

Submitted to:

**Office of the Intellectual Property Enforcement Coordinator
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503**

via internet: www.regulations.gov

***Written Comments on the Development of the Joint Strategic Plan on Intellectual
Property Enforcement***

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**Submitted by
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**On behalf of
Innovation Defense Foundation
October 31, 2018**

The Innovation Defense Foundation (IDF) is pleased to submit these comments on the Joint Strategic Plan on Intellectual Property Enforcement. The Foundation is a nonprofit, nonpartisan, research and issue-advocacy institution focusing on “permissionless innovation,” seeking to address unnecessary legal or regulatory impediments to innovation. The Innovation Defense Foundation is actively involved in several issues relating to intellectual property and is particularly interested in how changes in technology frame our understanding of intellectual property.

This is a critical issue in the digital economy, where technological advances have led many to revisit the proper role of intellectual property enforcement. The IDF urges the Coordinator to consider potential barriers to innovation when dealing with our trading partners on issues relating to intellectual property. Establishing the appropriate

intellectual property framework is an important component of trade agreements, but if misapplied, they can hinder, rather than promote economic growth. For example, the IDF has some concerns about the copyright discussion in the recent US-Mexico-Canada Agreement (USMCA), which replaces the North American Free Trade Agreement.¹ While the USMCA extends the term of copyright, it ignores other important aspects of American copyright law, such as fair use and the public domain, which are integral components of the law. A broader application of the U.S. approach to questions of copyright, including fair use and the public domain would create a more workable approach to international agreements on intellectual property.

The IDF is a strong advocate for internet freedom and technological innovation. given their significant impact on productivity and economic growth. In 2016 the digital digital economy represented 6.5 percent of the GDP in current dollar terms, and its impact continues to grow.² While intellectual property rights can be an important spur to innovation, improperly applied or overly broad protections pose a serious threat to innovation in one of the most dynamic sectors of the economy.

Recognizing this important link between incentives and innovation, the U.S. Constitution allows Congress the ability to provide “inventors and authors” limited monopolies on the works that they create. Congress first exercised this authority in 1790 when it passed the Copyright Act that determined a copyright to last for 14 years, with an option for an additional renewal of 14 years.

¹ See, United States-Mexico-Canada Agreement Text, Office of the United States Trade Representative, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico#>.

² Kevin Barefoot, Dave Curtis, William Jolliff, Jessica R. Nicholson, and Robert Omohundro, “Defining and Measuring the Digital Economy,” *Working Paper*, Bureau of Economic Analysis, March 15, 2018, available at <https://www.bea.gov/system/files/papers/WP2018-4.pdf>.

Over time, Congress has revisited this definition, most recently in the Sonny Bono Copyright Extension Act of 1998, which extended copyrights to include the life of the author plus 70 years, or in the case of corporate authorship 120 years from the year of creation or 95 years from the year of publication, whichever comes first. Many have challenged these extensions,³ questioning whether they do, indeed, promote innovation. Intellectual property laws may provide incentives for creators, but there is a legitimate debate over the optimal length and breadth of both patents and copyrights. Ideally, the law strikes the proper balance, which fosters innovation rather than simply protecting monopoly rents.

Moreover, while copyright guarantees exclusivity, these rights have always been tempered by the fair use doctrine, which allows the use of copyrighted materials under certain circumstances. In this sense fair use doctrine is a “loose joint” that allows the law to balance the interests of consumers and copyright owners in a constantly changing world. The proper balance is required between intellectual property protections and fair use; the Intellectual Property Enforcement Coordinator should evaluate the appropriate balance and scope of intellectual property protections as the United States works to negotiate trade agreements that facilitate innovation, entrepreneurship, and creativity.

Importantly, the emergence of the digital economy has raised even more concerns about copyright and the enforcement of intellectual property laws. Recognizing the potential of the emerging technological advances, both the administration and Congress

³ See, for example, Brief for George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser as amici curiae in support of petitioners, *Eldred v. Ashcroft*, 537 US 186 (2003), available at: <https://cyber.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>.

initially opted for “light touch” regulation for internet ecosystem that has prevailed for the most part over the past two decades.⁴ This included the creation of safe harbors that limited the liability of service providers for actions taken by customers on their networks. This did not absolve service providers in instances of intellectual property violations. Rather, it also requires service providers to make a good faith effort to eliminate infringing materials. The Digital Millennium Copyright Act and its safe harbor in Section 512 led to a complex system of “notice and takedown” to address concerns over intellectual property theft. This is an additional area that is worthy of examination by the IPEC. Safe harbor exemptions are critical for protecting innovation and encouraging our trading partners to adopt similar provisions will promote economic growth and innovation.

At the same time intellectual property law is in flux as technology redefines how intellectual property is both created and consumed. Technology has prompted a significant degree of disintermediation that has spawned an entirely new creative class that operates outside the traditional content industries. Technology has dramatically reduced the costs of creating content while the internet has granted creative entrepreneurs access to a global audience. One study found that in 2016 this new, independent class of creators earned \$6 billion in revenue.⁵ This is made possible by the open nature of internet access, and IPEC is encouraged to work with our trading partners to protect internet access and the innovation that it supports. The United States is a world leader

⁴ See, “A Framework for Global Electronic Commerce,” available at <https://clintonwhitehouse4.archives.gov/WH/New/Commerce/read.html>

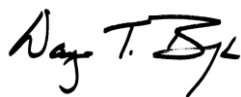
⁵ Robert Shapiro and Siddhartha Aneja, “Unlocking the Gates: America’s New Creative Economy,” 2017, available at <https://www.recreatecoalition.org/wp-content/uploads/2018/02/ReCreate-New-Creative-Economy-Study-Report-508.pdf>.

with respect to internet technology precisely because of the light touch regulatory policies that allowed technological innovation. Ensuring that trade negotiations protect this framework is critical for the continued evolution of the digital economy.

In this ever-changing world of technology—which is getting smarter, faster, and more efficient every day—the definition and scope of intellectual property is constantly in flux. As the U.S. Constitution notes, intellectual property protection can be a powerful force for promoting progress in science and the useful arts. However, overly broad enforcement can hamper innovation by making it difficult for entrepreneurs to develop new products or services. The Innovation Defense Foundation urges IPEC to examine the appropriate application of copyright law, seeking to identify a workable system that prompts innovation without becoming a means of protecting monopoly rents.

While it is important for the government to adapt its policies to new technologies, it is just as important for content providers to update their business models to reflect current technologies. The industry is already changing in order to limit piracy, and it will take a combination of updating laws and adopting new business models for the industry to thrive. IPEC should maintain an interest in how private stakeholders are working to adapt to new technologies. As business models change, trade agreements will need to be modified to reflect current realities, and IPEC can work with stakeholders to identify policies that continue to promote economic growth and innovation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wayne T. Brough". The signature is written in a cursive, slightly stylized font.

Wayne T. Brough