

From: [REDACTED]
To: [FN-OMB-IntellectualProperty](#)
Cc: [Espinel, Victoria](#)
Subject: Comments on the Joint Strategic Plan
Date: Wednesday, March 24, 2010 3:40:45 PM

Victoria Espinel
Intellectual Property Enforcement Coordinator
Office of Management and Budget
Executive Office of the President
Filed via email

Dear Ms. Espinel:

I write to you today as a long-time content creator, who makes a living off of my ability to continue to create content and receive remuneration for that activity. And yet, I am concerned about the state of US copyright law, and the fact that it does not serve my interests or the interests of the vast majority of content creators today. Despite being a professional content creator, I have purposely chosen not to make use of copyright law, because the way it is structured today actually hinders my own ability to profit from my content creation.

Based on this, I would like to address three key points in response to your request for comment on the strategic plan for IP enforcement:

- * Any efforts at enforcement should be judged on the actual evidence, rather than faith-based claims of "harm" where no harm may exist.
 - * The actual evidence suggests that less enforcement may actually increase economic and cultural progress -- and thus, any government run enforcement plan should tread carefully.
 - * There is an important difference between harm to certain companies that don't want to adapt to a changing market, and harm to an overall industry -- and we too often confuse the two.
- Promoting Progress

The central tenet of copyright law has been, "To promote the Progress of Science and useful Arts," and the mechanism for this is both copyright and patents, or more specifically, "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Unfortunately, over the years, all too often we've lost sight of the beginning of that sentence, in the assumption that any increase in those "exclusive rights" must surely "promote the progress." And, yet, as we have expanded and stretched copyright law time and time again -- and almost never contracted it -- no one ever seems to ask for any actual evidence that stronger and lengthier copyright law leads to promoting more progress.

This is not a new concern. Thomas Macaulay famously argued in 1841 that we ought to be careful to only extend and expand copyright upon evidence that such an extension or expansion would, in fact, lead to greater incentives to create. Yet, to this day, our public policy has been to take it on faith that stricter copyright laws lead to greater incentives to create -- despite the lack of evidence to support this position. In fact, the evidence has suggested that as technology has decreased the ability of copyright holders to enforce copyright, the incentives to create have only increased. And this is not just the ability to create as an amateur, but the ability to create and earn money as a professional.

A Look at the Evidence

A recent paper by economists Felix Oberholzer-Gee and Koleman Strumpf demonstrated this in rather great detail, highlighting that even as new technologies have undermined classical copyright law, there remains little evidence that this change has undermined the incentives to create. In fact, the research collected in that paper and other papers (such as the research by economist Will Page of PRS for Music in the UK) suggests that more people are creating more new works of music today than ever before in history. The same is true of movies, an industry that has seen the number of annual releases double in the last five years alone and box office results continue to increase to record numbers.

Given this, it is unfortunate that your request for comment on enforcement strategies focuses solely on one half of the equation: "the harm." Looking at the actual evidence on the economics of intellectual property, it suggests that there are also benefits to reduced intellectual property enforcement -- and, in fact, those benefits may outweigh the costs. A bigger concern should be that overly aggressive expansion of intellectual property enforcement will actually cut off important forms of expression along with cultural and economic progress. The Oberholzer-Gee and Strumpf paper is quite detailed in reviewing the facts, concluding that "weaker copyright protection, it seems, has benefited society." They do this analysis both economically and from the viewpoint of output. More content than ever before is being produced and distributed, and the vast majority is being done outside the boundaries of traditional copyright law. At the same time, the amount of money being made by the various industries involved in these endeavors has continued to rise.

Even the music industry -- often seen as being the most hard hit -- is actually doing better than it has done in the past. This is because the breakdown of traditional scarcities in the market has fueled important and valuable new business models. The greater efficiencies of the system mean that consumers are actually getting more value, and are actually paying more than in the past. In economic terms, the shift in the market, sometimes associated with intellectual property infringement, has actually driven much greater complementary revenue streams. This argument may seem counterintuitive at first, but it is not as surprising when you recognize that modern technology, often by enabling further infringement, has also made the creation, distribution, promotion and consumption of such content significantly more efficient. Trying to block the infringement through greater enforcement via the law does not come without costs. It can serve to significantly burden those other areas as well, leading to decreased output and decreased economic activity.

The real issue is not harm to society or to the economy as a whole. Oberholzer-Gee and Strumpf's report shows that the overall music market has grown, such that in 2007 it was actually 66% larger than in 1997 in terms of revenue. This is not an industry in trouble. The problem is that one segment of the entertainment industry has seen harm: those firms that have relied heavily on copyright protections for their business models. However, as we have seen, the wider industry has already successfully been putting in place alternative business models.

Given that, it would be a dangerous mistake to increase enforcement policies, or to put in place new rules that may stifle these new opportunities and new models, as they are growing. I recognize the concerns of those in companies that have not been able to successfully adapt, but we should not be setting policy to rescue or support specific companies -- especially as the overall industry is thriving and consumers are benefiting

greatly.

For detailed methodology on how the music industry has been thriving, you can read the Oberholzer-Gee and Strumpf report at the following URL <http://www.hbs.edu/research/pdf/09-132.pdf>. Further support for similar results in more focused areas comes from Will Page, the chief economist for PRS for Music, looking at the UK market for music, which is also growing: <http://bit.ly/ukX9Y>.

Policy Implications

These studies, along with numerous others, point to important facts about how industries can adapt, even in the face of technologically-weakened copyright, without the need for greater enforcement. But they also raise an important point: before our policy on copyright is made without actual evidence, it is important to allow the market to function to see if it can adapt appropriately. This often creates disruption, but we should not assume that a disruption within some companies within an industry means that the entire industry is imperiled.

Given all of this, it would be unfortunate to rush into any form of greater enforcement without evidence that it is actually needed.

From a specific policy perspective, then, the Joint Strategic Plan should set out a process for actually judging the real economic impact of stronger enforcement, rather than starting from the assumption that greater enforcement is necessarily good. It should not only look at the claimed "harm," but the flip side as well, the vast "benefits." It should step back from the question of "how do we increase enforcement" to ask whether stronger enforcement actually does serve to "promote the progress." For 300 years, since the Statute of Anne in the UK, copyright has been mostly a faith-based initiative. There is an opportunity now to bring actual evidence into the decision making process. I look forward to seeing how IPEC proceeds in making sure that any efforts in enforcement are based on actual evidence and tied back to that key requirement: "to promote the progress of science and the useful arts."

Sincerely,

Michael Masnick