



**Comments of the Center for Democracy & Technology
for the
U.S. Intellectual Property Enforcement Coordinator
Joint Strategic Plan for 2019-2021**

November 13, 2018

The Center for Democracy & Technology respectfully submits these comments in response to the September 13, 2018 Federal Register notice requesting public input regarding the development of an updated Joint Strategic Plan on Intellectual Property Enforcement.¹ CDT is a non-profit, public interest organization advocating for the digital rights of all.

New digital technologies, services, and the internet have led to novel factual disputes, calls for new types of enforcement actions, and areas of legal uncertainty on copyright issues. At the same time, growing tensions between trading partners regarding the use of intellectual property and enforcement of IP rights have placed even greater weight on the need for a coordinated approach to both trade negotiations and IP enforcement. CDT shares the Coordinator's interest in crafting a practical, workable, approach.

Although these comments focus specifically on copyright, some of the more general principles set forth may also be useful for other areas of intellectual property. However, those areas raise distinct issues that the Intellectual Property Enforcement Coordinator (IPEC) must take into account when determining how best to craft enforcement strategies and devote resources to them. For example, some forms of counterfeiting pose serious risks to human health and safety that copyright infringement does not. CDT appreciates that, in 2017, the bulk of the enforcement actions taken by the Intellectual Property Task Force (IPTF) focused on the interception of counterfeit goods, many of which posed these health and safety risks.²

On copyright matters, CDT seeks pragmatic approaches to policy and enforcement that respect the rights of creators without curtailing the internet's tremendous potential for fostering innovation and free expression. We support vigorous enforcement of existing copyright laws and view such enforcement as consistent with both innovation and free expression. However, the Joint Strategic Plan (JSP or Plan) should focus on tactics and practices that do not impose significant costs on innovation or constrain free expression.

The landscape has not changed dramatically since the creation of the first JSP in 2010, and many of CDT's comments are consistent with the observations and suggestions that CDT made during the

¹ Office of Management and Budget, Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement, 83 Fed. Reg. 46522 (Sept. 13, 2018).

² United States Dep't of Justice, PRO-IP Act Annual Report FY 2017, 11-15, 32 (2017).

development of the 2010 JSP.³ Indeed, these multi-year plans are designed to span across administrations in order to ensure greater consistency and continuity in enforcement efforts, and provide predictability and stability for both industry and consumers. CDT supports the IPEC maintaining a similar approach to enforcement in the new JSP. Above all, CDT offers the following suggestions:⁴

- The Plan should not call for imposing new network-policing roles on internet intermediaries.
- The Plan should target enforcement against true bad actors and avoid ratcheting up copyright protections across the board in a manner that would impair legitimate business activity and chill technological innovation and fair use.
- The Plan should focus on effective and efficient use of existing tools, rather than seeking to increase penalties, expand the scope of copyright liability, or otherwise make substantive changes to the copyright regime.
- The Plan's goal for copyright should be realistic: making participation in legal markets easier and more attractive than widespread infringement.

Engagement with trading partners

The Joint Strategic Plan should resist international pressures to call for new policing roles for intermediaries

The historical importance of Section 230 of the Communications Decency Act and Section 512 of the Digital Millennium Copyright Act (DMCA) to free expression and innovation on the internet cannot be overstated.⁵ The United States owes its position as a global leader in internet commerce and innovation in part to the legal certainty these statutes give to intermediaries regarding the ability to provide services, conduits, and forums that allow users to create new content, and access and comment on other user-generated content. CDT cautions against the unintended consequences of disruptions to that certainty.⁶

Legal mandates to implement automated content filtering and similar enforcement remedies have arisen in new venues, including the European Union. In response to demands from rightsholders, the EU is finalizing a new copyright directive that will increase obligations for “online content sharing

³ Written Submission of the Center for Democracy & Technology Re: Intellectual Property Enforcement Joint Strategic Plan (March 24, 2010) available at https://www.cdt.org/files/pdfs/CDT_comments_for_IPEC.pdf (CDT 2010 Comments).

⁴ CDT reiterated many of these observations and suggestions in its 2012 and 2015 comments. Comments of the Center for Democracy & Technology on Intellectual Property Enforcement (August 2012), available at <https://www.cdt.org/files/pdfs/CDT%20IPEC%20comments%208-2012.pdf> (CDT 2012 Comments). CDT's 2015 Comments are available at <https://cdt.org/files/2015/10/CDT-Joint-Strategic-Plan-Comments.pdf>.

⁵ 47 U.S.C. § 230; 17 U.S.C. § 512.

⁶ CDT 2012 Comments at 3; CDT 2010 Comments at 7.

service providers” that allow users to upload, share, or store copyright-protected content.⁷ Although the final text of the directive is still subject to negotiations, proposed texts would require service providers to monitor all uploads for potentially infringing content so as to block or “prevent the availability of” unauthorized uses of copyrighted works.

This effort to use intermediaries as copyright police, if implemented, will have unintended consequences affecting the entire internet ecosystem, ranging from small startups to the largest American tech companies.⁸ CDT urges the IPEC not to call for similar obligations or changes to copyright law domestically because requiring intermediaries to act as copyright judges creates the potential to chill free expression and harm competition among providers. If intermediaries can be held liable for copyright infringement based on content uploaded by their users, risk-averse providers will tend to block more content than necessary so as to avoid liability altogether. But this precautionary over-blocking could prevent users from sharing millions of non-infringing posts reducing the internet’s value as a forum for free expression and stifling a creative (and lucrative) outlet for many Americans.⁹

That systems are automated does not eliminate these problems. Even the most sophisticated systems, which generally cost tens of millions of dollars to develop, regularly block or remove legitimate, non-infringing content and no system is capable of assessing whether a post uses copyrighted works in a way considered “fair” under 17 U.S.C. § 107.¹⁰ Mandating the use of such systems puts algorithms in charge of limiting free expression and creates a barrier to entry for small businesses offering users the opportunity to upload their creative content online. CDT asks the IPEC to consider the Plan in light of our country’s First Amendment values, and to resist pressure from trading partners to implement additional enforcement obligations for private companies.

In the past, rightsholders have looked to the International Corporation of Assigned Names and Numbers (ICANN) as a forum in which domain name registrars may be conscripted into the fight against online copyright infringement. The USTR’s 2014 Out-of-Cycle Review of Notorious Markets for the first time listed a registrar as a notorious market based on its failure to take action when notified of

⁷ See Proposal for a Directive Of The European Parliament And Of The Council on Copyright in the Digital Single Market, COM/2016/0593 final - 2016/0280 (COD), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593>.

⁸ See CDT’s Letter to the European Parliament, (Sept. 4, 2018) available at <https://cdt.org/files/2018/08/2018-08-31-Copyright-Action-Week-letter-to-MEPs.pdf>.

⁹ More than 14 million Americans earned an estimated 5.9 billion dollars by posting their creative content on nine major web services in 2016. See Robert Shapiro and Siddhartha Aneja, “Unlocking the Gates: America’s New Creative Economy” (2017) available at <https://www.recreatecoalition.org/wp-content/uploads/2018/02/ReCreate-New-Creative-Economy-Study-Report-5-08.pdf>.

¹⁰ See Ulrich Kaiser, Can Beethoven send takedown requests? A first-hand account of one German professor’s experience with overly broad upload filters , Wikimedia Foundation, (Aug. 27, 2018) <https://wikimediafoundation.org/2018/08/27/can-beethoven-send-takedown-requests-a-first-hand-account-of-one-german-professors-experience-with-overly-broad-upload-filters/>.

infringing content on websites that registered domains through that registrar.¹¹ The registrar in question landed on the Notorious Markets List in part because it was deemed to be out of compliance with the Registration Accreditation Agreement (RAA) that each registrar enters into with ICANN. Requiring registrars to take action against their clients saddles them with vague but unavoidable obligations to police the activity of websites. Invoking the RAA for that obligation also thrusts ICANN into an unwanted role in policing internet content.¹²

Clarification from the IPEC that the Plan does not envisage such a role for ICANN could remove one potential source of concern. More broadly, a clear statement that the Joint Strategic Plan is not intended to alter any internet intermediaries' obligations or immunities with respect to intellectual property would be welcome by innovators and the user community.

Effective use of all legal authority, including trade tools.

The Joint Strategic Plan should prioritize the efficient use of existing tools and voluntary efforts to combat copyright infringement

As detailed in previous Joint Strategic Plans, the IPEC has performed significant work to harmonize the efforts of IP enforcement staff and projects and build further capacity for such efforts.¹³ The sheer number of departments and agencies involved in these efforts is daunting. For example, the Department of Homeland Security's Immigration and Customs Enforcement Intellectual Property Rights Center (DHS ICE-IPR) coordinates the actions of 23 different agencies, including four international bodies¹⁴ CDT supports the IPEC's efforts to coordinate cross-agency efforts, such as through the "Whole of Government" approach, eliminate duplication, such as through the "Specialized Office" approach, and to better track resource allocations for intellectual property enforcement.¹⁵

Again, those efforts and resources should focus on genuine bad actors and prioritize violations of intellectual property laws that pose a risk to public health and safety. The Plan should not task interagency working groups with proposing or evaluating changes to substantive copyright law. Instead, substantive changes should be considered in publicly-accessible fora, with ample opportunities for engagement by all concerned stakeholders. It is unclear that an interagency group focused primarily on enforcement can appropriately weigh the need for effective enforcement against the equally important

¹¹ United States Trade Representative, 2014 Out-of-Cycle Review of Notorious Markets, March 5, 2015, at 12, available at https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20-%20Published_0.pdf.

¹² See Allen R. Grogan, ICANN Chief Contract Compliance Officer, "ICANN Is Not the Internet Content Police," June 12, 2015, available at <https://www.icann.org/news/blog/icann-is-not-the-internet-content-police>.

¹³ 2013 JSP at 22-23.

¹⁴ 2016 JSP at 123-124.

¹⁵ 2016 JSP at 122, 125

need to promote innovation and free expression in the digital environment. To that end, we ask that the Plan remain focused on enforcing existing laws and refrain from actions to change copyright law in the interest of enforcement.

The JSP should maintain a realistic focus on reducing infringement, increasing education, and encouraging legal alternatives

It is unrealistic to expect that copyright infringement will vanish entirely from the digital, internet-enabled world. The PRO-IP Act's focus on reducing -- rather than eliminating -- infringing goods from the supply chain is entirely appropriate.¹⁶ Willful infringement on a massive scale is the most appropriate target for coordinated enforcement actions. For individual, incidental, or accidental infringers, the Plan should emphasize education about infringement and create incentives for innovating and promoting legal channels for content, making illegal alternatives appear riskier and less attractive by comparison.

Government-sponsored and voluntary education efforts

The 2013 and 2016 Plans appropriately placed emphasis on public awareness about copyright generally, and also education regarding the issue of fair use.¹⁷ Given the economic importance of fair use to American internet enterprises, the new JSP could include even more analysis on the interplay between fair use and enforcement.¹⁸ Education can be a central component of voluntary efforts to deter piracy. The Copyright Office's Fair Use Index was a significant undertaking that created a valuable resource for academics, policymakers, and individual creators with questions about what prior cases may say about their intended use of copyrighted works.¹⁹ Given the highly contextual nature of fair use, the ability to consult relevant precedent is helpful. For the same reason, forward-looking guidance for specific types of uses is important. To this end, libraries and other institutions have promulgated best practices tailored to potential uses of works most relevant to the communities they serve.²⁰ The JSP should encourage the further development of such resources.

¹⁶ Prioritizing Resources and Organization for Intellectual Property (PRO IP) Act of 2008, Pub. L. No. 110-403 (2008), § 303(a)(1).

¹⁷ 2013 JSP at 18; 2016 JSP at 10, 74.

¹⁸ Fair use industries accounted for 16% of the U.S. economy in 2014. Fair Use in the U.S. Economy, Computer & Communications Industry Association (2017) <http://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>

¹⁹ U.S. Copyright Office Fair Use Index. Last updated July 2018. <http://copyright.gov/fair-use/>.

²⁰ See, e.g., Association of Research Libraries et al., Code of Best Practices in Fair Use for Academic and Research Libraries (2012), available at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

Likewise, the voluntary efforts of many online service providers help users identify and assess the differences between legitimate, non-infringing offerings and those from illicit sources. These efforts help to both reduce infringement online and to protect consumers from dangerous counterfeit goods.²¹

Legal alternatives to copyright infringement

Providing legal means to access works may be one of the most effective means of diverting users from illegal ones. When services offering reasonably priced, legal options to enjoy access to copyrighted works launch in new markets, copyright infringement tends to decrease.²² Connecting users to legal sources is as important as deterring the use of illegal ones.

Of course, the legal services must exist in the first place. While CDT filed in support of neither party in the *Aereo* litigation,²³ the case points to a significant issue that arises repeatedly when our copyright system confronts emerging digital technologies.²⁴ Those technologies give users new abilities to access works in the time and place, and on the device of their choosing. However, laws and licensing arrangements can make it legally impermissible to do what is technologically possible and desirable. The JSP should consider whether there are ways, short of legislation, to encourage rightsholders and service providers to cooperate on efforts to expand user choice in accessing content.

Expanded law enforcement action and cooperation

CDT's previous comments on the JSP suggested focusing enforcement resources and efforts on truly bad actors, while avoiding collateral damage to innocent users and innovators. Of particular concern are domain seizures pursuant to powers granted by the PRO-IP Act.²⁵ Through "Operation in Our Sites," Immigration and Customs Enforcement (ICE) has seized thousands of domain names for alleged copyright infringement, in some cases relying almost entirely on information provided by rightsholders or failing to provide adequate notice or process for the owner of the site to challenge the seizure.²⁶ Unlike the notice-and-takedown regime of the Digital Millennium Copyright Act (DMCA), which targets specific infringing content, domain

²¹ See Scott Spencer, How we fought bad ads, sites and scammers in 2016, Google (Jan. 25, 2017) <https://blog.google/technology/ads/how-we-fought-bad-ads-sites-and-scammers-2016/>.

²² See, e.g., Janko Roettgers, "Charts: How Spotify is killing music piracy," GigaOm, Jul. 18, 2013, <https://gigaom.com/2013/07/18/charts-how-spotify-is-killing-music-piracy/>.

²³ *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

²⁴ The Supreme Court is currently considering whether to hear a case involving copyright and web-based services, regarding the fourth factor of the fair use analysis under 17 U.S.C. 107. *TVEyes, inc. v. Fox News Network, LLC*, (2nd Cir. 2018) Dkt. No. 18-321 (2018), cert pending.

²⁵ Such as the enhanced civil forfeiture provisions of 18 U.S.C. §§ 2323, 981.

²⁶ See Timothy B. Lee, ICE Admits Months Long Seizure of Music Blog Was a Mistake, *Ars Technica* (Dec. 8, 2011) <https://arstechnica.com/tech-policy/2011/12/ice-admits-months-long-seizure-of-music-blog-was-a-mistake/>

name seizures can remove entire websites, or groups of websites, that contain both infringing and noninfringing content. Overbroad seizures present serious concerns with respect to free expression and due process.²⁷

It is unclear to what extent enforcement initiatives have taken into account the continued migration to cloud-based services. Questions about the possibly unintended effects of the seizure of cloud computing resources surfaced following the 2012 seizure of Megaupload, and remain unanswered. As of last spring, one Megaupload user represented by the Electronic Frontier Foundation is still asking for his files back.²⁸ Overbroad seizure of cloud computing resources may also arise in the context of trade secrets.

The “Defend Trade Secrets Act,” which passed into law in 2016, created an avenue for private parties to seek a seizure order to prevent disclosure of trade secrets.²⁹ The legislation appropriately directs the court to limit seizure orders to “the narrowest seizure of property necessary” and requires that “the seizure be conducted in a manner that minimizes any interruption of the business operations of third parties[.]”³⁰ Nonetheless, there is a risk that the property seized contains the data of multiple parties, some of whom are engaged in entirely legitimate conduct that relies on shared computing resources. The Plan should address how to properly conduct seizures so as to minimize their potential impact on innocent parties and legitimate content.

Engagement and partnership with the private sector and other stakeholders

Cooperation and transparency in voluntary enforcement efforts

The 2013 JSP highlighted the Administration’s approach of encouraging the private sector to implement cooperative and voluntary initiatives to reduce infringement.³¹ Payment processors, advertising networks, websites, and search engines have undertaken such initiatives, sometimes working in concert and sometimes on their own. CDT supports such efforts and believes they can form an essential part of the Plan. At the same time, such efforts must remain transparent, flexible, and genuinely voluntary. As CDT noted in its 2012 comments, voluntary private action may be less

²⁷ See CDT, CDT Warns Against Widespread Use of Domain Name Tactics to Enforce Copyright (Mar. 21, 2011) <https://cdt.org/insight/cdt-warns-against-widespread-use-of-domain-name-tactics-to-enforce-copyright/>

²⁸ See EFF, EFF Asks Appeals Court to Break Through Five-Year Logjam in Megaupload Case, (Apr. 24, 2017) <https://www.eff.org/press/releases/eff-asks-appeals-court-break-through-five-year-logjam-megaupload-case>

²⁹ Defend Trade Secrets Act, PL 114-153 (2016); 18 U.S.C. § 1836(b).

³⁰ Id.

³¹ 2013 JSP at 35.

transparent than government action, making it more difficult to evaluate and respond reasonably to whatever actions are taken.³²

Transparency is particularly important when it comes to automated filtering or graduated response mechanisms. The possibility of unilateral action or a voluntary agreement leading to automated removal of information from the internet inherently raises free expression concerns. And there have been clear cases of automated content identifiers malfunctioning.³³ The Plan should encourage transparency in reporting on the implementation and operation of automated content filtering.

Transparency, accountability, and data-driven governance are an appropriate focus of the strategic plan

CDT supports the IPEC's previous focus on transparency, accountability, and data-driven governance in the formulation of the next strategic plan. Enhanced information sharing and open access to datasets is central to furthering those objectives. The Government Accountability Office's (GAO) April 2010 Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods noted that it could not substantiate the results of three widely cited government reports on the costs of counterfeiting because the underlying data was unavailable.³⁴ Two years later, the lack of data on matters such as substitution rates between infringing and non-infringing content obstructed the GAO's efforts to quantify the cost of counterfeiting and infringement.³⁵ Both rightsholders and online services may have useful data regarding fluctuations in the use and sale of services or content that could help quantify the impact of infringement on legal services and, conversely, the impact of new legal services on infringement. The Plan should encourage the sharing of those data on an entirely voluntary basis.

The IPEC might also consider ways to encourage more entities to issue transparency reports. An increasing number of internet commerce companies regularly release reports that quantify both government information requests and copyright and trademark actions.³⁶ Other entities might be more inclined to do so if they were certain that the information could not be used to derive conclusions about business practices or market share.

³² CDT 2012 Comments at 12.

³³ See, e.g., Sam Machkovech, "DMCA takedown laser brings down Vimeo videos with 'Pixels' in the title," ArsTechnica (Aug. 9, 2015) <http://arstechnica.com/tech-policy/2015/08/dmca-takedown-laser-brings-down-vimeo-videos-with-pixels-in-title/>.

³⁴ Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods, Government Accountability Office, at 18, April 2010. <http://www.gao.gov/new.items/d10423.pdf>.

³⁵ Intellectual Property: Insights Gained from Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods, Government Accountability Office, at 8, July 2013. <http://www.gao.gov/assets/660/655781.pdf>.

³⁶ See, e.g., Tumblr, Transparency Report, <https://www.tumblr.com/transparency>; Twitter, Transparency Report, <https://transparency.twitter.com/en.html>; Wikimedia Foundation, Transparency Report, <https://transparency.wikimedia.org/>; Google, Transparency Report, <https://transparencyreport.google.com/?hl=en>.



To be clear, CDT does not propose that the IPEC's office collect this information itself. Any information voluntarily shared should be aggregated, anonymized, and maintained by a non-governmental custodian adhering to strict privacy and data security practices. However, the IPEC (or a designee) can provide a clearinghouse for information on the government's own intellectual property enforcement efforts. More granular and open data on enforcement efforts may help both the IPEC and interested observers determine whether resources are being deployed efficiently and fairly.

Conclusion

The Center for Democracy & Technology appreciates the opportunity to submit these comments on the Joint Strategic Plan. CDT believes that the IPEC's work can further an effective, practical approach to intellectual property enforcement that respects the rights of creators as well as the public's interest in innovation and free expression. We look forward to working with the IPEC on this objective.

Respectfully submitted,

Stan Adams, Open Internet Counsel
Center for Democracy & Technology
1401 K Street NW, Suite 200
Washington, DC 20005