harms that meet the standards for criminal conduct. When society marks certain conduct as criminal, it authorizes public enforcement, recognizes that deterrent (as opposed to merely remedial) actions are more appropriate, and allows that in an individual case the cost of punishing the violation may outweigh the economic harm of the violation itself because of the *moral* wrong committed. Third, publicly funded enforcement resources should be reserved for clear violations of the law, rather than in "gray areas" characterized by uncertain and evolving legal or marketplace norms. The government should spend public funds on enforcement only when all three of these principles are met.¹⁹

The first principle is not intended to allow many aggregate small harms to continue unabated simply because no individual infringement is of sufficient magnitude to warrant enforcement. Rather, it suggests that enforcement should be targeted in a way that simultaneously abates those many small harms; e.g., by pursuing centralized, large-scale direct infringers. The first principle *does* suggest that infringements that cause real economic harm should almost always be prioritized over those that do not. For instance, it would probably be a copyright infringement to scan a decades-old, unattributed photograph and make it available online. But this kind of infringement causes no real economic harm, as opposed to infringement for commercial gain, or even infringement that supplants legitimate sales of content.

¹⁹ Support for these principles can be found in the Prosecuting Intellectual Property Crimes Manual, which notes that prosecution should prioritize "the most egregious cases," and is "most appropriate when the questions of intellectual property law are most settled." Computer Crime and Intellectual Property Section, Department of Justice, *Prosecuting IP Crimes Manual 2006*, §IX.B.2.

The second principle suggests that infringers who willfully disregard copyright law, especially those who willfully seek commercial gain through clear infringements, should be pursued over those who may have infringed copyright without criminal intent. In pursuing actions that reach a criminal level of culpability (even if enforcement is through civil means), the government should be guided by the standards of criminal copyright infringement in targeting defendants whose actions most clearly show a lack of good faith.

The third principle targets the expenditure of public resources on clear violations of the law, rather than on efforts by private interests to reshape the law. For example, U.S. Attorneys have successfully used the DMCA's anticircumvention provisions to pursue commercial DVD counterfeiters. However, when Adobe persuaded federal prosecutors to charge a Russian software developer named Dmitry Sklyarov with DMCA violations based on his development of a competing software product, public resistance and a jury acquittal derailed the effort, leaving American taxpayers to foot the bill.²⁰ Similarly, current jurisprudential debates about the scope of the DMCA safe harbors,²¹ the limits of the first sale doctrine,²² or legality of parallel importation²³ are not the proper subject for publicly funded enforcement efforts. In these and other "gray areas" of the law, private stakeholders should be required to pay for their own efforts to "push the legal envelope." By the same token, those who develop innovative products and services while believing in good faith that their activities are not infringing should not face the prospect of public enforcement efforts if their good faith belief turns out to be mistaken. In fact, many products and services taken for granted today, including the VCR, cable television, Internet access, and search engines, began in "gray areas" of our IP laws.

b. Foreign outreach considerations

The U.S. government expends significant efforts in improving enforcement of IP rights in other countries. Examples of these efforts include the annual Special 301 review process, the efforts of various government personnel deployed in overseas offices, and negotiation of plurilateral treaties such as the Anti-Counterfeiting Trade Agreement (ACTA). As the government pursues the important goal of improving IP enforcement abroad, it should also recognize the understanding that IP law is a balance between rights owners and the public. This balance, essential for innovation, learning, and democratic discourse, is central to the U.S. IP system. Therefore, efforts to improve enforcement abroad should not undermine this balance in other countries. Rather, the U.S. government should promote balanced IP systems in other

²⁰ See Lisa M. Bowman, *ElcomSoft verdict: Not guilty*, CNET NEWS, Dec. 17, 2002, http://news.cnet.com/ElcomSoft-verdict-Not-guilty/2100-1028_3-978176.html.

²¹ See, e.g., *Capitol Records, L.L.C v. Seeqpod*, 2010 WL 481228 (S.D.N.Y., February 01, 2010); *Columbia Pictures Indus. v. Fung*, 2009 U.S. Dist LEXIS 122661 (C.D. Cal Dec 21, 2008); *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 1:07-cv-02103 (S.D.N.Y. filed Mar. 13, 2007); *Scott v. Scribd, Inc.*, 4:09-cv-03039 (S.D. Tex. complaint filed Sept. 18, 2009), more details at:

http://blog.ericgoldman.org/archives/2009/09/another_copyrig.htm.

²² See, e.g., *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055 (C.D. Cal. 2008), *appeal docketed*, No. 08-55998 (9th Cir. Jun. 19, 2009); *Vernor v. Autodesk, Inc.*, 555 F. Supp. 2d 1164 (W.D. Wash. 2008), *appeal docketed*, No. 09-35969 (9th Cir. Oct. 28, 2009).

²³ *Pearson Education, Inc. v. Liu*, 1:08-cv-06152-RJH, 2009 U.S. Dist. LEXIS 88569 (S.D.N.Y. Sept. 25, 2009), <http://www.scribd.com/doc/20386077/Pearson-v-Liu-Order-Denying-Motion-to-Dismiss-09252009>.

countries. In addition, U.S. enforcement efforts should be aware of the state of development in other countries and their capacity to implement the desired levels of enforcement—where IP policies are concerned, one size surely does not fit all countries (as demonstrated by the historical evolution of U.S. attitudes toward international copyright norms).

- i. *Outreach programs in IP enforcement should be coordinated with other foreign policy efforts*

In coordinating the efforts of government agencies in combating infringement in foreign countries, the IPEC should encourage exchanges of information and goals not only among IP enforcement authorities, but envoys and negotiators involved in other aspects of foreign relations. Facilitating such communication can help the United States prioritize its foreign policy goals holistically, and help set realistic goals for foreign IP enforcement. The United States government has pursued a foreign policy in IP based on expanding protections for U.S. rights holders. However, this policy should be situated within the United States' larger foreign policy agenda that requires co-operation from many of the countries targeted for their shortcomings in IP policies.

Such coordination will ensure that efforts to enforce U.S. copyrights, trademarks, and patents overseas do not interfere with other pressing foreign relations goals. For example, past free trade agreements and the Special 301 process have attempted to encourage trading partners to limit their use of the flexibilities built into the Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS), while pressing for policies extending beyond the IP protections required by TRIPS. All of these efforts, while perhaps in the service of economic interests of some domestic industries, can operate at odds with U.S. foreign policy objectives of promoting access to medicines, global health, and economic development. The President's Emergency Plan for AIDS Relief (PEPFAR), for instance, relies upon the availability of TRIPS flexibilities to treat more patients at a lower cost.²⁴

Similarly, President Obama has declared the U.S. adherence to the United Nations millennium development goals.²⁵ Expansive IP laws and their overly broad enforcement can interfere with some of these goals, such as making available the benefits of new technologies, especially information and communications technologies, to developing countries.²⁶ In order to abide by the president's promise of promoting the Millennium Development goal, U.S. IP policy should account for the developmental needs of countries and the effect of IP policies that limit their ability to seek development via appropriate limitations and exceptions to IP laws.

Foreign policy goals linked to freedom of speech are intimately intertwined with online efforts to enforce copyright laws. The same technologies that can allow for real-time inspection of content for infringement also allow for comprehensive surveillance on individual communications. The automated systems that single out information using keywords linked to

²⁴ Comments of Oxfam et al. In the Matter of 2010 Special 301 Review 9 (Feb. 16 2010).

²⁵ Remarks by the President to the United Nations General Assembly, September 23, 2009, *available at*, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-United-Nations-General-Assembly/.

²⁶ Millennium Development Goals, Goal 8: Develop a Global Partnership for Development, Goal 8f, *available at* <http://www.undp.org/mdg/goal8.shtml>.

copyrighted material are trivially repurposed to single out politically sensitive subjects. As Secretary of State Clinton recently remarked, information technologies have a vital role to play in encouraging and protecting the freedom of expression around the world, when “even in authoritarian countries, information networks are helping people discover new facts and making governments more accountable.”²⁷ In particular, in considering any legislative or policy recommendations on enforcement of intermediary liability for IP infringement, the IPEC should be careful not to cause harm to technology developers’ ability to create and distribute technologies and tools like those Secretary Clinton lauded for their ability to promote free expression.

ii. *Enforcement policy should account for the needs of other U.S. industries to do business overseas*

As mentioned above, the copyright and trademark policies pursued by the U.S. abroad have implications for domestic businesses beyond the rights holders’. Many industries, including the consumer electronics industry and Internet-based companies, rely on limitations and exceptions to IP laws in other countries to market their products and services. Any curtailment of these limitations and exceptions would reduce the flexibility of these companies in export markets. For instance, creators of consumer devices that facilitate fair use, time-shifting, or space-shifting might be deemed as facilitating copyright infringement in another country with less flexible copyright laws. Similarly, search engines and other Internet-based services that have relied on limitations and exceptions in U.S. copyright law to build robust services within the U.S. could find themselves unable to operate in foreign countries.²⁸ Therefore, any recommendations in the Joint Strategic Plan should be careful not to disturb the system of limitations and exceptions in foreign countries. Towards this end, the JSP should not recommend further expansion of IP rights or provision of new IP rights abroad, without at the same time also recommending limitations and exceptions.

iii. *Outreach to foreign governments should include promotion of limitations and exceptions*

U.S. intellectual property law embodies a balance between rights of IP owners and the public in general. This balance has preserved core values such as free speech, education, and innovation, and is a system that the U.S. government should promote in its foreign policy. Promoting not only our trade interests, but also the cultural interests of the public in other countries, would enhance respect for IP laws in those other countries instead of perpetuating the view that the IP regime is merely the imposition of a developed country with greater power and influence. Outreach in the form of technical assistance in IP promotion and enforcement should therefore include education on limitations and exceptions.

²⁷ Secretary of State Hillary Clinton, Remarks on Internet Freedom (Jan. 21, 2010), available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

²⁸ See for example, Jonathan Band, *Google and Fair Use*, (December 2007), at <http://www.policybandwidth.com/doc/20080211-MLB104.pdf>, (explaining Google and other search engines’ reliance on fair use and how in the absence of fair use or a similar exception, their operations in Europe are jeopardized).

Supplemental Questions

Question 4 asks commenters to “[p]rovide examples of existing successful agreements, in the U.S. or abroad, that have had a significant impact on intellectual property enforcement, including voluntary agreements among stakeholders....” One type of voluntary agreement between stakeholders is the system of ISPs passing along notifications to their customers that their Internet addresses are associated with activity that may infringe copyright. By informing users that they face legal risk for engaging in online copyright infringement, these notices allow users to more fully appreciate the risks and costs associated with their behavior. Notices tailored to a particular user’s behavior are more likely to be effective than unilateral policies. For example, “graduated response” or “three strikes” measures have not been shown to be more effective than individually tailored notices at reducing copyright infringement.²⁹ While it is obvious that a person who has been barred from using the Internet will not engage in online copyright infringement, there are countervailing costs to so extreme a measure.³⁰ A person who has infringed copyright, much less one who has merely been alleged of infringement, does not necessarily deserve to be cut off from emergency communication, economic opportunities, government services, or news.

Question 7 asks commenters to “[d]escribe existing technology that could or should be used by the U.S. Government or a particular agency or department to more easily identify infringing goods or other products.” Commenters caution the IPEC that many technologies designed to limit copyright infringement online have negative unintended consequences.³¹ For example, network-based content filters cannot take fair use into account, and could have the effect of blocking “unauthorized” uses of content, rather than unlawful ones. Content filters can be stymied by infringers through the use of easily available encryption technologies, undermining their purpose while still limiting unencrypted lawful uses. Attempts to combat online copyright infringement by blocking or degrading certain Internet communications protocols likewise have the effect of blocking lawful as well as unlawful uses. Attempts to “lock down” media and devices are flawed both in theory and in practice, ineffective at limiting infringement, while copyright owners seek to use anti-circumvention provisions to turn legal uses into illegal ones.

²⁹ See Sylvain Dejean, Thierry Pénard, & Raphaël Suire, UNE PREMIÈRE ÉVALUATION DES EFFETS DE LA LOI HADOPI SUR LES PRATIQUES DES INTERNAUTES FRANCAIS, <http://recherche.telecom-bretagne.eu/marsouin/IMG/pdf/NoteHadopix.pdf> (March 2010) (a French study which indicates that though the effects of the French “three strikes” law are complex, the number of French online infringers has increased since its passage).

³⁰ Furthermore, there are significant due process concerns that inevitably arise when the government recommends that people be deprived of important interests without an opportunity to rebut the charges by an impartial decision-maker. It would be a due process violation for the government to require that ISPs disconnect users on the basis of allegations by interested parties, or to provide incentives for ISPs to do so.

³¹ See Mehan Jayasuria *et al.*, *Forcing the Net Through a Sieve: Why Copyright Filtering is Not a Viable Solution for U.S. ISPs*, Public Knowledge, <http://www.publicknowledge.org/paper/pk-filtering-whitepaper> (2009).

Question 9 asks how state and local officials can better participate in the enforcement of IP laws. Any person charged with enforcing the law should be aware of its actual scope,³² and not presented with a narrow or biased account. A well-designed, unbiased educational program would be important in educating officials about the purpose, scope, and proper level of enforcement of IP rights. Some industries have offered biased and inaccurate “educational” material in the past.³³ Thus, in answer to Question 20, which asks how a “public education and awareness” might be designed, we stress again that any educational program must discuss what is protected, and what is not, under copyright law, and the extent to which fair use and other limitations and exceptions limit a rights holder’s exclusive control. Such a program would also be useful in improving the Government’s “enforcement assistance and technical training” (in response to Question 12), and to be effective, should be constructed in consultation with *all* relevant industries and stakeholders, as well as academics and thought leaders. Commenters offer one educational program as a model,³⁴ but fully expect this program to be subjected to the same wide-ranging feedback as any program would be, so that the public can be sure that the government promotes an impartial view.

Question 19 asks commenters to “[s]uggest specific strategies to significantly reduce the demand for infringing goods or products both in the U.S. and in other countries.” There are many approaches open to content owners that reduce the attractiveness of online infringement. While online piracy may never be eliminated, demand for it is reduced when content owners make their products readily available at affordable prices. Many businesses profitably sell access to video, music, and book content online, successfully “competing with free” by offering a superior product at affordable prices, and reducing the attractiveness of infringement.

In addition, the JSP should encourage stakeholders to investigate private collective licensing solutions that could expand the legal availability of copyrighted content. Historically, collective licensing has often been successful at reducing demand for infringing goods by increasing the availability of licensed content.³⁵ In the digital music context, for example, the Register of Copyrights, Marybeth Peters, has suggested legislative reforms that could spur the growth of

³² See, e.g., Lohr McKinstry, *Keene artist had hard time getting back into US*, PLATTSBURGH PRESS-REPUBLICAN, Oct. 4, 2008, available at http://www.pressrepublican.com/homepage/local_story_278220015.html.

³³ For example, the Copyright Alliance has released “educational” materials that claim that “‘fair use’ does not permit making unauthorized copies of copyrighted material for professional use,” The Copyright Alliance, Educators Guide 3, <http://www.copyrightfoundation.org/files/userfiles/file/EducatorsGuide.pdf>, which is not an accurate statement of the law. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) (expressly holding that a fair use may be commercial in nature).

³⁴ EFF, *Teaching Copyright*, <http://www.teachingcopyright.org>. Other useful resources include best practices guidelines that can assist particular users of copyrighted material in ensuring that they can continue working with media without infringing copyright. See, e.g., Association of Independent Video and Filmmakers et al., *Documentary Filmmakers’ Statement of Best Practices in Fair Use*, available at http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/; *Code of Best Practices in Fair Use for Media Literacy Education*, available at http://www.centerforsocialmedia.org/resources/publications/code_for_media_literacy_education/; Future of Public Media, *Code of Best Practices in Fair Use for Online Video*, available at http://www.centerforsocialmedia.org/resources/publications/fair_use_in_online_video/.

³⁵ See Robert P. Merges, *Compulsory Licensing vs. the Three “Golden Oldies”*: Property Rights, Contracts, and Markets, Cato Policy Analysis (2004) available at <http://www.cato.org/pubs/pas/pa-508es.html>.

private licensing.³⁶ In addition, major record labels have launched an effort to license digital music on college campuses.³⁷ When it comes to reducing the demand for infringing goods, enforcement is only one mechanism among many, and the IPEC should encourage affected stakeholders to explore alternatives before pressing for publicly funded enforcement efforts.

Conclusion

The IPEC should recommend that the government only use its enforcement resources to combat infringements that cause public harm. The costs and benefits of different IP enforcement mechanisms must be carefully weighed, because public enforcement of previously private rights of action can lead to socially and economically undesirable outcomes.

³⁶ *Copyright Office Views on Music Licensing Reform: Hearing Before the H. Subcommittee on Intellectual Property, H. Comm. On the Judiciary 109th Cong. (2005)* (statement of Marybeth Peters, Register of Copyrights) available at <http://www.copyright.gov/docs/regstat062105.html> (proposing a simplified “music rights organization”).

³⁷ See, e.g., Janko Roettgers, *Building the Tools to Legalize P2P Video-Sharing*, GigaOM, Salon.com, May 9, 2009, http://www.salon.com/technology/the_gigaom_network/online_video/index.html?section=online_video&blog=/tech/giga_om/online_video/2009/05/09/building_the_tools_to_legalize_p2p_video_sharing; Jim Griffin, President, Choruss, *Choruss: A New Business Model for Digital Music*, presentation at EDUCAUSE Live!, Mar. 3, 2009, available at <http://www.educause.edu/Resources/ChorussANewBusinessModelforDig/163765>.