

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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**Submitted via regulations.gov, OMB-2012-0004**

Victoria A. Espinel  
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, 77 Fed. Reg. 38088 (June 26, 2012)**

Dear Ms. Espinel:

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 March 24, 2010 on the development of the first Joint Strategic Plan.<sup>2</sup> We appreciate that many of IIPA’s recommendations were accepted into the 2010 Joint Strategic Plan on Intellectual Property Enforcement, and hope that this submission will assist the U.S. Government in crafting its Joint Strategic Plan for the coming three-year period, as specified in the notice.<sup>3</sup>

Since 1984, IIPA’s work has consistently focused on copyright law and enforcement issues in markets outside the United States, along with associated trade policy issues. That focus is reflected in these comments, with regard to the impact both of copyright infringement that originates outside the territorial borders of the United States, and also of increasing market access, discriminatory, and trade protectionist barriers which harm all the creative industries. We

<sup>1</sup> The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA’s seven member associations appear below, and represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including business applications software and entertainment software (such as videogame discs and cartridges, personal computer CD-ROMs, and multimedia products); theatrical films, television programs, 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](#), [Business Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers’ Association](#), and [Recording Industry Association of America](#).

<sup>2</sup> See *Comments of International Intellectual Property Alliance (IIPA)*, March 24, 2010, at <http://www.iipa.com/pdf/IIPASubmissionToIPEC032410.PDF>.

<sup>3</sup> See *2010 Joint Strategic Plan on Intellectual Property Enforcement*, at [http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty\\_strategic\\_plan.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf).



also address related issues, such as the protection of technological measures used by copyright owners to control access to and prevent infringement of their works; reaffirm the important role which U.S. Government officials can play in overseas Posts in helping to address some of the creative industries' most pressing commercial concerns through existing programs; and call for the expansion of pivotal programs. In the following written submission, we follow the organizational format of the request.

## **Part I. Strategy Recommendations for the Joint Strategic Plan**

The Federal Register Notice has requested that we “provide specific recommendations for significantly improving the U.S. Government’s intellectual property enforcement efforts,” detailing “any approaches that are considered to be particularly effective as well as any concerns with the present approach to intellectual property enforcement.” We begin with a few general recommendations for the Joint Strategic Plan, all of which we view as important elements of a comprehensive program, and which are not presented in any particular order of importance.

### ***General Strategy Recommendations***

- First, 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. Where necessary, their programs should be enhanced, such as the following.
- The Department of Justice’s Criminal Division created positions for experienced federal prosecutors to Bangkok, Thailand, and Sofia, Bulgaria (a position which since March 2011 has unfortunately been vacant), to serve as Intellectual Property Law Enforcement Coordinators (IPLECs) for Asia and Eastern Europe. IIPA viewed this as a particularly effective mechanism for approaching intellectual property enforcement. IIPA would like to see such efforts expanded. The U.S. Department of Justice agrees, and has requested in its Fiscal Year 2013 budget the establishment of six International Computer Hacking and Intellectual Property coordinators (ICHIPs) (and eight additional positions).<sup>5</sup> The budgetary implications of this request are relatively minor, but the impact on overall enforcement efforts in key markets from establishing these positions would be enormous.

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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 *U.S. Department of Justice FY 2013 Budget Request*, at <http://www.justice.gov/jmd/2013factsheets/traditional-missions.pdf>. The new request is similar to the FY 2012 Congressional budget request which requested ICHIPs to be established in Eastern Europe, Asia, Latin America, South Asia, West Africa, and Western Europe. See Department of Justice, *The Criminal Division, FY 2012 President’s Budget*, at <http://www.justice.gov/jmd/2012justification/pdf/fy12-crm-justification.pdf>. The new request indicates that the new ICHIPs would replace the current IPLECs.



IIPA strongly supports the establishment of six Criminal Division attorney positions to serve as regional ICHIPs.

- U.S. Customs and Border Protection (CBP) plays a significant role for the protection of intellectual property rights in the United States from foreign illegal activities. One area of proliferating concern is the attempted importation into the United States of devices, technologies, or components used to circumvent technological protection measures used 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. Copyright industries 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. Regulatory or (if necessary) legislative changes would facilitate this assistance, and advance the shared goal of effective enforcement, by clarifying CBP's authority to share information and samples of seized product with industry experts. Such changes would reduce the deleterious impact of overseas-based piracy on the U.S. economy.
- Second, the Special 301 process 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. We also commend USTR for increased identification of cross-cutting issues encountered in more than one market.<sup>6</sup> We further strongly support USTR's emphasis and development of a "Notorious Markets" out-of-cycle review (OCR). With respect to specific markets, 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. This process has been a very constructive use of the Special 301 process, builds on recent trends in the Special 301 process, and provides 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).
- Third, 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, with the coordinating leadership of the IPEC, should facilitate training by the appropriate U.S. agencies and for the relevant foreign agencies, in order to avoid 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.

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<sup>6</sup> IIPA notes twelve "Initiatives or Challenges for 2012" as part of its 2012 Special 301 Submission. See International Intellectual Property Alliance, *IIPA Written Submission Regarding 2012 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/2012SPEC301COVERLETTER.pdf>.



- Fourth, we believe the Joint Strategic Plan should focus on enforcing existing bilateral and multilateral commitments in the area of intellectual property rights. The Plan should also 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 WTO and FTAs, as well as other agreements or trade programs (e.g., the conditions for qualifying for the Generalized System of Preferences, or other regional trade preference programs) provide for appropriate dispute settlement and remedies. The U.S. Government should not hesitate to use these and any other tools at its disposal to challenge measures or practices in 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 do more to insist that these governments live up to their word, both in government-to-government communications, and where necessary, in more public ways, even if the agreements in question do not provide more concrete or specific remedies for non-compliance. The longstanding U.S.-Russia bilateral commitments are an example where a more public strategy may be warranted. 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.
- Fifth, we believe that significant and growing market access challenges for creative industries that rely on intellectual property rights in some of the world's fastest-growing emerging markets call for the Joint Strategic Plan to set out in a more systematic way how the U.S. Government will achieve the dismantling of market restricting, discriminatory, and trade protectionist barriers in those markets. Such a systematic approach should include intensifying bilateral engagement to achieve market opening measures; periodic reviews of barriers in key markets; tracking measurable progress made, or lack thereof; and using existing trade tools to address such barriers.

### ***Seeking Effective Enforcement Standards***

It is important that the Joint Strategic Plan for the protection of intellectual property aim to promote effective enforcement standards in countries and territories around the world to reduce piracy (and reduce other barriers to 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 U.S. has negotiated with several countries since TRIPS came into force, and hopefully would be part of a negotiated Trans-Pacific Partnership (TPP) agreement. IIPA notes several key elements of an effective enforcement system that should be promoted and supported by the 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. Other key areas the Plan should aim to promote include government legalization of copyright materials,<sup>7</sup> and effective approaches to address IP theft as connected with organized crime.<sup>8</sup>

## A. 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>9</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 profited;<sup>10</sup> 3) providing for criminal penalties sufficient to deter further infringements and to remove any monetary incentive to infringe; 4) 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>11</sup> 5) 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) the unauthorized use of software in a business setting in order to reduce piracy of business software; c) illegal camcording;<sup>12</sup> d) hard disk loading<sup>13</sup> and mobile device piracy;<sup>14</sup> and e) signal theft.<sup>15</sup>

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<sup>7</sup> For example, governments are generally the largest single users of software in a country. Use of unlicensed software on government computers is especially harmful since, in addition to the direct harm it causes to software producers, it most likely violates the law and sets a poor example for corporate end users of software in other sectors of the economy. The U.S. Government should ensure that our trading partners publicize and actively implement bans on the use of unlicensed software in the IT systems of all levels of their government. Similar principles should be enforced to ensure that government networks and computers are not used to infringe copyright, and to prevent public educational institutions from using infringing copies of textbooks or other educational materials.

<sup>8</sup> Piracy (both online and offline) has been taken over in many countries by organized crime syndicates, linked across national boundaries, that control large amounts of capital, and exploit complex distribution networks. The private sector does not possess the tools, nor usually the legal authority, to investigate and fight organized crime. In addition, such organized groups or other commercial pirates can become violent, and company representatives and counsel have in some countries experienced threats on their lives, physical intimidation, or attacks leading to injury when doing their jobs to investigate piracy, and this has prevented enforcement activity by the private sector in many instances. 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>9</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.

<sup>10</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>11</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>12</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>13</sup> Hard disk loading involves unscrupulous computer manufacturers and dealers who install copies of software onto the internal hard drive of the personal computers they sell without authorization from the copyright holder.



## **B. 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. 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 World Intellectual Property Organization (WIPO) in December 1996, the WCT and the WPPT,<sup>16</sup> provisions recognizing online piracy as a form of cybercrime,<sup>17</sup> and provisions that foster cooperation among the stakeholders (including ISPs) involved in the online supply chain to combat online infringements.<sup>18</sup> Effective enforcement is critical to ensure the healthy development of a legitimate online 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, the primary goal can be simply stated: to provide strong incentives for Internet service providers 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, 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) limitations on infringement remedies for certain Internet service providers in certain cases who follow sound practices aimed at minimizing acts of infringements over their systems, when they lack the requisite knowledge of and have not encouraged or induced infringements; 3) expeditious notice and takedown procedures for

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<sup>14</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>15</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>16</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. In June 2012, the Beijing Audiovisual Performers Treaty (BAPT) was concluded, which provides the same features as applied to audiovisual performers.

<sup>17</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>18</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.



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.

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 the U.S. Government should stand ready to assist with training, expertise and other relevant resources as appropriate. We also commend the U.S. Government for launching, as part of a Special 301 out-of-cycle review (OCR) process, the Notorious Markets list.<sup>19</sup> We believe the attention drawn to specific selected markets, including ones on the Internet that are reportedly engaged in piracy and counterfeiting, has been instrumental in bringing about positive changes in many of the markets identified. Distinguished from the annual Special 301 process, in which countries are identified, the OCR process has enabled foreign governments to address problems in specific marketplaces without regard to their effect on the country's Special 301 standing.

### **C. 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>20</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 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

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<sup>19</sup> See United States Trade Representative, *Out-of-Cycle Review of Notorious Markets*, December 20, 2011, at [http://www.ustr.gov/webfm\\_send/3215](http://www.ustr.gov/webfm_send/3215).

<sup>20</sup> Damages should not be restricted to the infringer's profits, nor calculated based on prices in the pirate marketplace.



within described categories, rather than being limited to specific named titles; 4) greater use of reliable informants to detect and prosecute infringement cases, especially in the business end-user environment, and measures to protect the anonymity of such witnesses and to protect them against reprisals; 5) encouragement of law enforcement to pursue investigations upstream in the distribution channel in order to identify suppliers and manufacturers; 6) provide for 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; 7) provide for 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 8) provide courts with the authority to seek information that will provide evidence of their supply chain, 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.

#### **D. Market access barriers**

The U.S. copyright industries suffer from myriad market access barriers, investment barriers, discriminatory treatment, and trade protectionist barriers that make it difficult to compete in some of the world’s fastest-growing emerging markets.<sup>21</sup> All efforts to crack down on 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. Barriers in China, India, Brazil, Ukraine, Kuwait, and elsewhere, are emboldening other emerging markets to impose

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<sup>21</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 transparency or adequate opportunity for stakeholder participation in the development process for technology standards. For a detailed description of business software-related market access barriers, please see Business Software Alliance, *Lockout: How a New Wave of Trade Protectionism Is Spreading through the World’s Fastest-Growing IT Markets — and What to Do about It*, June 2012, at [http://www.bsa.org/~media/Files/Policy/Trade/BSA\\_Market%20Access\\_Report\\_FINAL\\_WEB\\_062012.ashx](http://www.bsa.org/~media/Files/Policy/Trade/BSA_Market%20Access_Report_FINAL_WEB_062012.ashx). For more detailed information on these and other market access barriers, please see IIPA’s Special 301 submission, *supra* note 6.





protectionist measures of their own, posing immediate and long-term threats to the creative industries. 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 eliminate or phase out market access barriers.

## **Part II: Threat Assessment**

The Federal Register notice has requested us to describe “existing and emerging threats to the protection of intellectual property rights and the identification of threats to public health and safety and the U.S. economy resulting from intellectual property infringement.” The sections immediately above and below describe in greater detail the significant piracy and market access problems facing the industries. These problems pose a considerable threat to the continuing vibrancy of the creative industries as a positive contributor to growth of the U.S. economy, as shown in independent and U.S. Government studies.<sup>22</sup> Many of the issues and concerns listed above comprise existing or emerging threats to the U.S. economy, and are discussed in even further detail in previous IIPA submissions.<sup>23</sup> The remainder of this section describes the recent studies demonstrating or suggesting to the greatest degree possible the harm caused to the creative industries due to piracy.

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 harm on the U.S. economy as a whole.<sup>24</sup> As these reports have consistently noted, piracy is a

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<sup>22</sup> In November 2011, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2011 Report*, prepared by Stephen Siwek of Economists Inc. 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 \$931.8 billion or 6.36% of the U.S. gross domestic product (GDP) in 2010. These industries provide nearly 5.1 million U.S. jobs, which is 4.75% of the entire private sector labor force in 2010, and pay on average over \$78,000, 27% higher than the overall workforce average. Estimated 2010 foreign sales and exports of key sectors of the core copyright industries amounted to \$134 billion, a significant increase over previous years, and more than foreign sales of other major U.S. industry sectors such as aircraft, automobiles, agricultural products, food, and pharmaceuticals. See Steven E. Siwek, *Copyright Industries in the U.S. Economy: The 2011 Report*, November 2, 2011. 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.

<sup>23</sup> See, e.g., IIPA’s Special 301 Submission, *supra* note 6.

<sup>24</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



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 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>25</sup> The Business Software Alliance issued its 9th Global Piracy Study, finding that the global piracy rate hovered at 42 percent in 2011, while a steadily expanding marketplace in the developing world drove the commercial value of software theft globally to \$63.4 billion.

Quantification is more difficult in the digital and Internet environment. However, studies have emerged demonstrating that a disturbingly high percentage of Internet usage is devoted to illegal uploading/downloading of copyright materials. A January 2011 study by Envisional concluded that an astonishing 23.76% of all worldwide Internet traffic is copyright infringing, broken down by the following technologies: 11.4% illegal BitTorrent downloading; 5.1% illegal downloading from infringing distribution hubs; 1.4% illegal video streaming; and 5.8% other P2P filesharing (eDonkey, gnutella) or Internet protocols, such as Usenet, that are used for file sharing.<sup>26</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 the massive proliferation of illegal services that are unencumbered by costs associated with either producing copyrighted works or obtaining rights to use them.

### **Part III. Optional Questions**

While some of the "supplemental questions" listed in the Federal Register notice have been addressed in Parts I and II above, IIPA offers the following additional observations on a few of them, omitting those questions to which additional responses are not being provided.

*1. How can international regulatory and law enforcement collaboration and information sharing be enhanced to address cross-border intellectual property infringement?*

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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>25</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>26</sup>Envisional, *Technical Report: An Estimate of Infringing Use of the Internet*, January 2011 (on file with IIPA).



The recent criminal investigation into the activities of the MegaUpload conspiracy clearly demonstrated the value of strong law enforcement cooperation and information sharing arrangements. These make possible credible deterrent enforcement initiatives against large-scale alleged cross-border intellectual property infringement. We encourage the U.S. Government to continue to develop such collaborative and information-sharing arrangements with key nations. Target countries for such arrangements should include those where Notorious Markets are located, housed or registered, as identified by the U.S. Trade Representative in its now annual out-of-cycle review (OCR) process.

2. *What legal or operational changes might be made, or collaborative steps undertaken between federal agencies and the private sector, to streamline or improve the efficacy of enforcement efforts directed at protecting intellectual property rights?*

As mentioned above, IIPA strongly supports the establishment of six DOJ attorney positions to serve as regional ICHIPs.

7. *What authentication tools and track and trace technologies would significantly enhance federal efforts to identify suspect counterfeit or pirated goods?*

Copyright industry experts are in a position to bring these enhanced tools and technologies to bear on the problem of counterfeit or pirated goods. As noted above, a major concern is the importation into the United States of devices, technologies, or components used to circumvent technological protection measures used by copyright owners to protect works from unlawful copying or access, as well as pirated goods. IIPA supports the needed regulatory or (if necessary) legislative changes to facilitate effective industry assistance to U.S. Customs and Border Protection (CBP) to identify the type and origin of the circumvention devices, technologies, components, or goods seized by it.

8. *In a global economy that increasingly utilizes Internet based e-commerce and mobile platforms for transactions, the number of shipments sent through international mail and express carrier services has dramatically grown in recent years. Accordingly, law enforcement efforts directed at interdicting infringing goods shipped in the express and international mail environments have resulted in significant increases to seizure levels of infringing goods shipped through these modes of transit. What steps could be undertaken by CBP, its partner U.S. Government agencies, and the private sector to further improve detection of express carrier and international mail shipments containing infringing goods?*

We fully support law enforcement's augmented efforts to interdict infringing goods shipped through express and international mail. As e-commerce grows in the global market place, it has become a new frontier for criminal exploitation. Unsuspecting consumers, along with a variety of brand holders, increasingly become victims of legitimate-appearing websites and goods. More than ever before, there is an urgent need for more transparent information sharing between CBP and rights holders. Administrative barriers have become an unfortunate roadblock to the sharing of information and best practices. Training, intelligence sharing and



improved pro-active coordination between CBP and rights holders should be considered a national economic and security priority.

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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,

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