



March 24, 2010

The Honorable Victoria Espinel
U.S. Intellectual Property Enforcement Coordinator
Office of Management and Budget
The White House
Washington, DC 20500

Re: Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan (Federal Register Volume 75, Number 35 – FR Doc. 2010-3539)

Dear Ms. Espinel:

The Internet Commerce Coalition (ICC), a coalition of leading Internet service providers and e-commerce companies and trade association, is pleased to respond to the IP Enforcement Coordinator's request for comments on its Joint Strategy Plan. ICC members are key players in the US high-tech industry, which, like the entertainment industry, is a huge source of high-wage jobs and economic activity that is key to the economic recovery.

ICC members strongly oppose counterfeiting and copyright infringement, supported the creation of the IP Enforcement Coordinator's Office, and support better coordination and use of federal resources to attack the problems of counterfeiting and infringement.

We strongly support increasing appropriately prioritized criminal enforcement activity against perpetrators of these crimes, devoting investigative resources at the FBI and elsewhere in the federal government to supporting prosecutions, creating incentives and accountability for customs and border protection authorities to interdict dangerous imports of counterfeits at U.S. ports of entry, continuing and increasing training in countries that are sources of counterfeiting and infringing activity, and increasing coordination with state law enforcement authorities.

We note that Congress has passed a large number of federal laws criminalizing and creating civil remedies against counterfeiting and copyright infringement, but that federal and state enforcement remains extremely rare. Worse yet, in view of the risks posed from the flow of potentially dangerous counterfeit goods into the U.S., there has been little or no activity to date by customs and border protection in intercepting goods flowing from known sources of



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counterfeiting. Service providers stand ready to work with law enforcement investigating these offenses.

We hope that the IPEC Strategic Plan will fulfill the role Congress specifically created for it – of coordinating and improving the scattered federal activities in pursuing professional IP criminals. By the same token, we hope that the IPEC will stay true to this role envisioned by Congress, rather than wading into highly contentious policy debates over modifying civil copyright law on topics such as reopening the Digital Millennium Copyright Act. Copyright law reflects a careful balance struck by the legislative and judicial branches, and the executive branch should be careful not to tip that balance by placing emphasis on any particular industry or group of industries, especially in ways that risk having a profound adverse effect both on lawful expression on the Internet and on subscriber privacy (for example, through network blocking requirements, which are almost invariably overbroad, or through requirements to monitor subscriber activities).

The Administration has already decided to move forward with the Bush Administration's ACTA initiative before being able to fix the transparency flaws in the initiative. USTR has defended this initiative on the ground that it will not change U.S. law. In light of this, it would be both unwise and unfortunate to use the IPEC Strategic Plan to propose changes in domestic copyright rules, lest ACTA appear to be a step in a plan to alter the rights of Internet users to engage in non-infringing communications or receipt of lawful information over the Internet.

Indeed, it is important to recognize that strong enforcement does not require new substantive copyright or counterfeiting laws, but rather a better marshalling of federal and state enforcement and training resources. It is equally important to recognize that stronger laws in this area are not necessarily better laws.

One need only look to Europe to see this. Several key EU member states, who are largely driving the EU ACTA negotiating positions that the US delegation is seriously discussing, treat as "trademark infringements" sales of genuine products that are fully protected under the First Sale Doctrine in the U.S. This position reduces consumer choice and beneficial competition in genuine articles. Similarly, EU courts have imposed extensive monitoring obligations on service providers that force service providers to put subscriber activities under constant surveillance. Lastly, a Belgian court and now the UK House of Lords have embraced blocking and filtering obligations on ISPs that are not narrowly tailored and risk censoring large swaths of non-infringing content. Initial returns indicate that even the much-publicized *Loi HADOPI* in France has not significantly affected infringing behaviors of French citizens.¹

¹ Sylvain Dejean, Thierry Pénard, Raphaël Suire, "Une première évaluation des effets de la loi Hadopi sur les pratiques des internautes français", available at <http://www.marsouin.org/spip.php?article345>.



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II. Suggested Priorities

Of the list of priorities set forth in the Federal Register Notice, we respectfully suggest that the IPEC team look particularly closely at the following elements:

1. Prioritize enforcement: Enforcement resources should be directed principally at threats to public safety and high-volume violators. At the same time, some enforcement to deter large-scale end user violators may be warranted.

2. Investigative resources: It is our understanding that there are currently little or no FBI agent resources available to help prepare cases. Dedicating even one or two FBI agents to put together priority cases against professional counterfeiters and piracy rings would be a significant improvement in the federal enforcement landscape.

3. Interdiction: Dangerous counterfeit goods are almost always sent into the U.S. from abroad. However, we understand that Customs and Border Protection agents do not screen packages from the addresses of known large-scale counterfeiters that flow repeatedly through the same ports of entry. Obviously, there are host of very serious threats these agents must focus on. However, creating incentives and benchmarks for attacking high priority counterfeiting targets would be a very positive step.

4. Training: PTO and Copyright Office training programs and other resources to help well-meaning authorities in countries that are significant sources of counterfeit and infringing goods to address these problems is another important investment. These programs – as well as support for sources of hacking and other computer crimes – should be increased.

5. Coordination: Coordinating with state authorities to improve enforcement is another important way to create enforcement synergies.

III. *Supplemental Question 14: Methods to Limit Internet Infringement*

We strongly support increased enforcement and the bulleted objectives of the strategic plan set forth in the Request for Comment. Above we suggest several particular priorities among these worthy ideas.

In light of overbroad European “Internet” initiatives that we mention in the introduction to these comments and your questions in stakeholder consultations about reopening the Digital Millennium Copyright Act, we are submitting specific comments in response to Supplemental Question #14 – specific methods “to limit or prevent” sale, distribution or dissemination of infringing products over the Internet.



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Regrettably, it is not possible to completely prevent infringing activities, and, particularly in the case of counterfeit goods, the Internet often plays a minimal role in production and dissemination of products.

We are convinced that ultimately the best tool to protect intellectual property online is adopting and promoting attractive business models that help make IP more accessible to consumers who will pay for it. In this regard, we are very encouraged by voluntary bi-lateral deals between studios, for example, and major ISPs and online marketplaces. All parties share a stake in the growth of these lawful marketplaces, now becoming available to online consumers on an attractive scale and attractive terms.

At the same time, it is important to move consumers to these lawful marketplaces. Our members educate users about respecting copyright, work quickly to remove infringing content they become aware of, and are undertaking active notice forwarding campaigns, which have yielded impressive results:

For example, aggregate data on the success of notice-forwarding programs that we received from several ICC member companies uniformly showed that the overwhelming majority of notices are ones sent for the first time to an account. These are followed by a very steep drop in the percentages of second notices sent to an account, with subsequent notices constituting tiny percentages of notices forwarded. These data show that notice forwarding is a significant tool in educating users and significantly curbing infringement.

Moreover, our marketplace members employ special expedited notice and take down procedures to help rights and brand owners to remove infringing and counterfeit listings.

We are convinced that cooperation between service providers and rights owners against infringement and counterfeiting will increase through bi-lateral discussions and business arrangements. These issues are addressed in the context of business discussions, which is where they belong, because building lawful alternative markets to infringement is essential to changing user behavior. There is simply no need for government officials to convene or participate in these discussions, because their doing so would chill rather than advance discussions.

At the same time, we have serious concerns about some proposals that have been adopted in Europe in the name of curbing Internet infringements and would strongly oppose efforts to import them into U.S. law. These include:

- Ongoing monitoring obligations ordered in a series of Internet marketplace cases. The legality of this approach will be tested in the Scarlet Extended case from Belgium, which has been certified to the European Court of Justice, while this approach still remains a



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cornerstone of EU proposals in ACTA. These obligations are often impossible to comply with and force service providers to function as “policemen of the „Net,” following users’ behaviors in great details.

- Obligations to attempt to block websites, again at issue in the Scarlet Extended case and now part of the House of Lords’ version of the Digital Britain legislation. As the court in *Center for Democracy and Technology v. Pappert*, 337 F. Supp.2d 606 (E. D. Pa. 2004), found , these efforts can typically be very easily side-stepped by violators while they inevitably censor significant amounts of lawful content.
- The “*negligence characterisee*” approach in the French *Loi HADOPI*, which on its face would completely deny subscribers access to the Internet for 30 days for infringements of others (e.g., children) using the same Internet connection even if the user has tried to stop those infringements.
- Embracing loose definitions of trademark rights that reduce consumer choice to buy lawful products from less expensive sources.
- The imposition of personal criminal liability against executives of Google for the content of 3rd party users posted to the YouTube website.

We note that as yet evidence suggests that such approaches are in fact no more effective at limiting infringement. In fact, initial evidence on infringing activity in France following adoption of the Loi HADOPI is that the law has not significantly curbed infringing activity.²

IV. Conclusion

For the foregoing reasons, we urge the IP Enforcement Coordinator to do the job Congress asked the office to do – improving enforcement and better marshalling federal and state resources for that job. We also urge the Coordinator not to suggest legislative changes to substantive copyright or trademark law, as the law has been amended repeatedly and the government has done minimal enforcement of these many current laws.

Sincerely,

James J. Halpert
General Counsel

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² See footnote 1, *supra*.