March 24, 2010

Victoria A. Espinel
United States Intellectual Property
Enforcement Coordinator
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Dear Ms. Espinel,

The Institute for Policy Innovation (IPI) appreciates the opportunity to comment on your efforts to develop an intellectual property enforcement strategy for the United States.

The Institute for Policy Innovation (IPI) is a non-profit, non-partisan public policy research institute. IPI does not lobby, and we do not represent clients or other parties.

We do, however, believe that property rights, including intellectual property rights, are the foundation of a functioning market economy. Furthermore, we believe that, in an information economy, intellectual property rights are both more important than ever and also under greater threat than ever before.

We therefore commend you for your efforts to foster strong intellectual property protection regimes, both domestically and internationally, and to expand and enhance the coordination and enforcement function of all relevant agencies of the U.S. government.

Our comments will serve to provide evidence of the harm caused to the U.S. economy by piracy and counterfeiting, and second to outline some selected policy implications that result from an assumption of the importance of intellectual property protection.

Comments from the Institute for Policy Innovation (IPI) are comprised of this document, and the following recent IPI publications:

1. *The True Cost of Motion Picture Piracy to the U.S. Economy* by Steven E. Siwek, IPI Policy Report #186, 9/29/2006
2. *The True Cost of Sound Recording Piracy to the U.S. Economy* by Steven E. Siwek, IPI Policy Report #188, 8/21/2007
3. *The True Cost of Copyright Industry Piracy to the U.S. Economy* by Steven E. Siwek, IPI Policy Report #189, 10/3/2007
4. *A Legislators and Consumers Guide to Prescription Drug Importation*, by Merrill Matthews and James Frogue, 1/6/2004
5. *Will Congress Circumvent the DMCA?* By Richard Epstein, IPI Ideas #35, 1/5/2006
6. *Still Bad: A Critique of the Latest Attempt to Gut the DMCA*, by Lee Hollaar, IPI Issue Brief, 4/3/2008

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7. *What's "Fair"? Why Those Concerned About Copyright Fair Use Need to Say What They Mean*, by Lee Hollaar, IPI Issue Brief, 4/11/2007

Evidence of Economic Harm to the U.S. Economy from Piracy and Counterfeiting

The Institute for Policy Innovation (IPI) has conducted original, primary research on the impact of piracy and counterfeiting on the U.S. economy. We hope that our research in this area would be received as valuable input to the Office of the IP Enforcement Coordinator, given that this research directly addresses the first of the two areas of inquiry described in the Federal Register notice.

Three (3) research papers which are included as part of these comments comprise the research IPI has conducted in this area. In the course of this research, methodologies were developed by the principle researcher on the project which are not only described in detail in the research itself, but which lend themselves to peer review, critique and updates when more recent data are available.

Among the core conclusions of this research (based on 2005 data):

- The U.S. economy loses $58.0 billion in total output annually. Output includes revenue and related measures of gross economic performance.
- The U.S. economy loses 373,375 jobs. Of this amount, 123,814 jobs would have been added in the copyright industries or in downstream retail industries, while 249,561 jobs would have been added in other U.S. industries in support of the copyright industries.2
- American workers lose $16.3 billion in earnings annually. Of this total, $7.2 billion would have been earned by workers in the copyright industries or in their downstream retail industries while $9.1 billion would have been earned by workers in other U.S. industries.
- Federal, state and local governments lose at least $2.6 billion in tax revenues annually. Of this amount, $1.8 billion represents lost personal income taxes while $0.8 billion is lost corporate income and production taxes.

We hope the Office of the IP Enforcement Coordinator will take the time to examine the careful research methodology and conclusions of this series of research papers. Included IPI research papers 1, 2 and 3 are related to this topic.

Selected Policy Implications of Intellectual Property Protection

If it is the policy of the administration and of the U.S government to enforce strong intellectual property protections, as the PRO IP Act and the creation of the IP Enforcement Coordinator position suggest, some obvious policy implications logically follow. In the following section we outline some of these policy implications.

1. *Attempts to weaken the Digital Millennium Copyright Act (DMCA)*

   There have been repeated attempts, both by activists and legislators, to weaken or eliminate the careful and successful balancing of rights and responsibilities contained within the Digital Millennium Copyright Act (DMCA).

   Bills have been introduced several times to the U.S. Congress with the intention of undoing or weakening specific content protections in the DMCA. This type of legislation specifically

works against stated administration goals of protecting intellectual property by weakening the primary legislative device designed to protect IP online. The administration should work with members of Congress to dissuade them from introducing or pushing legislation that directly contravenes the stated Administration policy of greater IP protection. IPI research papers 5 and 6 included as part of these comments specifically addresses legislative attempts to weaken or undermine the DMCA.

There have also been specific legal challenges launched against the DMCA. While largely unsuccessful, these legal challenges likewise work against stated Administration policy. Our hope would be that the administration would continue to vigorously defend against legal challenges to the DMCA.

2. *Attempts to reopen and weaken the Trade Related Aspects of Intellectual Property Rights (TRIPS)*

   We're certain the Office of the IP Enforcement Coordinator is familiar with the recent history of Thailand and other developing countries attempting to use specific flexibilities within the TRIPS agreement to place compulsory licenses on prescription drugs. These flexibilities were negotiated so that compulsory licensing regimes could be used under certain circumstances to prevent harm to public health as a result of crisis or of the breakdown of negotiations.

   Countries are being encouraged by IP skeptic activist organizations to abuse TRIPS flexibilities and to use them inappropriately. It is important for compulsory licensing regimes to not be improperly extended into areas for which they are inappropriate or unintended. IPI encourages the administration to stand strong against the improper use of compulsory licensing by our trading partners.

3. *Negotiation of the Anti-Counterfeiting Trade Agreement (ACTA)*

   The proposed Anti-Counterfeiting Trade Agreement (ACTA) is an appropriate trade agreement in an information age, and it is also a logical and creative response to the inability to accomplish coordination and norm-setting through established international institutions. IPI supports the continued negotiations among parties on ACTA.

   Some IP skeptic organizations have attempted to undermine ACTA negotiations by implying that maintaining confidentiality of the documents during the negotiation process somehow indicates that nefarious and diabolical plans are in the works.

   The Institute for Policy Innovation (IPI) agrees that there is a need for greater transparency between government and its citizens. However, it is obvious that in early stages of treaty negotiations between nations, confidentiality of the various negotiating texts is necessary. While we support reasonable transparency measures, there are obviously some government functions where security and confidentiality is required. Early stage negotiations of sensitive treaty documents between nations require such confidentiality.

   The administration should defend the confidentiality of documents being negotiated between governments, including the confidentiality of ACTA, and should continue to negotiate in good faith with our major trading partners on ACTA.

4. *Inclusion of intellectual property protection in trade agreements*

   It is very unfortunate that the U.S. trade agenda has stalled. Not only are WTO trade liberalization attempts at a standstill, but the U.S. seems to have abandoned its previous attempts to pursue bilateral trade agreements (FTAs). Such a setback on trade liberalization is harmful to the U.S. economy, but is even more harmful to the economies of developing countries around the world.

   One factor which may have led to a de-emphasis on FTAs is the argument that it was somehow inappropriate for the U.S. to include IPR protections in FTAs pursued and negotiated. We would argue that it is absolutely necessary for the U.S. government to pursue stronger IP protections abroad, and that trade agreements are an appropriate "carrot" to offer countries along with the "stick" of stronger IP protections. We regret that the current administration is apparently not prioritizing trade liberalization, because walking away from trade liberalization abandons a policy tool for encouraging stronger IP protections among our trading partners.

   IPI would urge the IP Enforcement Coordinator to take every opportunity to encourage efforts to liberalize trade and protect IPRs internationally through trade agreements.

5. *Attempts to extend "fair use"*

   U.S. copyright law wisely defines a number of permissible exceptions to copyright protection. Beyond the permissible exceptions defined in law, U.S. law also wisely allows a "safety valve" to courts to allow for other exceptions to be determined through the judicial process. But these fair use exceptions are not unlimited, and are conditioned upon four clearly defined principles. This regime has largely worked well, and gives courts the flexibility to adapt copyright law and practice to changing technologies and circumstances.

   But many advocates have begun to define fair use themselves, and have carelessly implied fair use as being "convenient use." But fair use is explicitly NOT the same thing as convenient use.

   The fact that anti-copyright activists purposely misuse the term "fair use" in such a way as to propound an unprecedented and extra-legal common understanding of the term is insidious and should be resisted. Efforts to expand fair use beyond legislative and judicial intent are nothing more than strategic attempts to undermine copyright itself, and should be resisted. The IPI research paper number 7 included with these comments specifically addresses misunderstandings of fair use.

6. *Attempt to undermine the right to protect content through technical protection measures (TPMs)*

   Content owners must have the right to attempt to protect their content, a right recognized by the DMCA, especially in the anti-circumvention areas of the legislation. In fact, content owners should be encouraged to do all they can to protect their property, to the extent that they believe their property should be protected.

   This includes the use of technical protection measures (TPMs), including digital rights management (DRM) technologies, should the content owners choose to use such techniques.

   Whether or not to use DRM or other TPMs is a legal and business choice of the content owners. Some content owners may, for business model reasons, decide against using TPMs.

Others may choose to utilize the strongest TPMs available to protect their content. These decisions should remain those of the content owners as determined by their own business strategy and experimentation. Even if only a minority of content owners chooses to utilize TPMs to protect content, their right to do so must be maintained. Fair use exceptions to copyright have no bearing on whether it is more or less convenient to consumers to have to deal with TPMs.

7. *The importance of the "Special 301" process*

   The Institute for Policy Innovation (IPI) supports the Special 301 process and believes that it has led to an overall improvement in awareness of the importance of IP protection among our trading partners. IPI believes that the Special 301 process merits strengthening and expansion.

8. *Suggestions that IPRs are no longer the best way to stimulate innovation*

   Some are urging that intellectual property rights are no longer the most effective means of stimulating innovation and creativity. Unfortunately, those who assert thus base their arguments on ideology and assumptions, rather than on empirical data.

   It's important to note that there is nothing today that precludes innovators from using alternative incentive systems to foster innovation. If creators and inventors wish to forgo their intellectual property rights, use open source or other collaboration models, prize systems, and other variations and alternatives to the intellectual property system, they are free to do so.

   Alternate systems of incentivizing innovation have an opportunity to demonstrate their effectiveness within the marketplace. There is no need to risk damage to our innovative economy in order to experiment with alternate systems of innovation. The administration's stated intention to protect intellectual property should lead the administration to defend and protect the existing intellectual property system against misguided ideological attacks.

9. *Maintaining a level playing field between proprietary and alternate innovation models*

   If the administration is committed to protecting American innovation through protecting intellectual property rights, the administration should resist policies that tilt the playing field between proprietary and other models of innovation.

   A prime example would be software purchasing requirements to purchase, for instance, a certain quota of software that is based on open source development. Some of our trading partners have implemented or attempted to implement such policies that are biased against proprietary models of software innovation. In fact, such proposals have even been floated at the state level. Policies that pick winners and losers between differing models of innovation should be resisted by the administration, both domestically and internationally.

10. *Potential of "network neutrality" regulations to undermine cooperation between broadband providers and content owners*

    After years of conflict between content owners and other stakeholders in the Internet industry, today fruitful and constructive discussions are beginning on ways that content owners and Internet Service Providers (ISPs) can work together to protect the value of content online.

However, current rulemaking proceedings within the Federal Communications Commission (FCC) are designed to open the door toward greater federal regulation of the Internet and broadband networks. In addition, the Federal Trade Commission (FTC) and Congress have also shown interest in proposing regulations upon broadband networks.

These rules, which claim to be designed to foster an "open" and "free" Internet, have profound implications for the protection of copyright on-line. Specifically, rules that prohibit ISPs from filtering content and otherwise policing their networks could make it impossible for content owners to work with ISPs to protect copyright online.

An administration and U.S. government that values and pledges to protect intellectual property should be careful to not allow rules to be propounded by other government agencies that will make it much more difficult or impossible to protect copyright on-line.

Voluntary cooperation between ISPs and content owners, within the existing framework of U.S. law, is the best way to address the problem of online infringement. IPI is concerned that network neutrality rules under consideration by the FCC could thwart efforts by ISPs to work with content owners to identify, track and block infringing content. Indeed, we believe that at least part of the motivation of those pursuing network neutrality rules is to make it more difficult to enforce intellectual property protection online.

IPI urges the IP Enforcement Coordinator to communicate to the FCC the administration's concerns about the impact of proposed network neutrality rules on the ability to enforce IP protection online.

Conclusion

The Institute for Policy Innovation (IPI) appreciates this opportunity to share our thoughts and concerns with the IP Enforcement Coordinator's office. We would be delighted to work with you to accomplish the kind of IP protection regime that is necessary to maintain America's economic competitiveness in the Information Age.

Sincerely,

Tom Giovanetti
President
Institute for Policy Innovation (IPI)