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Victoria Espinel
United States Intellectual Property Enforcement Coordinator
Office of Management and Budget
Executive Office of the President
intellectualproperty@omb.eop.gov

Re: Comments of the Consumer Electronics Association and the Home Recording Rights Coalition Regarding the Development of the Joint Strategic Plan

Thank you for the opportunity to submit comments on the landmark federal effort to develop an intellectual property enforcement strategy to combat infringement.

The Consumer Electronics Association (CEA) trade association represents over 2,100 member companies that design, manufacture, distribute and sell a wide range of consumer products including digital televisions, personal computers and information technology products, personal communication devices, and digital video receivers and recorders.

The Home Recording Rights Coalition is a leading advocacy group for consumers' rights to use home electronics products for private, non-commercial purposes. The HRRC was founded in 1981, in response to the Ninth Circuit's ruling, in the *Betamax* litigation[1] (later overturned by the Supreme Court), that distribution of consumer video recorders constituted contributory copyright infringement.

CEA's members account for more than $165 billion in annual sales in the United States. The CE industry directly employs approximately 1.9 million workers in the United States. Of these, 212,000 jobs are in manufacturing; 574,000 are in retail; 38,000 are in transportation; and 1,073,000 are in parts of the U.S. economy that solely depend on the

[1] *Sony Corp. v. Universal City Studios, Inc.*, 484 U.S. 417 (1984).

utilization of CE products, such as the motion picture and sound recording industries, telecommunications, broadcasting, and software development. Many of these jobs are on the cutting-edge of technology, including jobs related to the research and development of new technologies, as well as the marketing and design of new products. The CE sector directly generates $1.4 trillion in output, $325 billion in labor compensation, $145 billion in tax payments, and 4.4 million jobs in the United States. This economic activity translates into a direct contribution of $585 billion by the CE sector to U.S. gross domestic product – approximately 4.6 percent of the national economy.

Collectively, CEA members annually obtain thousands of patents, and register copyrighted works and trademarks for goods and services. For CEA and its members, innovation is the lifeblood of the industry, and intellectual property protection against infringement remains a key priority.

CEA presents below several issues of concern that we believe merit deeper consideration by the United States, so as to better promote the progress of technological development, manufacturing, and delivery of products and services that fuel the digital information and entertainment revolution in the United States and worldwide.

Enhancing Customs Enforcement

CE and IT manufacturers continue to suffer losses in global markets from trade in counterfeit and fake products, as well as from trade of infringing goods. By some estimates, as much as ten percent of the global market in electronics products results from trade in counterfeit high technology products. These billions of dollars in lost annual revenue threaten innovation by depriving companies of the resources to conduct research and development into tomorrow's technologies.

HRRC, as an advocacy organization for private, noncommercial use of legitimate products, has always opposed counterfeiting and other commercial exploitations that are not fair uses, and which mislead consumers and are in direct competition with the commercial purpose of the distributor.

Counterfeiting of electronics products affects more than just the companies that manufacture legitimate products. It deprives consumers of the benefits of advanced and reliable authentic goods. Poorly manufactured electronics products also can place the consumer at risk of physical injury. Retailers are deprived of profits needed to maintain and expand their inventory in legitimate goods. Countries collect less revenue from unpaid duties and taxes. And, counterfeiting translates to lost jobs across all industry sectors of production, distribution, and retail.

Effective Customs enforcement of IP rights continues to be one of CEA's top international priorities. Improved communication among the Customs offices of our trading partners will help improve interdiction of counterfeit goods before they reach the public. An effective international Customs system enhances consumer welfare and

promotes industrial development. Moreover, by increasing seizures of counterfeit goods, effective Customs enforcement removes the financial incentives for, and so deters further acts of, commercial piracy.

Harmonizing available legal causes of action and remedies against counterfeiting should be a high government priority. Specifically, criminal penalties should be available against those found guilty of counterfeiting, and legal remedies should provide for the seizure and destruction of counterfeit goods. Practices in some countries allowing for the removal of false trademarks and the release of counterfeit goods into the market should be prohibited.

CEA and HRRC suggest that government and industry can collaborate on training and technical assistance, education and information exchange at international forums, and joint cooperation activities to more effectively remedy and prevent distribution of counterfeit goods. By collaboration, industry and government can be more effective partners in developing and implementing effective remedies against piratical practices that harm industrial innovation and consumer and public interests.

Patent infringement similarly drains the resources of legitimate manufacturers. Patent owners collect no royalties from infringing products, which deprives them both of a fair return on their past investments in technological development and of the resources to promote new research. Infringers that pay no royalties also unfairly obtain marketplace and price advantages over the patent owners and all legitimate licensees whose products reflect the true costs of innovation.

- CEA and HRRC urge greater international cooperation among Customs officials to prevent the unlawful importation of goods that have been judicially determined to be infringing.

- In this regard, harmonized patent laws and systems may also improve the prospects of more uniform and effective enforcement.

- Equally important for companies that manufacture and distribute high technology products are more uniform standards for issuing patents, and better technical resources available to patent examiners. Patents improvidently granted or improperly denied work a significant drag on innovation. We urge the United States to pursue patent reform in its domestic laws, and greater harmonization of laws and sharing of resources internationally.

Ensuring Balanced Interpretation of IP Rights and Fair Use

CEA members, as all innovators, are not only IP rights owners but IP rights licensees and users. Moreover, as designers and manufacturers of products for purchase by consumers, it has been essential to CEA and its members that consumers retain their reasonable and

customary rights to use works and goods protected by IP rights for their home and personal enjoyment.

HRRC was formed as an advocate for fair use and consumer sovereignty. Fair use has been an essential part of the technology industry and user IP rights agenda for more than 25 years, since the days of analog audio and video tape recording. Now, as we complete the first stages of the transition to digital technology, securing consumer personal rights is more crucial than ever.

Digital technology has unleashed an era of unparalleled creativity. Consumers with personal computers, an inexpensive digital video camera, free software, and imagination can create their own music and video, and sample, alter, edit, and mash up existing works into new and exciting personal commentary, artistic expressions, and entertainments. User-generated content sites like YouTube and MySpace are filled daily with hundreds of thousands of new songs and audiovisual works – some thoroughly original, and some involving transformative uses of pre-existing content. The fastest growing sectors of the Internet rely at least in part on the fair use doctrine. It is therefore crucial that the "fear factors" of digital technology – "perfect" copying and "mass" redistribution – should not curtail or outlaw consumers' right to reap the personal, private, and artistic benefits that digital technology and content can offer.

Exceptions to copyright that promote public interests, including but not limited to a robust fair use doctrine, remain fundamental to copyright law in the digital age. We strongly support the commitment made by the United States to support both better enforcement of copyright law *and* "better exceptions in copyright law" as "part and parcel of a balanced international system of intellectual property." United States of America, Statement on Copyright Exceptions and Limitation for Persons with Print Disabilities, WIPO Standing Committee on Copyright and Related Rights, 19th Session, at 5 (Dec. 15, 2009). Because foreign copyright laws lack flexible fair use provisions, U.S. companies may be exposed to liability overseas for activities U.S. courts permit. We therefore urge the United States to continue to press forward at WIPO to achieve greater international harmonization in recognition of fair use as an essential element of copyright law, and not an encumbrance upon it.

In that regard, one immediate affirmative step that should be undertaken by the United States is the inclusion of recognition of fair use and other public interest exceptions in bilateral and multiparty agreements that address IP rights. Where the United States seeks to broaden liability for infringing conduct, it should also seek in each instance to delineate with specificity the metes and bounds of the causes of action, and to clearly define the defenses. Where harsher remedies are sought, or prescribed liability through statutory damages, the United States should ensure that the consequences of infringement remain proportional to the actual injury incurred.

These concerns are particularly poignant for HRRC, and for CEA and its members, when considering secondary liability for infringement. CEA members remain mindful that over the last 30 years the introduction of virtually every technology capable of consumer

recording has been met with the threat or the filing of a lawsuit based on secondary liability for alleged consumer infringement. Had Sony lost the *Betamax* case in 1984, VCR manufacturers could have been bankrupted by statutory damage liability; consumers would have been denied access to a technology that greatly enhanced their personal enjoyment of video entertainment they lawfully purchased; and the entire basis of today's robust digital video technology – DVDs, DVRs, Blu-ray, set-top boxes, video games, and hundreds of billions of dollars in commerce worldwide – might never have come to pass. HRRC was formed specifically to advocate against such a disastrous result. The United States should recognize, and should help other nations also recognize, the potential for overly broad or loosely defined standards of secondary liability to kill the goose that lays the golden eggs of innovation.

First, because there has been no international consensus around the possibility of secondary liability, even in the 1996 WIPO treaties, other nations will not have the long history of jurisprudential development of circumstances that should, and should not, incur secondary liability. By contrast, our Supreme Court, nearly a century ago, recognized that imposing liability upon those who manufacture goods and provide services that are not solely directed toward infringement could "block the wheels of commerce." This concern is all the more acute because, second, any attempt to articulate in short-hand treaty language the nuanced standards of contributory, vicarious, and inducement liability risk misinterpretations that will prejudice technological development. Particularly in a world marketplace with global media and communication services, draconian rules imposed by one country can have direct and chilling consequences in other countries as well. Such risks are evident in the recent decision in an Italian court imposing liability, based on alleged violations of privacy laws, on individual employees of Google based solely on content uploaded by consumers.

Moreover, these standards of secondary liability continue to evolve in response to new technology and circumstances in the United States, and it is exceedingly dangerous to begin exporting concepts until one can be certain the pendulum has come to rest. Third, as noted above, any articulations of standards of secondary liability must be balanced with language securing the defenses and protections established under United States law. Principal among these is the long-standing protection for technology companies under the *Betamax* case. The *Betamax* test, whereby no manufacturer can incur contributory infringement liability for the manufacture and sale of products having substantial noninfringing uses, remains the key to design freedom and innovation throughout the world.

Similarly, with respect to provisions regarding anti-circumvention in current trade negotiations, a proper balance must also be struck between copyright holders and the rights of consumers to use lawfully acquired content as they are entitled to under U.S. law, so as not only to protect those rights, but to also ensure that there is no chilling of innovation or reduction of sales of technology products. One way forward regarding striking this balance on anti-circumvention may be to follow the language found in the U.S.-Chile FTA, which provides in part:

17.7.5. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, and producers of phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, protected by copyright and related rights:

(a) each Party shall provide that any person who **knowingly circumvents** without authorization of the right holder or law consistent with this Agreement any effective technological measure that controls access to a protected work, performance, or phonogram shall be civilly liable and, in appropriate circumstances, shall be criminally liable, or said conduct shall be considered an aggravating circumstance of another offense. No Party is required to impose civil or criminal liability for a person who circumvents any effective technological measure that protects any of the exclusive rights of copyright or related rights in a protected work, but does not control access to such work.

Voluntary Industry Efforts Yield Better Solutions than Technology Mandates

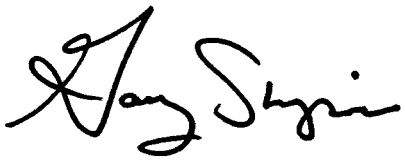
Over the last decade, consumers have acquired the majority of new audio and audiovisual content in digital formats. This rapid transition was made possible in large measure by voluntary cooperation among stakeholders that share common interests in the marketplace success of digital media; yet, on copyright issues, may have opposing points of view. These industry-led efforts did not require government technology mandates. Indeed, any mandates undoubtedly would have forced solutions that would have been instantly obsolete. Instead, stakeholder recognition of mutual benefits drove the process along a path to develop new technologies, products, and services that expands opportunities for industry and provides compelling experiences for consumers. Taking stock by government, rather than taking sides, will promote faster innovation in the marketplace, and will result in better solutions for the ultimate beneficiary – the public.

Conclusion

CEA and HRRC urges that the recommendations put forward by the Intellectual Property Enforcement Coordinator focus on developing solutions to address the legitimate and real economic harms caused by illegal counterfeit products and commercial infringement. We believe that a balanced enforcement policy must provide both protections for rights owners *and* clear exceptions and limitations for users and consumers, while allowing for private resolution of complex issues of technology policy. Such a balanced approach will ensure that copyright fulfills its mission "to promote the progress of science and the useful arts," while avoiding the harmful ratchet effect of imposing more severe penalties for non-commercial infringement and more stringent limitations on lawful uses.

Thank you very much for your consideration of the above comments. Please do not hesitate to contact us should you need additional information or clarification.

Respectfully submitted,



Gary J. Shapiro
President and CEO
Consumer Electronics Association
1919 S. Eads St.
Arlington, VA 22202

Michael E. Petricone
Vice Chairman
Home Recording Rights Coalition