



**COMMENTS OF PUBLIC KNOWLEDGE REGARDING
DEVELOPMENT OF THE JOINT STRATEGIC PLAN ON INTELLECTUAL
PROPERTY ENFORCEMENT**

Public Knowledge submits these comments in response to the Intellectual Property Enforcement Coordinator’s request, as published in the Federal Register on September 13, 2018.¹ Public Knowledge is a nonprofit organization dedicated to preserving an open Internet and the public’s access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully.

Below, we advocate for two basic tenets to guide the next Joint Strategic Plan (JSP), as well as IPEC’s work in general. First, enforcement priorities and recommendations should reflect the balances inherent in the U.S. IP system, with due attention to the many crucial exceptions and limitations to IP rights as well as the legitimate interests of many different stakeholders, in addition to rightsholders. Second, IPEC be rigorous and selective in identifying and pursuing enforcement priorities, to ensure that the public benefits of enforcement justify its public costs. We make several specific recommendations to put each of these principles into practice.

Balance

In the U.S. IP system, the creation and enforcement of intellectual property rights are not ends in and of themselves. Instead, U.S. copyright and patent law is rooted in the Constitution’s express aim to “promote the Progress of Science and useful arts.”² As the Supreme Court has explained, copyright “ultimately serves the purpose of enriching the general public through access to creative works . . . by striking a balance between two subsidiary aims: encouraging and rewarding authors creations while also enabling others to build on that work.”³ The “monopoly privileges” authorized by the Constitution “are neither unlimited nor primarily designed to

¹ 83 Fed. Reg. 46522.

² U.S. Constitution, Art. 1, Sec. 8, Cl. 1.

³ *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S.Ct. 1979, 1987 (2016).

provide a special private benefit”⁴ -- accordingly, both the Copyright and Patent Acts make “reward to the owner a secondary consideration.”⁵

The next Joint Strategic Plan, and any recommendations IPEC makes therein, should embrace this balance unequivocally. To be sure, the enforcement of valid IP rights can often serve the public interest, by protecting incentives and investments that artists and authors make in their works and by facilitating the commercialization and dissemination of knowledge and culture. But these aims must be carefully weighed against the risks and potential costs of IP enforcement, and the competing values and policy goals that are often at stake. For example, in the digital age, Americans from all walks of life regularly refer to and make use of copyrighted works in communicating with each other and expressing themselves on matters large and small. Without the foundational exceptions and limitations in U.S. law, such as fair use and idea/expression dichotomy, the copyright system would stifle free speech and democratic exchange, and run afoul of the First Amendment.⁶

Even when focusing on commercial and economic interests, balance in the IP system remains crucial. The free flow of information over the internet and connected systems has been central to the growth and competitiveness of the American economy for over two decades and counting. According to one recent study, industries that rely on making fair uses of copyrighted works added 2.8 trillion dollars to the US. economy in 2014, approximately 16% of the total GDP, and generated 5.6 trillion dollars in total revenue.⁷ Revenue from these industries grew at 5% each year from 2010 to 2014, substantially outstripping national growth. Employment in industries benefiting from fair use and related limitations and exceptions reached 18 million workers by 2014, adding one million workers from 2010 to 2014.⁸ Likewise, consumers and internet users regularly depend on IP exceptions and limitations in their everyday lives -- for example, when they borrow from libraries, complete schoolwork, search the internet, buy used books and movies, unlock their smartphones to switch carriers, and share news articles on social media.

Especially when dealing with the complexities of the modern internet, it is impossible to devise appropriate IP enforcement measures without careful consideration of the trade-offs. IPEC should reject one-sided demands that the Office serve rightsholders alone, to the exclusion of other values, policy goals, and stakeholders. Striking the right balance between competing

⁴ *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1983).

⁵ *Id.* (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932))

⁶ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (discussing “copyright’s built-in free speech safeguards”).

⁷ See generally Computer & Communications Industry Association, *Fair Use in the Economy: Economic Contribution of Industries Relying on Fair Use* (June 2017), <http://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-US.-Economy-2017.pdf>.

⁸ *Id.*

interests is integral to ensuring “that the federal government’s intellectual property efforts are focused and well-coordinated and that resources are being used effectively and efficiently.”⁹

To achieve appropriate balance in practice and to ensure that U.S. enforcement reflects the ultimate aims of the intellectual property laws, we specifically urge IPEC to:

- **Adopt balanced enforcement and well-functioning exceptions and limitations as express objectives in the Joint Strategic Plan.** To its credit, the 2016 JSP did broadly recognize that these principles “have permitted the Internet to thrive” and “must be safeguarded . . . understanding the role of exceptions and limitations as not only part of our body of laws, but as an important part of our culture.”¹⁰ However, there was scant consideration of balancing principles within the context of specific enforcement issues and recommendations. In the next JSP, IPEC should expressly analyze any exceptions and limitations that may affect or complicate a proposed enforcement action, and also assess any plausible effects of its recommendations on the practical scope and usefulness of exceptions and limitations. For example, IPEC should consider whether and how enforcement schemes will weigh the possibility of fair use in potential instances of online infringement, and how proposed restrictions or burdens on a particular technology or systems may affect non-infringing uses and other user interests. Here, IPEC should build on a model from the 2013 JSP, which launched the “Fair Use Index” in collaboration with the Copyright Office.¹¹
- **Clearly assess each proposed enforcement priority and action in terms of the ultimate aims of the copyright system, as opposed to increased enforcement for its own sake.** In particular, IPEC should focus on the values of encouraging technological innovation, free expression, consumer benefit, the advancement of knowledge and culture, and maximizing the public’s access to creative works (as much as possible, consistent with the other necessary functions of IP law). IPEC should only prioritize enforcement measures that have a robust and persuasively articulated connection to these aims, and should not automatically assume that more enforcement is always better
- **Consistently assess the risks of abuse in any major enforcement scheme, and recommend laws and policies that would substantially curtail abusive assertions of IP.** For example, trolls have been a major problem in both patent and copyright law.

⁹ U.S. Intellectual Property Enforcement Coordinator, *Annual Intellectual Property Report to Congress* at 4 (March 2018).

¹⁰ U.S. Intellectual Property Enforcement Coordinator, U.S. Joint Strategic Plan on Intellectual Property Enforcement, FY 2017-2019 at 4 (2016) (hereinafter, “2016 JSP”).

¹¹ See U.S. Copyright Office, Fair Use Index, <https://www.copyright.gov/fair-use/>

Complaints of infringement are frequently made in bad faith -- for example, out of a desire to hamstring a competitor, or silence a political opponent. As a result, online enforcement systems for copyright have been misused on a massive scale.

- **Recognize the risks and collateral damage of intermediary liability for IP infringement, and defend robust limitations on intermediary liability.** The strength of the digital economy relies on the internet's ability to directly connect companies and individuals to each other. For this connection to happen, online service providers, social networks, and other intermediaries must convey the speech and works of others. Should intermediaries find themselves held responsible for the actions of others, their activities would be so restricted as to hobble the flow of information and the public and societal value of their networks. As one study notes, increasing liability for content providers, holding intermediaries liable for their users' content, and relaxing thresholds to prosecution all have a dramatic negative effect on angel investment -- an important driver for innovation and economic growth. Especially as the European Union completes its copyright directive -- which threatens major harm to consumers, competition, and online expression -- IPEC should actively resist calls to weaken the DMCA's safe harbors, including half-baked proposals for "notice-and-staydown" and intrusive filtering mandates.
- **Avoid heavy-handed government involvement in private negotiations around "voluntary" measures to reduce online infringement.** While they may provide some speed and flexibility, the tradeoff can be the lack of open, transparent, and democratically accountable forums. Often, there is no opportunity for public debate over, or participation in, shaping the terms of the agreements. Almost universally, these initiatives are negotiated behind closed doors and without the participation of public interest groups or consumer advocates. Further, the terms of the agreements are rarely fully released to the public, and their treatment of privacy and freedom of expression interests is often unclear. Finally, these initiatives may not provide sufficient meaningful opportunities for those accused of intellectual property infringement to challenge allegations and seek meaningful review. While government involvement may be less problematic for measures targeting the commercial relationships of major bad actors, IPEC should generally refrain from encouraging any private measure that may significantly restrict the public's access to, or legitimate uses of, the "vast democratic forums of the Internet" (which the Supreme Court has recognized as protected by the First Amendment).¹²

¹² *Packingham v. North Carolina*, 582 U.S. ____ (2017).

- **Advocate internationally for the adoption of the U.S. IP system as a whole -- including its balancing principles, exceptions and limitations -- and not just the selective foreign adoption of only those provisions favoring rightsholders.** This has been a persistent problem with many trade agreements containing IP provisions, which have repeatedly been negotiated with only rightsholder interests in mind.
- **Consult with and consider the interests of all relevant stakeholders--not just rightsholders--in all significant areas of policy.**

Rigor and Selectivity

Across different administrations, IPEC has recognized that one of its primary responsibilities is to conduct policymaking that is “well-grounded in sound research and data.”¹³ Of course, such rigorous analysis is essential to identifying and pursuing the correct priorities for enforcement. One of IPEC’s core functions is to be selective in the use of scarce government resources, rather than pursuing any and all enforcement possibilities without focus or distinction.

There is a systemic need for rigor and selectivity in IP enforcement, given the inevitable tension in granting private rights to achieve public benefits. By default, the owner of an IP right bears the responsibility for and costs of enforcement, given that they will keep the resulting profits. As IP law has expanded in the modern economy, the government has departed from this baseline principle, by dedicating some public resources directly to IP enforcement on its own initiative. But these situations are still the exception rather than the rule. Rightsholders of course have every incentive to push the substantial costs of IP enforcement onto others--either specific third-parties or the public as a whole (via the government). IPEC and any other enforcement agency must take care with this dynamic -- not only because the benefits of public expenditures may end up accruing unfairly to private interests, but also because there is a higher risk that the costs of IP enforcement will outstrip its benefits when externalized.

To achieve the necessary rigor and selectivity in its enforcement priorities and recommending, we specifically urge IPEC to:

- **Avoid conflating distinct types of intellectual property and enforcement problems. The harms caused by various IP infringements have varying effects on the public and the economy at large.** IP infringement allegedly causes threats to public health and safety, the financing of organized crime, and job losses. However, not all types of

¹³ 2016 JSP at 143.

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, in the case of trademarks, preventing the harm caused by adulterated or substandard pharmaceuticals being passed off as legitimate should be of greater concern to the federal government than the harm posed by the availability of counterfeit luxury items. The lodestar for the IPEC in assessing the benefits of a particular enforcement action should be the threat posed to the public by the targeted infringement.

- **Only recommend government enforcement action when it's clear that private enforcement efforts are not enough, and the larger public benefits justify the public costs.** This will typically require an assessment of the private legal remedies available to rightsholders on their own initiative. Furthermore, IPEC may also need to consider the extent to which infringement problems may be subsumed by technological or business shifts. This is not to condone or excuse violations of the law, but in some cases it simply does not make sense to sink enormous resources into eradicating some form of infringement if it is being made irrelevant by an alternative model for lawful distribution and commercialization.
- **Focus enforcement efforts on targeted bad actors, rather than diffuse categories of infringers.** The 2016 JSP wisely recognized this principle, focusing efforts against digital piracy on “large-scale illicit business models that have been designed to intentionally and unlawfully infringe third-party copyrighted content,” while steering clear of “broad Federal enforcement in order to address any and all acts that may be deemed infringing.”¹⁴ In order to minimize both the harms caused by infringement and the collateral damage of enforcement inflicted upon technological innovators and individual consumers, IPEC should prioritize infringements that are most clearly the result of willful law-breaking for commercial gain, or that threaten public safety.
- **Only undertake major enforcement actions after gathering sufficient and reliable data detailing the scope and harms of a particular problem.** This has been a consistent shortcoming of many IP policies and enforcement efforts, which often rely on incomplete and self-serving research funded by major corporate rightsholders. The 2016 JSP recognized a “critical” need for more rigorous research on nearly every major dimension of IP enforcement, but provided no clear plan for how to complete it.¹⁵ Where necessary data is incomplete, IPEC should focus on gathering it, rather than making major policy decisions in its absence.

¹⁴ 2016 JSP at 10.

¹⁵ *Id.* at 143.

- **Expressly weigh the potential costs of enforcement actions against their likely public benefits.** While this may often be expressed in financial terms, this does not mean that only quantifiable economic benefits should be counted. But even where the cost-benefit analysis is necessarily qualitative, both IPEC and enforcement agencies should articulate a clear rationale for what public objectives they are advancing, and be reasonably confident that the upside will likely be greater than the costs.

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