



October 16, 2015

**Submitted via regulations.gov, OMB FRDOC 0001-0162**

The Honorable Daniel H. Marti  
United States Intellectual Property Enforcement Coordinator  
Executive Office of the President

**RE: IIPA Written Submission Related to the Development of the Joint Strategic Plan on Intellectual Property Enforcement; Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments, 80 Fed. Reg. 52800 (September 1, 2015)**

Dear Mr. Marti:

The International Intellectual Property Alliance (IIPA)<sup>1</sup> appreciates the opportunity to provide its written submission on the “Development of the Joint Strategic Plan on Intellectual Property Enforcement.” This written submission follows upon prior submissions, including that submitted on August 10, 2012, on the development of the second Joint Strategic Plan.<sup>2</sup> The 2013 Joint Strategic Plan on Intellectual Property Enforcement<sup>3</sup> addressed many of the issues that continue to be IIPA’s most pressing priorities. With the hope that this submission will assist the U.S. Government in crafting its Joint Strategic Plan for the coming three-year period, we submit comments herein with reference to the relevant topics as they appear in the 2013 Joint Strategic Plan, making recommendations for improvements or new areas of focus where appropriate.

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<sup>1</sup> IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world. These include entertainment software, including interactive video games for consoles, handheld devices, personal computers and the Internet, and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Visit [www.iipa.com](http://www.iipa.com). Members of the IIPA include [Association of American Publishers](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), and [Recording Industry Association of America](#).

<sup>2</sup> See *Comments of International Intellectual Property Alliance (IIPA)*, August 10, 2012, at [http://www.iipa.com/pdf/2012\\_Aug10\\_IIPA\\_Filing\\_to\\_IPEC\\_on\\_Joint\\_Strategic\\_Plan.pdf](http://www.iipa.com/pdf/2012_Aug10_IIPA_Filing_to_IPEC_on_Joint_Strategic_Plan.pdf).

<sup>3</sup> See *2013 Joint Strategic Plan on Intellectual Property Enforcement*, at <https://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf>.



Since 1984, IIPA's work has consistently focused on improving the legal and enforcement environment for copyright industries in markets outside the United States. Today, the importance of the digital economy in reaching those markets makes it essential to promote standards encouraging legitimate activity and permitting enforcement against bad actors, in a manner inclusive of all stakeholders in the online ecosystem. Our member associations view the role of the Intellectual Property Enforcement Coordinator (IPEC) as essential to this task, in coordinating the U.S. government effort to combat copyright infringement that originates outside the territorial borders of the United States, and to minimize discriminatory and protectionist market access trade barriers which harm all the creative industries.

To these ends, IIPA submits recommendations below that correspond to four key areas of the IPEC's activities:

First, IIPA highlights the important role that U.S. government officials can play domestically and in overseas posts in helping to address some of the creative industries' most pressing commercial concerns. This includes the posting of U.S. intellectual property attachés in strategically chosen embassies; support for Department of Justice (DOJ) Intellectual Property Law Enforcement Coordinators (IPLC) and International Computer Hacking and Intellectual Property (ICHIP) coordinators; and support within U.S. Customs and Border Protection to address the importation into the United States of infringing goods, as well as devices, technologies, or components used to circumvent technological protection measures put in place by copyright owners to control access to and prevent infringement of their works, and provide technical assistance and training to foreign enforcement officials.

Second, IIPA notes the significance of IPEC's role in advancing important initiatives to fight online piracy, including efforts to combat foreign-based and foreign-controlled websites that infringe American intellectual property rights, and to facilitate voluntary initiatives to reduce online intellectual property infringement, such as working with ad networks.

Third, IIPA underscores the continued value of U.S. trade policy tools, including the annual Special 301 review of intellectual property protection and market access practices in foreign countries and the related out-of-cycle review of notorious markets, trade agreements, and high-level bilateral engagement. These trade policy tools must be informed by high standards of effective enforcement, including the priority standards discussed below.

Finally, IIPA encourages IPEC to continue its efforts to identify relevant data to assess the importance of intellectual property-intensive industries and emerging threats, particularly those online.



## **I. U.S. Government Agencies and Resources Crucial to Ensuring Efficiency and Coordination**

Numerous agencies, including most of those listed in *Executive Order 13565 – Establishment of the Intellectual Property Enforcement Advisory Committees*,<sup>4</sup> play critical roles in the U.S. Government effort to promote more effective copyright enforcement overseas. All of the activities of these relevant agencies need adequate funding, and all those engaged in carrying out these efforts require strong political support from their parent agencies. Commendably, the 2013 Joint Strategic Plan expanded upon U.S. overseas programs by calling for Department of Justice postings of ICHIPs. We also welcome the placement of an IP attaché in Brussels to collaborate with international organizations, as well as EU institutions and member states. This and other programs cited in the 2013 Joint Strategic Plan should continue,<sup>5</sup> and IIPA recommends the following enhancements.

- The USPTO placement of IPR Attachés in high-priority regions and organizations is a vital tool in the effort to promote effective copyright enforcement efforts internationally.<sup>6</sup> IIPA encourages USPTO to continue to support the IPR Attaché program with an aggressive recruitment process, and we look forward to the future placement of highly experienced candidates in a manner that allows for continuity of dialogues on the ground. Once in place, Attachés should have access to sufficient resources to permit, for example, adequate staffing and higher profile programming activities for maximized impact in the target markets. The upcoming placement of IPR Attachés in Lima, Peru and Kiev, Ukraine is a welcome development.
- U.S. Customs and Border Protection (CBP) plays a significant role in the protection of intellectual property rights in the United States from foreign illegal activities. One area of increasing concern is the attempted importation into the United States of devices, technologies, or components used to circumvent technological protection measures put in place by copyright owners to protect works from unlawful copying or access, as well as the importation of infringing goods shipped through express and international mail. Rights owners are well-positioned to help CBP identify the type and origin of the circumvention devices, technologies, or components seized by it, as well as infringing goods. In September 2015, CBP adopted regulatory amendments that allow it, for the purpose of obtaining assistance in determining whether merchandise bears a counterfeit mark, to disclose to a

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<sup>4</sup> Those agencies listed include: (i) the Department of State; (ii) the Department of the Treasury; (iii) the Department of Justice; (iv) the Department of Agriculture; (v) the Department of Commerce; (vi) the Department of Health and Human Services; (vii) the Department of Homeland Security; (viii) the Office of Management and Budget; and (ix) the Office of the United States Trade Representative. See The White House, *Executive Order 13565 – Establishment of the Intellectual Property Enforcement Advisory Committees*, February 11, 2011, at <http://www.whitehouse.gov/the-press-office/2011/02/08/executive-order-establishment-intellectual-property-enforcement-advisory>.

<sup>5</sup> See 2013 Joint Strategic Plan on Intellectual Property Enforcement, Action Item 10, “Improve Effectiveness of Personnel Stationed Abroad,” and Action Item 11, “Coordination of International Capacity-Building and Training.”

<sup>6</sup> Attachés are currently stationed in Belgium (covering the EU and the EC), Switzerland (covering WIPO and WTO), Brazil, India, Russia, China, Kuwait, Mexico, and Thailand. See the USPTO IP Attaché Program’s webpage at <http://www.uspto.gov/learning-and-resources/ip-policy/ip-attach-program>.



trademark or other mark owner information appearing on merchandise or its retail packaging that may otherwise be protected by the Trade Secrets Act.

IIPA member associations are aware that CBP is considering a new copyright regulation which would parallel many of the changes promulgated in the trademark rule finalized in September. However, changes in the copyright rule have been under consideration by CBP on and off since 2004, and have not proceeded beyond a Notice of Proposed Rulemaking. The current rule does not authorize disclosure of information to injured parties in relation to copyright infringement or with respect to seized circumvention devices, and we urge prompt action to resolve this longstanding issue, along with reforms to streamline the recordation process so that it works for all copyright industries, and to clarify that recordation is not a prerequisite for the seizure and forfeiture of clearly infringing materials.

The new CBP trademark rule was under consideration for several years at CBP after initial publication before it was finalized. A similar extended timetable for the copyright rule would only continue to delay the benefits to injured parties of a disclosure regime which allows for information sharing regarding seized copyright infringing articles and circumvention devices—an issue with particular impact on the entertainment software industry. IIPA recommends that IPEC work closely with CBP and the Department of Treasury to expedite publication and finalization of a new copyright rule. IPEC should also continue to work with CBP to ensure that the needs of rights holders are taken into consideration as CBP considers changes to its pilot program which authorizes importers to abandon suspect infringing goods, rather than subject them to seizure.

Many of these positive changes have been agreed to by the House and Senate in the pending legislation Trade Facilitation and Trade Enforcement Act of 2015.

- The Department of Justice operates two programs that provide vital law enforcement expertise to U.S. anti-piracy efforts abroad, and both should remain top priorities in IPEC's Joint Strategic Plan. IIPA strongly supports the expansion of DOJ's Intellectual Property Law Enforcement Coordinators (IPLECs) to four full-time positions, which the State Department has made possible through committed funding. With posts filled or pending in Sao Paulo, Brazil; Hong Kong, SAR; Bangkok, Thailand; and Bucharest, Romania, the IPLECs are well positioned to provide specialized training and capacity building to key governments across multiple regions. IIPA also strongly supports DOJ in its Fiscal Year 2016 budget request to expand its international IP enforcement capacity with 11 additional personnel, including two new International Computer Hacking and Intellectual Property coordinators (ICHIPs).<sup>7</sup> These additional resources will bolster the work of the ICHIPs by increasing their ability to share evidence and investigation-related information. Altogether, these officials' technical expertise is extremely effective in facilitating cross border law enforcement, which is imperative when discussing online copyright theft, and IIPA views this as a particularly effective mechanism for approaching intellectual property enforcement.

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<sup>7</sup> See U.S. Department of Justice FY 2013 Budget Request: *Enforcement Priorities*, at [http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/6\\_enforcement\\_priorities\\_fact\\_sheet.pdf](http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/6_enforcement_priorities_fact_sheet.pdf).



- U.S. government agencies should continue to coordinate training and capacity building activities as a critical need and should, in particular, ensure that U.S. government programs are geared toward training and empowering foreign enforcement authorities to investigate and prosecute copyright offenses. The Administration should facilitate training by the appropriate U.S. agencies and for the relevant foreign agencies, including continued support for USPTO's Global Intellectual Property Academy and programs developed in partnership with the World Intellectual Property Organization (WIPO). IIPA appreciates the effort made to deliver high quality training programs to key officials from targeted training partners, drawing from U.S. government identification of key markets, and encourages these programs to continue. The coordinating leadership of the IPEC is vital to avoiding duplication or working at cross-purposes, and to ensure that these valuable training and assistance resources are targeted as effectively and expended as efficiently as possible. This leadership role might also include encouraging U.S. agencies to submit to IPEC information regarding training and capacity building programs at the conceptual stage, when programs can best capitalize on available shared resources.

## **II. IPEC Initiatives to Fight Online Piracy**

IIPA strongly recommends that IPEC continue to take a leading role in advancing initiatives to fight online piracy. The 2013 Joint Strategic Plan reflects this aim by listing efforts both to combat foreign-based and foreign-controlled websites that infringe American intellectual property rights,<sup>8</sup> and to facilitate voluntary initiatives to reduce online intellectual property infringement.<sup>9</sup> Some of the voluntary agreements and cooperative initiatives cited in the Joint Strategic Plan—with Internet Service Providers, advertisers and ad networks, credit card companies, and payment processors—represent significant advances in the effort to establish a legitimate online environment, but may be limited in scope, require continued monitoring and may not directly impact all right holders. Other initiatives—such as those concerning domain name registrars and registries—have not progressed as far, and should be addressed now. Government has a critical role in facilitating cooperation, including by clearly establishing the responsibilities of these types of intermediaries. IIPA recommends the following:

- Although the 2013 Joint Strategic Plan identified hosting services as a sector in which voluntary cooperative initiatives should be encouraged, a related service has grown substantially in importance since then, and should also be addressed. Companies that provide ancillary services to website operators in order to optimize performance, protect against denial of service attacks, and route web traffic through distributed networks fill an important market niche for legitimate sites. However, some of them also offer these services indiscriminately to known bad actors whose sites are dedicated to facilitating piracy. Besides making such sites more efficient and secure in carrying out their illegal activities, the services provided have the effect of masking the IP address (and thus the location) of the actual host of the site, thus significantly complicating enforcement efforts against them. Certain of these web resiliency service providers may be U.S.-based, but provide services to foreign-hosted

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<sup>8</sup> See 2013 Joint Strategic Plan on Intellectual Property Enforcement, Action Item 16.

<sup>9</sup> See 2013 Joint Strategic Plan on Intellectual Property Enforcement, Action Item 22.



sites identified by IIPA members as constituting “notorious markets” that are reported annually to the Office of the U.S. Trade Representative. IPEC should encourage these providers to work with right holders to develop efficient protocols for identifying the actual host of sites engaged in infringing activities, and to agree upon best practices for denying these services to indubitable bad actors.

- According to a 2014 study, websites devoted to content theft make approximately \$227 million in ad revenue a year. A large concentration of such online advertising agencies are located in and operated out of Israel. Two of the most prominent and active of these advertising networks consistently appear among the top five ad placement networks serving websites devoted to film and television piracy. Even when notified and requested to stop serving websites that are devoted to copyright infringement, these advertising agencies push back or persist in doing business with pirate sites. As long as advertising networks are willing to do business with websites devoted to content theft, the operation of commercial scale piracy online will persist. The IPEC should continue its work to ensure that advertisers and ad networks do not provide resources to pirate sites, including by reaching out to the Israeli government, and urging them to work with their ad networks to adopt and develop industry-wide protocols, such as those of the Trustworthy Accountability Group.
- None of the best practices initiatives implemented so far, nor any of those that should be in the pipeline for the upcoming strategic plan cycle, can be fully effective if they are confined to the U.S. market. Internationalization of these initiatives should be a high priority in the new strategic plan. Too many of our trading partners have done little or nothing to bring interested parties to the table for cooperative discussions on what responsible players can do together to combat pervasive infringement in the online environment. The U.S. government should make it a priority to change this, including by insisting that our trading partners work to ensure that their laws promote fair and accountable practices by intermediaries, and that they dismantle any bureaucratic or regulatory barriers to the needed cooperative efforts. The U.S. government should also advocate that foreign governments make the necessary investments in building capacity to provide effective enforcement against criminal infringements carried out online, and it should stand ready to assist with training, expertise and other relevant resources as appropriate.

### **III. Tools for Enforcing Our Rights Abroad With Highest Standards for Protection and Enforcement**

IIPA encourages IPEC to continue to support the full inventory of trade policy tools available to the Administration, as reflected in the 2013 Joint Strategic Plan,<sup>10</sup> including the annual Special 301 review of intellectual property protection and market access practices in foreign countries, the related and increasingly relevant out-of-cycle review of notorious markets, negotiations with trading partners toward the achievement of trade agreements or their implementation, and high-level bilateral engagement. These trade policy tools must be informed

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<sup>10</sup> See 2013 Joint Strategic Plan on Intellectual Property Enforcement, Action Item 15, “Promote Enforcement of U.S. Intellectual Property Rights through Trade Policy Tools.”





by high standards of effective enforcement, including the priority standards discussed below. IIPA makes the following recommendations.

#### A. Trade Policy Tools

- The annual **Special 301 review** remains a key element in achieving necessary bilateral engagement to make intellectual property and market access improvements in foreign markets. The mainstay of the Special 301 process has been the identification of countries that deny adequate and effective protection of intellectual property rights or that deny fair and equitable market access to U.S. persons who rely on intellectual property protection. USTR's identification of cross-cutting issues is instrumental in signaling new or persistent challenges for intellectual property owners that surface in multiple markets.<sup>11</sup> IIPA also stresses the continued importance of concrete action plans for at least those countries and territories named to the Priority Watch List each year. IPEC made reference in its 2013 Joint Strategic Plan to such action plans, which have been a very constructive extension of the Special 301 process, providing affected countries and the U.S. government with clear benchmarks for gauging progress – or lack thereof – over the ensuing year (or other agreed periods of time).
- USTR's development of the “Notorious Markets” out-of-cycle review (OCR) within the Special 301 process has become an increasingly important tool to achieve more immediate results with respect to specific, targeted bad actors, particularly in the online space. We believe the attention drawn to specific selected markets that are reportedly engaged in or directly facilitating piracy and counterfeiting, including online destinations, has been instrumental in bringing about positive changes in many of the markets identified. We propose that the U.S. government should ensure that action against identified Notorious Markets be a focus for inter-agency action plans that incorporate the various capacities of different agencies, and which fully utilize the strengths of the IPLECs, ICHIPs, IPR Attachés, and others.
- We believe the Joint Strategic Plan should continue to call for action to enforce existing bilateral and multilateral commitments in the area of intellectual property rights, and to ensure that new trade agreements adequately address longstanding as well as emerging IP and market access challenges. Many of these challenges, whether existing or emerging, do not require new tools. The World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and U.S. Free Trade Agreements (FTAs), as well as other agreements or trade programs (e.g., the conditions for qualifying for the Generalized System of Preferences (GSP), or other regional trade preference programs) provide for appropriate dispute settlement and remedies. The U.S.

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<sup>11</sup> See United States Trade Representative, “Section I. Developments In Intellectual Property Rights Protection And Enforcement,” 2015 Special 301 Report, available at <https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>. IIPA notes Key Challenges for the Copyright Industries as part of its 2015 Special 301 Submission. See International Intellectual Property Alliance, *IIPA Written Submission Regarding 2015 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing Request to Testify at 2012 Special 301 Hearing* (76 Fed. Reg. 81555, Dec. 28, 2011), February 10, 2012, at <http://www.iipa.com/pdf/2015SPEC301COVERLETTER.pdf>.



government should not hesitate to use these and any other tools at its disposal to challenge measures or practices of our key trading partners which violate existing agreements in the areas of intellectual property. In addition to these remedy-focused agreements, the U.S. has entered into a wide range of bilateral agreements in which our trading partners have made formal commitments to address important deficiencies in their copyright law and enforcement regimes. Where our trading partners have not fulfilled these commitments, the U.S. government should insist, through diplomatic engagement, that these governments live up to their word. Finally, the U.S. government should use all available bilateral and multilateral opportunities to press for new trade disciplines that effectively address emerging intellectual property rights concerns.

## **B. Seeking Effective Enforcement Standards**

- It is important that the Joint Strategic Plan for the protection of intellectual property promote effective enforcement standards in countries and territories around the world to reduce piracy, which stands as a principal barrier to the growth of legitimate trade in creative materials. The enforcement standards noted below principally build on and/or clarify the existing framework under the TRIPS Agreement's enforcement text. In order to keep pace with changing circumstances and technologies, many of these standards are included in FTAs that the United States has negotiated with several countries since TRIPS came into force. IIPA notes several key elements of an effective enforcement system that should be promoted and supported by the Joint Strategic Plan: 1) establishment of adequate criminal remedies to deter piracy in all its forms; 2) adequate and effective measures to deal with damaging online piracy; and 3) measures that promote effective civil remedies, investigations, evidentiary standards, and border measures. The Joint Strategic Plan should also aim to promote effective approaches to address IP theft that takes place across national boundaries and which is highly organized.<sup>12</sup>

### **1. Criminal enforcement standards**

An effective criminal enforcement framework should be promoted by the Joint Strategic Plan. *Key elements of an effective criminal enforcement framework include:* 1) empowering law enforcement officials to investigate and prosecute criminal violations of the copyright laws on an *ex officio* basis;<sup>13</sup> 2) including in the scope of criminal liability all willful acts of infringement on a commercial scale, as required by Article 61 of TRIPS, without requiring proof that the infringer had a commercial motivation or directly

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<sup>12</sup> Piracy (both online and offline) is frequently highly organized, transnational in nature, and involving large amounts of capital and the utilization of complex distribution networks. The private sector does not possess the tools, nor usually the legal authority, to investigate this type of highly organized crime. Governments should step up to this challenge. Since 2000, INTERPOL has recognized the need for national and international enforcement authorities to coordinate their efforts and cooperate with IP right holders to fight IP crimes including piracy. The U.S. Government should encourage countries to apply their organized crime laws, like Hong Kong's Organized and Serious Crimes Ordinance and the United Kingdom's Serious Crimes Act 2007, to bring enhanced remedies to bear against syndicate operations involved in piracy, including, inter alia, disclosure of information being used to commit piracy and seizure or freezing of assets.

<sup>13</sup> The provision of *ex officio* authority should not be understood as requiring countries to modify existing separate enforcement practices based on the filing of complaints and the efficient resolution thereof.





profited;<sup>14</sup> 3) ensuring the application of criminal penalties for aiding and abetting infringement; 4) ensuring the application of criminal penalties sufficient to deter further infringements and to remove any monetary incentive to infringe; 5) ensuring the dedication of sufficient enforcement resources commensurate with the scale of the piracy problem, to provide for “effective action” and “remedies that constitute a deterrent” to infringement as the minimum required by the TRIPS Agreement;<sup>15</sup> 6) extending criminal (as well as civil) liability to: a) trafficking in tools or services aimed at circumventing technological measures used by right holders to control access or prevent infringement, or the manufacture or distribution of counterfeit authentication tools, documentation and packaging; b) illegal camcording;<sup>16</sup> c) mobile device piracy;<sup>17</sup> and d) signal theft.<sup>18</sup>

## 2. Addressing online infringements

The Joint Strategic Plan should be directed at addressing IP theft which causes significant harm to the U.S. economy, including growing and damaging online piracy which hinders the development and prosperity of legitimate distribution platforms. The significant challenges of online piracy require a multi-faceted approach, but some of the solutions are quite straightforward. An adequate legal framework for the protection of copyright online will include provisions in line with the two treaties adopted by the WIPO in December 1996, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT),<sup>19</sup> provisions recognizing online piracy as a form of cybercrime,<sup>20</sup> and provisions that foster cooperation among the stakeholders (including ISPs) involved in the online supply chain to combat online infringements.<sup>21</sup> Effective enforcement is critical to ensure the healthy development of a legitimate online

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<sup>14</sup> For instance, making valuable works available online risks stimulating a high volume of infringing activity and should be criminally punishable regardless of commercial motivation, or actual profit to the infringer, provided that the infringing acts are likely to cause significant economic harm.

<sup>15</sup> For effective deterrence, prosecutors and judges should impose penalties that remove the monetary incentives that drive the pirate trade. Recidivism is endemic in many countries, thus, deterrence may require prison sentences in such cases.

<sup>16</sup> Acts covered should include the use or attempt to use an audiovisual recording device to make or transmit a copy of a motion picture, a major source of digital master copies of first-run films for the pirate marketplace.

<sup>17</sup> Mobile device piracy involves pirates operating from stalls or kiosks, or masquerading as “repair” shops, who offer the illicit downloading onto any device of virtually any kind of copyrighted material.

<sup>18</sup> Signal theft may include the: a) trafficking in decoders, smart cards, or other technologies used to unlawfully decrypt encrypted cable or satellite signals; b) unlawfully decryption of encrypted cable or satellite signals, or receipt or use of unlawfully decrypted signals, or distribution of unlawfully decrypted signals, or distribution of lawfully decrypted signals without permission, including in public venues or over the Internet; or c) retransmission of television signals on the Internet without the authorization of the right holder in the content.

<sup>19</sup> This should include protection of temporary as well as permanent reproductions, since business and consumers engage in the full exploitation of copyright materials they receive over a network without ever making a permanent copy, and all “communications to the public” including those subject to an interactive “making available” right.

<sup>20</sup> Governments should join and implement the Council of Europe Cybercrime Convention, Budapest, 23.XI.2001, which contains, in Articles 10 and 11, obligations to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright [and related rights] ... where such acts are committed wilfully, on a commercial scale and by means of a computer system,” and to outlaw intentional aiding and abetting of such crimes.

<sup>21</sup> Many governments, particularly in Asia and Europe, have recognized the need for urgent steps to curb online piracy, and while not all approaches are favored by all the content industries equally, the goal is the same: to ensure effective action is available in practice against online piracy. There is consensus that bad actors who cause massive harm or profit from their direct involvement in the online infringing supply chain should be held responsible. There is also general agreement that all stakeholders in the online supply chain, including service providers, should have proper incentives to cooperate to eradicate bad behavior.



market, and it must take place before it is too late to recover markets that are severely damaged by widespread and persistent piracy in all its forms. As we know from our respective members' experiences, new legal online services for delivery of copyrighted material can succeed only if they are not undermined by unfair competition from illegal sources.

As the Office of the IPEC and U.S. government officials engage with their foreign government counterparts to combat widespread copyright infringement in the online environment, a primary goal can be simply stated: to provide strong incentives for Internet service providers, and all other intermediaries involved in the e-commerce marketplace, to cooperate with right holders to deal effectively with online infringement. The forms that those incentives will take will no doubt vary across different markets and industry sectors, but the solutions will cluster around certain common themes, including: 1) clear standards for secondary liability (defining the circumstances under which one is responsible for copyright infringements that are directly committed by other parties); 2) legal incentives such as limitations on infringement remedies for certain intermediaries who follow sound practices aimed at minimizing acts of infringements over their systems or using their services, when they lack the requisite knowledge of and have not encouraged or induced infringements; 3) expeditious procedures for dealing effectively with infringing activity that is detected (including, but not limited to, notice and takedown processes for removing or disabling access to infringing content hosted on their systems, as well as assistance from Internet service providers to address transitory P2P infringements occurring through their networks); and 4) effective and fair mechanisms to deal with repeat infringers.

### **3. Promoting effective civil remedies, investigations, evidentiary standards, and border measures**

It is important that the Joint Strategic Plan promote effective and deterrent remedies, effective investigation methods, less burdensome evidentiary standards, and improved border measures. Among the most important remedy provisions to seek bilaterally and multilaterally through the Plan are the following: 1) civil damages available to fully compensate the right holder and provide adequate deterrence to acts of infringement;<sup>22</sup> 2) availability of pre-established statutory damages or other effective means of enhancing damages; 3) availability of full recovery of costs and attorneys' fees; 4) availability from courts of enforceable injunctions, including on an *ex parte* basis when necessary to preserve evidence or to prevent pirated goods from entering the stream of commerce; 5) availability of preliminary seizure of pirate goods, the implements used to produce them, assets attributable to piracy, and documentary evidence of infringing activity; 6) availability of final forfeiture and destruction of pirate goods and the implements used to produce them, as well as confiscation of the proceeds of infringing activity; 7) availability of a closure remedy (as to manufacturing facilities or retail

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<sup>22</sup> Damages should not be restricted to the infringer's profits, nor calculated based on prices in the pirate marketplace.



outlets); and 8) publication of judgments and the disposition of cases as an educational tool (and to provide yet further deterrence).

It is also important to seek enhancements to investigations, as well as to ease evidentiary burdens, and the Plan's promotion of the following would be helpful: 1) removal of impediments to information sharing and cooperation between law enforcement officials and right holders, and encouragement of law enforcement to make use of the technical expertise and market knowledge of right holders; 2) ensuring law enforcement may obtain search warrants and similar processes on an *ex parte* basis in appropriate cases; 3) authorization of law enforcement to seize items within described categories, rather than being limited to specific named titles; 4) encouragement of law enforcement to pursue investigations upstream in the distribution channel in order to identify suppliers and manufacturers; 5) establishing presumptions regarding the subsistence and ownership of copyright, in order to forestall frivolous challenges that delay and needlessly complicate both criminal and civil enforcement against infringement; 6) facilitating enforcement through reasonable factual presumptions such as the allowance of "sampling" (i.e., a sample of infringing products seized should stand as evidence that all are infringing); and 7) empowering courts to demand information that will provide evidence of the supply chain of infringing products or services, so that more culpable individuals or entities may be identified and pursued.

The Joint Strategic Plan should continue to foster stronger measures to ensure that our and others' borders are safe from piracy. Key enhancements which the Plan should seek to promote include: 1) *ex officio* authority to customs officials to detain or seize imports that are suspected of being infringing copies or illicit circumvention devices; 2) information sharing with right holders regarding border seizures (including information on points of origin and destination) as well as access by right holders to samples of seized product for inspection and analysis under appropriate safeguards; 3) availability of searches and seizure of exports and goods in transit, including those passing through free trade zones, in order to comprehensively deter international trade in pirate goods; and 4) a destruction remedy for goods seized by customs officials to prevent such seized pirated goods or equipment from being returned to the country of origin or re-shipped into the target country through another port.

#### **4. Market access barriers**

The U.S. copyright industries suffer from myriad market access barriers, investment barriers, and discriminatory treatment that make it difficult to compete in some of the world's fastest-growing emerging markets.<sup>23</sup> All efforts to crack down on

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<sup>23</sup> Among the market access barriers faced by the creative industries include: 1) ownership and investment restrictions on enterprises involved in the distribution and transmission of copyright materials; 2) discriminatory or onerous content review/censorship systems; 3) discriminatory restrictions including on the ability to engage fully in the development, creation, production, distribution, promotion, and publication of copyright materials; 4) the maintenance of a variety of market-distorting policies that prevent the development of healthy competition in the audio-visual sector; 5) onerous import duties or the improper assessment of duties on an ad valorem basis; 6) procurement preferences for domestic products or those with locally-owned or locally-developed IP, either by government agencies or by state-owned or state-influenced enterprises; and 7) lack of



piracy will be unavailing if legitimate products and services cannot be brought into a market to meet consumer demand. Understanding that market access barriers do not form the core of the Office of the IPEC's mission, the reduction of market access impediments is, in fact, an important component of ongoing efforts to combat piracy. Whatever form they take, whenever such market access restrictions impede the entry of legitimate products, they make it easier for pirate operations to fill the void, become de facto "exclusive" distributors of the products, and cement strong loyalties with their consumer base that make them even harder to dislodge. U.S. officials should continue to strive to open markets and to eliminate or phase out market access barriers.

#### **IV. Threat Assessment**

IIPA encourages IPEC to continue efforts to identify relevant data to assess the importance of intellectual property-intensive industries and emerging threats, particularly online, and to identify emerging or potential future threats posed by copyright violations. Many of the issues and concerns listed above are discussed in even further detail in other recent IIPA submissions to the U.S. government.<sup>24</sup>

Independent and U.S. government studies have shown the copyright industries to be a significant positive contributor to growth of the U.S. economy. In December 2014, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2014 Report*, prepared by Stephen Siwek of Economists Incorporated. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The "core" copyright-based industries in the U.S. continue to be major contributors to the U.S. economy, accounting for an estimated \$1.1 trillion or 6.71% of the U.S. gross domestic product (GDP) in 2013. These industries provide nearly 5.5 million U.S. jobs, which is 4.81% of the entire private sector labor force in 2013, and pay on average over \$87,860 annually, 347% higher than the overall workforce average. Estimated 2013 foreign sales and exports of key sectors of the core copyright industries amounted to \$156.3 billion, a significant increase over previous years, and more than foreign sales of other major U.S. industry sectors such as aircraft, agricultural products, chemicals, and pharmaceuticals.<sup>25</sup>

Over the years, government and private sector reports have demonstrated how piracy undermines the revenues and profitability of the entire copyright sector, and inflicts substantial

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transparency or adequate opportunity for stakeholder participation in the development process for technology standards. For more detailed information on these and other market access barriers, please see IIPA's Special 301 submission, *supra* note 11.

<sup>24</sup> See, e.g., IIPA's Special 301 Submission, *supra* note 10.

<sup>25</sup> See Steven E. Siwek, *Copyright Industries in the U.S. Economy: The 2014 Report*, December 17, 2014. The entire report as well as summaries can be accessed at [http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html). Core copyright industries are those whose primary purpose is to create, produce, distribute or exhibit copyright materials. These include books, journals, newspapers, and periodicals; motion pictures; recorded music; radio and television broadcasting; and computer software. Linkages between copyright protection and economic development in other countries are documented by the World Intellectual Property Organization's 2012 study on the *Copyright + Creativity = Jobs and Economic Growth: WIPO Studies on the Economic Contribution of the Copyright Industries*, compiling similar studies in 30 countries (report on file with IIPA). On April 11, 2012, the Commerce Department's Economics and Statistics Administration and the United States Patent and Trademark Office released the report *Intellectual Property and the U.S. Economy: Industries in Focus* (March 2012), demonstrating that intellectual property-intensive industries contribute \$5 trillion and 40 million jobs to the U.S. economy.



harm on the U.S. economy as a whole.<sup>26</sup> As these reports have consistently noted, piracy is a clandestine activity, so exact data on costs of piracy to the U.S. economy is difficult to produce. However, several recent studies have attempted to quantify the overall value or cost of piracy to the economy. An independent study released by the International Chamber of Commerce's Business Action to Stop Counterfeiting and Piracy (BASCAP), *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (Frontier Economics, February 2011), estimated the value of digitally pirated music, movies and software (not losses) at \$30-75 billion in 2010 and, growing to \$80-240 billion by 2015. The United States International Trade Commission (USITC) released a report in May 2011, finding that copyright infringement was the largest category of reported IP infringement in China in 2009 and that overall IP infringement in China alone cost the U.S. economy as much as \$107 billion and 2.1 million jobs.<sup>27</sup> This cost of piracy to Americans is not surprising since China also has some of the most protectionist barriers to importation and distribution of legitimate copyrighted materials.

While quantification is more difficult in the digital and Internet environment, studies demonstrate that a high percentage of Internet usage is devoted to uploading/downloading of copyright materials. A recent study concluded that peer-to-peer (P2P) file sharing amounts to 22% of all consumer video traffic on the Internet, and 18% of consumer Internet traffic overall.<sup>28</sup> Previous studies have indicated that a significant portion of this online file sharing traffic involves illegal downloading or streaming. A September 2013 study by NetNames concluded that across North America, Europe, and Asia-Pacific, an astonishing 23.8% of the total bandwidth used by all Internet users is copyright infringing, and during January 2013, 25.9% of the total Internet user population in these regions (equaling 327 million unique users) sought infringing content. Of those, 178.8 million unique users engaged in infringing use of BitTorrent portals; 96.3 million accessed infringing content through video streaming; and 148.6 million sought infringing content through direct download cyberlockers.<sup>29</sup>

In short, content industries continue to contend with those who, in the absence of good protection and enforcement, engage in piracy as a high-profit, low risk enterprise. Today, legitimate businesses built on copyright are facing increased threats, as they must compete with

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<sup>26</sup> The first modern-day accounting of losses due to copyright piracy were carried out by the U.S. government in 1984, in International Trade Commission, *The Effects of Foreign Product Counterfeiting on U.S. Industry, Final Report on Investigation No. 332-158 under Section 332(b) of the Tariff Act 1930*, January 1984; and U.S. Copyright Office, *Size of the Copyright Industries in the United States, a Report of the U.S. Copyright Office to the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary*, United States Senate, December 1984 (as reported in International Intellectual Property Alliance, *Piracy of U.S. Copyrighted Works in Ten Selected Countries, a Report by the International Intellectual Property Alliance to the United States Trade Representative*, August 1985 (on file with IIPA)).

<sup>27</sup> United States International Trade Commission, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, Investigation No. 332-519, USITC Publication 4226, May 2011, available at [www.usitc.gov/publications/332/pub4226.pdf](http://www.usitc.gov/publications/332/pub4226.pdf).

<sup>28</sup> Cisco, *Visual Networking Index: Forecast and Methodology, 2014-2019* (May 27, 2015), Tables 10, 12 and 13, [http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white\\_paper\\_c11-481360.html](http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.html) (reporting 2014 figures of 21,264 PB/month for nonp2p consumer Internet video traffic and 33,595 PB/month for overall consumer Internet traffic).

<sup>29</sup> NetNames, *Sizing the piracy universe*, September 2013, available at <https://copyrightalliance.org/sites/default/files/2013-netnames-piracy.pdf>.



the massive proliferation of illegal services that are unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them.

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Thank you for the opportunity to provide the perspectives of the U.S. copyright-based industries on the Joint Strategic Plan. Please do not hesitate to call on us if you need further information.

Sincerely,

Steven J. Metalitz  
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Amanda Wilson Denton  
Counsel to International Intellectual Property Alliance