



RESPONSE TO THE U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR'S REQUEST FOR COMMENTS ON THE JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT

The Library Copyright Alliance (LCA) consists of three major library associations: the American Library Association, the Association of Research Libraries, and the Association of College and Research Libraries. These three associations collectively represent over 350,000 information professionals and more than 100,000 libraries of all kinds throughout the United States. An estimated 200 million Americans use these libraries over two billion times each year. LCA welcomes the opportunity to respond to the request of the U.S. Intellectual Property Enforcement Coordinator's (IPEC) for comments on the 2016 Joint Strategic Plan on Intellectual Property Enforcement.

Perhaps more than other institutions, libraries stand at the middle point between users and rights holders, investing heavily in the development and acquisition of protected and public domain materials and at the same time providing broad access to these resources by the public. Libraries are major consumers of intellectual property. The libraries represented by LCA spend more than \$4 billion annually acquiring books and other information resources. At the same time, libraries serve our communities by providing them access to these materials, access made possible by provisions in the Copyright Act that protect educational uses such as lending, preservation, distance education, and interlibrary loan. We are at the fulcrum of a delicate legal balance between rights holder control and public access and meaningful use.

As discussed below in greater detail, the 2016 Joint Strategic Plan should: 1) attempt to strike the right balance between protection and access; 2) base policies on data rather than beliefs; 3) focus on eliminating counterfeit goods that threaten health and safety; and 4) promote the availability of lawful content through implementing the Administration's public access and open education policies.

I. Striking the Right Balance

The most important aspect for the IPEC to consider in the formulation of the Joint Strategic Plan is that the law in this area is designed to protect public access just as surely as it is designed to provide a reasonable reward for authors and publishers under certain circumstances. Indeed, the Constitution makes clear that the author's limited right to control her works is only a means to an end, a government granted monopoly necessary to promote the creation of cultural and scientific work.¹

This utilitarian rationale is reflected (though imperfectly) in the limited nature of the rights that vest in authors and inventors. IP rights are not perpetual and boundless rights to control all dispositions of a given work. The rights of copyright holders, for example, are described in one section of the Copyright Act, while the following fifteen sections describe a host of exceptions and limitations that protect the public and intermediaries.² After a defined (if ever-lengthening) time, a work loses all protection and becomes a part of the public domain, where anyone may use it in any way she pleases.³

¹ See U.S. Const. art. 1, § 8, cl. 8 (“Congress shall have the power . . . *To promote the Progress of Science and the useful Arts*, by securing *for limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”) (emphasis added).

² 17 U.S.C. § 106 (enumerating rights) and §§ 107-122 (limitations and restrictions on scope of right). See also §§ 411, 412 (requiring registration prior to infringement action

In order to protect public access, the law also protects intermediaries like libraries, who facilitate access in ways that would be impossible in a system of absolute author or rights holder control. For example, libraries as such could not exist if the copyright owners' right of distribution were to extend beyond the "first sale." § 109(a) codifies the common-sense premise that once someone buys a work, they may lend it without the author's or rights holder's permission. Libraries receive additional rights under § 108 of the Copyright Act, and of course libraries and their users rely heavily on the fair use provision in § 107 to provide a flexible, equitable exception that covers common practices such as photocopying and web searching. When libraries and universities provide Internet services, they receive special protections that allow them to host and transmit information without the unbearable burden of acting as a censor or policeman inspecting the millions of files uploaded or transmitted online at any given instant.⁴ Without these protections, the Internet as we know it simply could not exist.

A body of law that represents such a careful balance of interests cannot be justly enforced or improved by a process that is responsive to only one group of stakeholders. We ask that the IPEC keep in mind that enlarging the control of rights holders necessarily diminishes the rights of the public and of intermediaries, including libraries.

In that context, we appreciate the 2013 Joint Strategic Plan's recognition that "enforcement approaches should not discourage authors from building appropriately

and limiting remedies for unregistered works); § 1201(a)(1)(B), (C), (D) (describing triennial rulemaking to determine exceptions to anti-circumvention liability).

³ 17 U.S.C. §§ 301-305.

⁴ 17 U.S.C. § 512.

upon the works of others.”⁵ The 2013 JSP further acknowledged that “Fair use is a core principle of American copyright law. The Supreme Court has repeatedly underscored fair use provisions in the Copyright Act as a key means of protecting free speech....”⁶ The 2013 JSP recommended that the Copyright Office, in consultation with the Administration, publish and maintain an index of major fair use decisions “in order to make fair use more accessible to the authors of the 21st century, ease confusion about permissible uses, and thereby encourage the production of a greater variety of creative works....”⁷ We are gratified that the Copyright Office published this index, including summaries of the holdings, in the spring of 2015, and hope that the Office continues to update it as the courts hand down additional fair use decisions.

Additionally, the 2016 JSP should support prompt Senate ratification of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. It also should support the adoption of appropriate exceptions and limitations, including flexible, open-ended provisions like 17 U.S.C. § 107, in other jurisdictions. Ambassador Froman stated that in the Trans Pacific Partnership Agreement, “we are asking our trading partners to secure robust balance in their copyright systems – an unprecedented move that draws directly on U.S. copyright exceptions and limitations, including fair use for important purposes such as scholarship,

⁵ *2013 Joint Strategic Plan on Intellectual Property Enforcement*, U.S. Intellectual Property Enforcement Coordinator, Executive Office of the President, 18 (June 2013)(*hereinafter* 2013 JSP).

⁶ *Id.*

⁷ *Id.*

criticism, news commentary, teaching, and research.”⁸ The United States should ask other trading partners likewise to secure a robust balance in their copyright systems.

II. Data-Driven Decision Making

The IPEC appropriately asks for assistance in improving the availability of data regarding intellectual property policy. The request for comments recognizes that better data “would enable researchers, rights holders, industry-at-large, public interest groups, policymakers, and others to better gauge the specific nature of the challenges; develop recommendations for well-balanced strategies to effectively and efficiently address those challenges; and measure the effectiveness of strategies that have been or will be developed and implemented.” Notwithstanding this recognition of the need to “further the objective of supporting transparency, accountability, and data-driven governance,” the U.S. Government continues to rely upon problematic and misleading studies. For example, government officials repeatedly cite the 2012 Department of Commerce study of the contribution of IP intensive industries to the U.S. economy,⁹ notwithstanding the study’s flawed methodology.

In particular, the study includes “trademark-intensive industries” within the definition of “IP-intensive industries.” Trademark-intensive industries, in turn, include

⁸ Michael Froman, U.S. Trade Representative, Office of the U.S. Trade Representative, A Values-Driven Trade Policy: Remarks by Ambassador Froman at the Center for American Progress (Feb. 18, 2014) in https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/February/A-Values-Driven-Trade-Policy_Remarks-by-USTR-Froman-at-Center-for-American-P

⁹ See Remarks by Michelle Lee, Director, U.S. Patent and Trademark Office (Aug. 17, 2015), available at <http://www.uspto.gov/about-us/news-updates/remarks-director-michelle-k-lee-technology-policy-institute-aspen-forum>; *The Trans-Pacific Partnership: Detailed Summary of U.S. Objectives*, Office of the U.S. Trade Representative, Executive Office of the President (Sept. 2015) <https://ustr.gov/sites/default/files/TPP-Detailed-Summary-of-US-Objectives.pdf>.

industries such as grocery stores, clothing stores, sporting goods and musical instrument stores, residential building construction, dairy product manufacturing, beverage manufacturing, footwear manufacturing, and gambling.¹⁰ Indeed, 83 percent of all reported IP-intensive jobs come from trademark intensive industries.¹¹ The study itself concedes that “employment in trademark intensive industries is almost six times as great as employment in patent-intensive industries.”¹² The study thus greatly overstates the contribution of truly IP-intensive industries to the U.S. economy.

Moreover, contrary to assertions made by U.S. government officials, the study does not show a causal connection between the level of IP protection and the success of these “IP-intensive” industries.¹³ Nor does it prove that “when Americans know that their ideas will be protected, they have greater incentive to pursue advances and technologies that help keep us competitive, and our businesses have the confidence they need to hire more workers.”¹⁴ Accordingly, the study provides no support for the contention that “this

¹⁰ Economic Statistics Administration and the U.S. Patent and Trademark Office, *Intellectual Property and the U.S. Economy: Industries in Focus*, 36-38 (Mar. 2012), http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf.

¹¹ James Love, *The USPTO/DOC’s Liberal and Misleading Definition of IP-Intensive Industries is Designed to Influence Policy Debates*, Knowledge Ecology International (June 6, 2012), <http://www.keionline.org/node/1432>.

¹² Economic Statistics Administration, *IP and the U.S. Economy* at vi.

¹³ See Rebecca Blank, *Intellectual Property-Intensive Industries Contribute \$5 Trillion, 40 Million Jobs to U.S. Economy*, U.S. Department of Commerce (Apr. 11, 2012), <http://2010-2014.commerce.gov/blog/2012/04/11/intellectual-property-intensive-industries-contribute-5-trillion-40-million-jobs-us->

¹⁴ Press Release, U.S Patent and Trademark Office, Commerce Department Releases New Report Showing Intellectual Property-Intensive Industries Contribute \$5 Trillion, 40 Million Jobs to US Economy (Apr. 11, 2012), *available at* <http://www.uspto.gov/news/pr/2012/12-25.jsp>.

Administration's efforts to protect intellectual property ... are so crucial to a 21st century economy that is built to last."¹⁵

It is time for this study to be retired, and for the Administration to stop relying upon it to justify increased levels of IP protection.

III. Counterfeit Goods Threatening Health And Safety

The 2013 Joint Strategic Plan commendably identified "protection of public health and safety" as one of its "primary concerns." And the Department of Homeland Security has suggested that its IP enforcement efforts are largely targeted at preventing the importation of counterfeit products that threaten health and safety.¹⁶ The actual statistics, however, reveal that only a small proportion of the imported counterfeit goods seized threatened health and safety.¹⁷ This suggests that the Administration is not taking this danger seriously enough.

The DHS report for IP seizures for 2102 contains statistics for seizures of counterfeit goods harmful to safety and security. In 2012, this category contained only 11.5% of counterfeit goods seized, measured by estimated MSRP of the goods. The safety and security category likewise represented just 14.8 % of the number of seizures. In 2011, 17.5% of the counterfeit goods seized fell within the safety and security category, and 17.6% of the number of seizures.

¹⁵ *Id.*

¹⁶ Press Release, U.S. Customs and Border Protection, CBP, HIS Release FY13 Intellectual Property Rights Numbers (Mar. 24, 2014), *available at* <http://www.cbp.gov/newsroom/national-media-release/2014-03-24-000000/cbp-hsi-release-fy13-intellectual-property-rights>.

¹⁷ Jonathan Band, *Department of Homeland Security IP Statistics Reveal Misplaced Priorities or Misrepresentation*, InfoJustice.org (May 7, 2014), <http://infojustice.org/archives/32700>.

Interestingly, the DHS reports for 2013 and 2014 no longer contain a breakdown for the safety and security category. However, using the same methodology as the 2012 report, the safety and security category in 2013 can be estimated to contain less than 10% of the value of goods seized, and under 14% of the number of seizures.

In short, for the past four years, counterfeit goods threatening safety and security represent significantly less than 20% of the goods seized, measured either by the value of the goods or the number of seizures. Moreover, the percentage of dangerous counterfeit goods is decreasing.

The decreasing share of dangerous goods seized could indicate that DHS is devoting fewer resources to intercepting such goods. Indeed, even if DHS is devoting the same or higher resources to the safety and security category as in the past, the small share of this category suggests that DHS has the wrong IP enforcement priorities. In 2013, fully 40% of the value of seized goods fell in the handbags/wallets category. Another 30% was in the watches/jewelry category. As noted above, less than 10% of the value related to safety and security. Similarly, 35% of the number of seizures involved wearing apparel/accessories, while under 14% of the number of seizures concerned safety and security goods.

It certainly is possible that some consumers are deceived when they purchase counterfeit handbags, watches, and accessories. But most consumers know exactly what they're getting when they purchase "luxury" items at a deep discount on Canal Street. In contrast, no consumer intentionally buys fake pharmaceuticals that could kill him. Any dollar spent on intercepting a counterfeit Louis Vuitton handbag or Rolex watch is a dollar not spent protecting U.S. consumers from counterfeit drugs and automotive parts.

In sum, DHS's own statistics show that it is not taking the danger posed by counterfeit goods to health and safety seriously enough. The Joint Strategic Plan should reallocate resources to target this threat.

IV. Lawful Content

The 2013 Joint Strategic Plan recognized that “when Americans and people around the world are given real choices between legal and illegal options, the vast majority will want to choose the legal option.”¹⁸ For that reason, the Administration “encouraged the further development and use of legitimate online services as an important part of an effective approach to reducing infringing activity.” The Plan noted that there already were “a myriad of legitimate ways” to obtain content, including “authors using systems to permit free distribution of their works under conditions that they choose.” At the same time, the Administration stated that it would “support and ... look for additional ways to encourage and facilitate efforts that will help expand the reach of legitimate alternatives to infringement...”

Notwithstanding this acknowledgement of the importance of the availability of lawful content in combating infringement, the Plan recommended few concrete steps directed at encouraging the development of legitimate alternatives. But in actuality, the Federal Government already is taking significant measures to increase the availability of lawful content through its public access initiatives and its support for open educational resources. Implementation and expansion of these efforts should be part of the 2016 Joint Strategic Plan.

In 2008, pursuant to direction from Congress, the National Institutes of Health

¹⁸ 2013 JSP at 7.

(NIH) adopted a mandatory public access policy.¹⁹ Under the policy, all investigators funded by the NIH are required to submit an electronic version of their final, electronic peer-reviewed manuscripts to the National Library of Medicine's PubMed Central, which then makes the manuscript publicly available within twelve months (or sooner, depending on the author's interest and the publisher's embargo period) of the official date of publication.

In February 2013, John P. Holdren, Director of the White House's Office of Science and Technology Policy, issued a memorandum directing federal research funding agencies with research and development budgets of \$100 million or more to develop a plan within six months to support increased public access to the results of research funded by the federal government.²⁰ In essence, this expands the NIH policy to other federal agencies. LCA strongly supports the Administration's objectives of enhancing the public's access to scholarly publications resulting from research funded by federal agencies and maximizing the return on federal investments in research and development. Continued implementation of the Administration's public access policy should be part of the 2016 Joint Strategic Plan.

Likewise, continued support for open educational resources should be an element of the 2016 JSP. At the United Nations Open Government Partnership meeting in

¹⁹ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, Div. G, Tit. II, § 218, 121 Stat. 1844, 2187 (2007). *See also NIH Public Access Policy Details*, Public Access Policy, National Institutes of Health, U.S. Department of Health and Human Services, <http://publicaccess.nih.gov/policy.htm> (last visited Oct. 8, 2015).

²⁰ Memorandum from the Office of Science and Technology Policy, Executive Office of the President, to the Heads of Executive Departments and Agencies, on Increasing Access to the Results of Federally Funded Scientific Research (Feb. 22, 2013), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf.

September 2014, President Obama announced a new commitment to “promote educational resources to help teachers and students everywhere.”²¹ The National Action Plan in support of the Open Government Partnership contains a section dedicated to promoting open education. The Plan states:

Open education is the open sharing of digital learning materials, tools, and practices that ensures free access to and legal adoption of learning resources. There is a growing body of evidence that the use of open education resources improves the quality of teaching and learning, including by accelerating student comprehension and by fostering more opportunities for affordable cross-border and cross-cultural educational experiences. The United States is committed to open education....²²

In the plan, the Administration committed to: raising open education awareness by hosting a workshop on the challenges and opportunities in open education; conducting three pilot programs overseas that use OER to support learning in formal and informal contexts; and launching an online skills academy to help students prepare for in-demand careers.²³ Implementation of these efforts should be included in the 2016 Joint Strategic Plan.

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²¹ Creative Commons USA, *President Obama Commits to Promote Open Education Resources* (Sept. 26, 2014), <http://us.creativecommons.org/archives/977>.

²² White House, *The Open Government Partnership: Announcing New Open Government Initiatives* (Sept. 2014), http://www.whitehouse.gov/sites/default/files/microsites/ostp/new_nap_commitments_report_092314.pdf.

²³ The federal government also funds the development of open educational resources. In 2011, for example, the Departments of Labor and Education announced a fund to grant \$2 billion to create OER materials for career training programs in community colleges. See Timothy Vollmer, *New Federal Education Fund Makes Available \$2 Billion to Create OER Resources in Community Colleges* (Jan. 20, 2011), <http://creativecommons.org/weblog/entry/26100>.