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COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY ON INTELLECTUAL PROPERTY ENFORCEMENT JOINT STRATEGIC PLAN

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The Center for Democracy & Technology (CDT) submits these comments in response to the June 26, 2012 Federal Register notice requesting public input regarding the development of an updated Joint Strategic Plan on Intellectual Property Enforcement.[1] CDT is a non-profit, public interest organization dedicated to preserving and promoting openness, innovation, and freedom on the decentralized Internet. These comments focus specifically on copyright enforcement, although some of the more general principles set forth below may be useful for other areas of intellectual property as well.

CDT believes copyright enforcement must aim to protect the rights of content creators without curtailing the Internet's tremendous potential for fostering innovation and free expression. That is not to suggest that there is any inherent conflict between copyright enforcement and online innovation or speech; indeed, large-scale copyright infringement undermines First Amendment values and threatens the growth of new media and e-commerce. There is, however, a range of possible enforcement tactics or practices that could be attractive from a copyright protection perspective but would carry significant costs to innovation and free expression. These are tactics the Federal Government should studiously avoid.

These comments are divided into three sections.

- First, we briefly review the four principle-level recommendations from the comments CDT submitted when the initial Joint Strategic Plan was being developed in 2010. Those principles are still relevant and indeed crucial to formulating sound policy in this area.

- Second, we offer recommendations for responding to a critical new development: the growing public perception that the Federal Government's copyright initiatives serve narrow private interests and ignore important competing values. This perception cannot be addressed merely with better messaging or public relations; copyright policy needs to become more open and sensitive to a broader range of stakeholders and interests, or risk further undermining public respect for copyright itself.

[1] Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement, 77 Fed. Reg. 38088 (Jun. 26, 2012), https://federalregister.gov/a/2012-15477.

- Finally, we explain that voluntary initiatives by private actors may offer some opportunities for progress in the fight to reduce infringement – but they also carry risks that demand considerable attention and caution.

I. Four Initial Principles for Federal Copyright Enforcement

In comments submitted on March 24, 2010, CDT made four main recommendations for the initial Joint Strategic Plan. The full discussion of those recommendations, which remain relevant to the current effort to develop an updated Joint Strategic Plan, can be found at https://www.cdt.org/files/pdfs/CDT_comments_for_IPEC.pdf. A shortened version of the recommendations is as follows.

A. In the area of copyright in particular, the Joint Strategic Plan needs to target enforcement against true bad actors. Ratcheting up copyright protections across the board would impair legitimate business activity and chill technological innovation and fair use.

Copyright enforcement in the digital age can affect a wide range of entities and behaviors. The potential impact for innovating companies in the Internet and information technology sectors is particularly serious. That is because new digital technologies inevitably make copies and/or enable users to do so, which can raise novel questions of copyright law leading to business disputes and lawsuits. The end result is that copyright enforcement tools are often brandished against upstart companies. Strengthening such tools can significantly increase the leverage of copyright holders in negotiating and trying to obtain settlements, even where it is highly unclear that the law is on their side.

This risk is far from abstract or theoretical. CDT's 2010 comments included a long list of technologies that have been the subject of copyright challenges, from VCRs to mp3 players to inkjet print cartridges to YouTube. The point is not that copyright disputes involving new technologies should always be resolved in favor of the technology providers and against the copyright holders; reasonable people can and do disagree about the optimal legal outcomes from case to case. But it should be clear that mechanisms for enforcing copyright are often brought to bear against technologies that may well be lawful, resulting in substantial uncertainty and delay in the rollout of new or competitive products.

The key lesson is that efforts to improve copyright enforcement need to be carefully balanced to avoid tipping the scales in commercial disputes between legitimate businesses over unsettled copyright law questions. The Plan should avoid steps that would have such an effect. Rather, the Plan should focus squarely and exclusively on enforcing current law against true bad actors in clear-cut cases.

To maintain this focus, the Joint Strategic Plan should seek to ensure that federal enforcement targets true criminal behavior only. The Plan should avoid making controversial recommendations regarding civil enforcement or the scope of civil liability. In addition, each proposed action or tactic in the Plan should be subject to rigorous cost-benefit analysis that includes a sober assessment of the potential for imposing costs or risks on legitimate companies or individuals.

B. The Plan should not call for imposing a new network-policing role on Internet intermediaries.

It is longstanding U.S. policy that intermediaries such as websites, hosting services, and Internet Service Providers (ISPs) generally should not be liable for the conduct of their users. In section 230 of the Communications Act and section 512 of the DMCA, Congress rejected the notion that ISPs should be held responsible for policing user behavior.[2] In the courts, the landmark 1984 case involving the Sony Betamax established that making and distributing a product does not give rise to liability for infringements users may commit, so long as the product is "capable of substantial noninfringing use."[3] The 2005 *Grokster* decision reaffirmed that absent active steps to promote infringement, the mere act of distributing a multipurpose product does not give rise to liability – even if the product's maker knows that some infringing uses are certain to occur.[4]

These policy choices have been nothing short of a tremendous success. It is thanks to this legal framework that recent decades have seen an explosion of innovation in digital technologies and Internet-based products and services – particularly interactive and "user-generated content" communications platforms. Society benefits from these empowering technologies in the form of increased opportunities for speech, collaboration, civic engagement, and economic growth. In contrast, new network-policing obligations would create new barriers to innovation and competition in communications offerings and force existing service providers to focus on "gatekeeping" and surveillance functions instead of empowering users.

As discussed in greater detail in section III below, there may still be opportunities for constructive, voluntary cooperation between intermediaries and rights holders. But the Plan should avoid departing from longstanding policy principles by having the Federal Government endorse new, affirmative network-policing obligations on Internet intermediaries.

C. For copyright, the Plan should focus on effective and efficient use of existing legal tools. It should not seek to increase penalties, expand the scope of copyright liability, or otherwise make substantive changes to the copyright regime.

The Joint Strategic Plan should aim to ensure that relevant federal agencies and authorities make effective and judicious use of the legal tools already at their disposal. The goal should be successful enforcement against true bad actors without negatively impacting lawful behavior by bona fide companies or members of the public.

The Plan should steer well clear of the very different task of trying to reshape substantive copyright law or policy with respect to (for example) what remedies or damages are available for infringement or when parties may be held liable for infringement committed by others under the doctrine of secondary liability. Legislative or other recommendations along these or similar lines would launch a highly contentious debate and carry serious repercussions for many legitimate activities and parties.

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[2] *See* 47 U.S.C. § 230(c)(1); 17 U.S.C. § 512.

[3] *Sony Corporation of America v. Universal City Studios, Inc.,* 464 U.S. 417 (1984).

[4] *See MGM Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005) at 932-933 ("the [staple article of commerce] doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one's products will be misused").

D. The Plan's goal for copyright should be realistic: making participation in widespread infringement relatively unattractive and risky, compared to participating in legal markets.

Eliminating copyright infringement completely is an impossible task. Modern information technology is here to stay and will continue to give users powerful tools for copying and disseminating data. Inevitably, some people will choose to misuse those tools to engage in infringement. Any law or policy aiming to curtail the *technical* capacity of people to engage in infringement has to go down the radically dangerous path of restricting access to or hobbling the very technologies that are central to the information economy. In the computer and Internet age, there simply are no good policy options for making infringement technically infeasible.

The Plan's goal should be more realistic: not to prevent infringement entirely, but rather to make it relatively unattractive and risky compared to participating in legal markets. The success of services like iTunes, Netflix, and now Spotify demonstrates that a broad base of consumers can be drawn to lawful services despite the continued availability of free but unlawful sources, and the software industry demonstrates that copyright-based businesses can be profitable despite the stubborn persistence of infringement. The goal of making infringement less attractive and less common is supported by the text of the PRO IP Act, which characterizes the objective of the Joint Strategic Plan as "[r]educing" infringing goods in the supply chain, not eliminating them.[5]

Importantly, the goal of making infringement less attractive compared to legal alternatives cannot be achieved by enforcement alone. It also requires that copyright industries provide legal offerings that are compelling and convenient. Where government can promote the deployment of compelling legal offerings – for example, by streamlining existing statutes pertaining to music licensing – it should do so. There is also a key role for public education, to improve the public's understanding regarding the obligations of copyright law and the consequences of violating them.

II. Recommendations for Countering the Perception that Federal Copyright Enforcement Serves Narrow Private Interests – And Ignores Important Competing Values

One of the lingering outcomes of the public debate over PIPA and SOPA is a widespread public perception that the Federal Government's approach to copyright policy serves a narrow set of corporate interests and pays little attention to the ways those interests are sometimes in tension with other important values such as free expression, due process, or Internet freedom.

Whatever one's views on the accuracy of this perception, it clearly colors the debate and, ultimately, threatens to further erode public respect for copyright law itself. Eroding respect for copyright is a serious problem for copyright holders and enforcers, as it is likely a key factor in perpetuating high levels of infringement among the general public. The Federal Government cannot change the public's views regarding copyright overnight, but it certainly should strive to avoid exacerbating the problem.

To combat this perception, it is essential for the Federal Government to conduct its enforcement and copyright policymaking activities in ways that are forthright, fair, and respectful of other

[5] Prioritizing Resources and Organization for Intellectual Property (PRO IP) Act of 2008, Pub. L. No. 110-403 (2008) § 303(a)(1).

legitimate interests. Government agencies and officials must not pursue enforcement initiatives with tunnel vision – and the IPEC, in its coordinating role, should help ensure that they do not. Attention is particularly needed in the following areas.

A. There needs to be a sober and rigorous assessment of a policy's likely effectiveness and its collateral impact on legitimate content and entities.

As in any area of policy, proposals for new anti-infringement measures must be subject to rigorous cost-benefit analysis, asking both how effective a proposed policy is likely to be in reducing infringement and what negative collateral impact it may entail.

The IPEC should be particularly alert to the risk that, where the benefits and costs of a measure accrue to different parties, it can be in the interest of the beneficiaries (likely the rightsholders) to lobby strongly even for a measure that offers relatively minor private gains at high social cost. Careful, independent consideration and balancing of the true costs and benefits of suggested measures is essential. Failure to seriously assess effectiveness and collateral impact would reinforce the perception that copyright policymakers are aiming to curry favor with specific industries rather than serve the public interest.

It is important that consideration of costs and benefits be made with a long view. Online copyright enforcement efforts are often characterized as an arms race, with determined infringers developing workarounds and new methods to infringe soon after new enforcement tactics take hold.[6] Consequently, many enforcement efforts may suffer from diminishing returns. At the same time, collateral damage to other policy objectives – such as protecting individuals' privacy or encouraging the global development of online platforms for speech and commerce – may be significant and long-lasting. If a particular proposal's reduction in online infringement is likely to be of marginal size or fleeting duration and the proposal would impose significant burdens on (for example) legitimate innovators or online free expression, then the proposal should be rejected.

The recent debate over the domain-name blocking provisions in PIPA and SOPA offers an instructive illustration. This kind of blocking is so easy to circumvent that many believed it would have had little long-term impact on infringement. It also carries a range of potential negative consequences cataloged by CDT, widely respected Internet engineers, and others.[7] Congress was widely seen as attempting to push forward the legislation with limited understanding of these consequences and, worse, limited interest in even trying to understand them.[8]

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[6] *See generally* Peter Biddle et. al. (Microsoft Corp.), *The Darknet and the Future of Content Distribution*, Nov. 18, 2002, http://www.bearcave.com/misl/misl_tech/msdrm/darknet.htm.

[7] *See, e.g., Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part I – Hearing before the House of Representatives Committee on the Judiciary Subcommittee on Intellectual Property, Competition, and the Internet,* 112th Cong. (Mar. 14, 2011) (statement of David Sohn, Senior Policy Counsel, CDT), http://judiciary.house.gov/hearings/pdf/Sohn03142011.pdf; Steve Crocker et. al., *Security and Other Technical Concerns Raised by the DNS Filtering Requirements in the PROTECT IP Bill*, May 2011, http://domainincite.com/docs/PROTECT-IP-Technical-Whitepaper-Final.pdf.

[8] *See, e.g.,* Joshua Kopstein, *Dear Congress, It's No Longer OK To Not Know How the Internet Works,* MOTHERBOARD, Dec. 16, 2011, http://motherboard.vice.com/2011/12/16/dear-congress-it-s-no-longer-ok-to-not-know-how-the-internet-works.

In contrast, the IPEC and other offices in the Administration engaged in a careful analysis, consulted with many stakeholders, and ultimately opposed the DNS-blocking proposals on the ground that they "pose a real risk to cybersecurity and yet leave contraband goods and services accessible online."[9] In short, the costs outweighed the benefits. This was a crucially important statement that reflected a commitment to sound and careful policymaking.

The Administration should maintain its commitment to this kind of evenhanded cost-benefit analysis as it plans for and implements its copyright enforcement efforts. It should insist that copyright enforcement practices and policies consider the full range of consequences, rather than catering exclusively to the more narrowly focused demands and objectives of individual enforcement initiatives or cases.

B. Government should establish policies or guidelines regarding criminal copyright prosecutions – including improved safeguards for domain name seizures – to minimize the risk of inadvertent collateral damage.

As infringement is prosecuted, it is crucial that there be policies in place to ensure that collateral effects are considered, minimized, and managed appropriately and fairly. Policy guidance is particularly important for Internet-related cases, which can often involve novel enforcement tactics or carry broader implications for communications platforms and their users. Law enforcement officials need to determine in advance whether and how a proposed law enforcement action may affect shared Internet resources, such as servers or domain names used by infringers and innocent third parties alike, and what the impact may be on lawful online expression.

Without appropriate guidance, there is a risk that enforcers will focus narrowly on the immediate objectives of individual prosecutions – either ignoring the broader impact, or attempting to deal with it on an ad-hoc basis after the fact. Such an approach is not likely to sufficiently protect the legitimate rights and interests of third parties. The IPEC can provide guidance in at least three areas.

1. Framing indictments appropriately and with an awareness of all claims' implications

In the active criminal copyright infringement case against the operators of MegaUpload, prosecutors point to a number of factors that would seemingly apply to any number of legitimate services. For example, included among the many facts alleged in the indictment, presumably as corroborating evidence of culpability, are the fact that MegaUpload did not have a search engine; the fact that it deleted files that were not downloaded for several weeks; and the fact that it rewarded uploaders of content that proved popular.[10]

While CDT takes no position on MegaUpload and its operators' guilt or innocence as a general matter, it would be absurd to suggest that these facts are indicative of criminality. Is not having a search engine feature really more suspicious than having one – which could prove useful to

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[9] Espinel, Victoria, Aneesh Chopra, and Howard Schmidt, *Combating Online Piracy while Protecting an Open and Innovative Internet*, Jan. 14, 2012, https://wwws.whitehouse.gov/petition-tool/response/combating-online-piracy-while-protecting-open-and-innovative-internet.

[10] *US v. Kim Dotcom et.al.* (E.D. VA, Criminal No. 1:12CR3), Indictment, Jan. 2012, http://www.scribd.com/doc/78786408/Mega-Indictment.

users who want to find infringing files? Is there anything suspicious about deleting inactive files, and thereby declining to provide long-term storage functionality? As one law professor has noted, "there's easily enough in the indictment to prove criminal copyright infringement . . . But much of what the indictment details are legitimate business strategies many websites use to increase their traffic and revenues."[11] The indictment also seems to blur the line between direct and secondary liability, failing to distinguish the relevant roles of MegaUpload and its users in committing infringement.

To be sure, parties engaged in large-scale commercial infringement warrant prosecution. But the "kitchen sink" approach to criminal indictments – listing numerous facts without articulating what specific behavior gives rise to the alleged violation – risks casting a pall of uncertainty over a wide range of common and legitimate features, practices, and businesses.[12] The Administration should insist that, as cases are brought against those who infringe online, investigators and prosecutors must be sensitive to the broader implications of the arguments they make; focus their attention on the specific behavior that is culpable in any given case; and avoid overbroad framing that would logically extend to, and hence cast a shadow of criminal suspicion over, behavior that may be entirely legitimate in many cases. Framing cases from the outset to focus more narrowly on the specific behaviors that suggest or confirm culpability would avoid any chilling effect and instead would provide important guidance to legitimate businesses and innovators about what practices may be suspect.

2. *Developing policies for handling data access and preservation questions that may arise in cases involving "cloud computing"*

The MegaUpload case has also raised complicated questions surrounding non-infringing material located on the defendants' servers at the time those servers were seized and the site was shut down. The issue came to a head when the government filed a letter with the court stating that it had obtained copies of whatever data prosecutors needed and that the third-party hosts of the data would soon delete the contents of the servers.[13] The Electronic Frontier Foundation intervened on behalf of at least one MegaUpload user, asking the court to order the return of non-infringing data. To date, the parties have not agreed on a process to do so, and the court has yet to rule on EFF's motion. The government's initial letter suggests that investigators and prosecutors had not fully anticipated this problem, and in subsequent briefing on the issue the government has maintained that it has no duty to return innocent data seized alongside the allegedly infringing files.

This situation has raised important questions about the privacy and security of remote data storage and so-called "cloud computing" services. Moreover, these questions may well recur in future cases involving increasingly ubiquitous cloud computing and user-generated-content services or functions. In some cases, temporary restriction of innocent users' data may be inevitable, but at a minimum these issues require careful analysis and the development of a

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[11] Nate Anderson, *Why the feds smashed Megaupload,* ARS TECHNICA, Jan. 19, 2012 (quoting Prof. James Grimmelman); *see also* Mike Masnick, *Megaupload Details Raise Significant Concerns About What DOJ Considers Evidence of Criminal Behavior,* TECHDIRT, Jan. 20, 2012.

[12] *See* Mike Masnick, *How the Megaupload Shutdown Has Put "Cloud Computing" Business Plans At Risk,* TECHDIRT, Feb. 17, 2012.

[13] Letter from US Attorney Neil H. MacBride to counsel for MegaUpload defendants, Jan. 27, 2012, https://www.eff.org/sites/default/files/Jan_24_govt_letter.pdf.

policy to guide any future enforcement actions where they arise. Given the complexity of the issues, the development of a policy in this area might benefit from a process that solicits public input and participation.

In the absence of a serious effort to wrestle with these questions, the impression presented to the public will be that the government is simply unconcerned about the collateral impact of its enforcement actions. Ensuring a well-considered, consistent, and fair approach to data access and preservation issues is important to promote confidence in both the Federal Government's copyright enforcement apparatus and the security of cloud computing.

3. Avoiding heavy-handed domain name seizures, improving procedural safeguards, and fully investigating any missteps that occur

ICE's program of domain-seizures raises several serious procedural and constitutional concerns. The program purports to be a straightforward application of existing civil forfeiture law, using new authority granted by the PRO-IP Act. Domain names, however, are instrumentalities of online speech – essential components of nearly all Internet communication – and their seizure should be held to a higher standard.

Several seizures that have received attention in the press highlight these problems. The seizure of the mooo.com domain name (not an IP-enforcement action but nonetheless similar to the "Operation in Our Sites" seizures) illustrates what can go wrong when law enforcement fails to conduct adequate advance due diligence regarding shared resources. In that case, law enforcement temporary disabled thousands of innocent subdomains under the shared "mooo.com" parent domain because of allegedly illegal content at one subdomain.[14] While ICE and DHS officials quickly apologized for the mistake, it is clear that whatever internal process led to the seizure did not include sufficient research into the nature of the mooo.com domain and the impact of seizing it.

A well-publicized seizure of much longer duration involved dajaz1.com. The owners of dajaz1.com initially questioned whether the domain name seizure was proper, arguing that much of the music content available had come directly from record labels promoting artists' work.[15] Subsequently, the owners and their attorney were kept in the dark for over a year while authorities sought extension after extension, all on a sealed, *ex parte* basis, in forfeiture proceedings before ultimately dropping the case and returning the domain.[16] Such a secretive and drawn-out procedure is the kind of unfair and egregiously heavy-handed law enforcement activity that can breed contempt for copyright enforcement. It also is a far cry from what is

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[14] Thomas Claburn, *ICE Confirms Inadvertent Web Site Seizures,* INFORMATION WEEK, Feb. 18, 2011, http://www.informationweek.com/news/security/vulnerabilities/showArticle.jhtml?articleID=229218959&cid=RSSfeed_IWK_All.

[15] Ben Sisario, *Music Web Sites Dispute Legality of Their Closing*, N.Y. TIMES, Dec. 19, 2010, http://www.nytimes.com/2010/12/20/business/media/20music.html; *see also* Mike Masnick, *If Newly Seized Domains Were Purely Dedicated To Infringement, Why Was Kanye West Using One?*, TECHDIRT, Nov. 30, 2010, http://www.techdirt.com/articles/20101130/00245312049/if-newly-seized-domains-were-purely-dedicated-to-infringement-why-was-kanye-west-using-one.shtml.

[16] Mike Masnick, *Breaking News: Feds Falsely Censor Popular Blog For Over A Year, Deny All Due Process, Hide All Details...,* TECHDIRT, Dec. 8, 2011, http://www.techdirt.com/articles/20111208/08225217010/breaking-news-feds-falsely-censor-popular-blog-over-year-deny-all-due-process-hide-all-details.shtml.

required under the First Amendment's prior restraint doctrine, which guides seizures of expressive material.

Indeed, another of ICE's domain-seizures is currently being challenged on First Amendment grounds in the Second Circuit.[17] The owners of rojadirecta.com and rojadirecta.org present a strong argument that the seizure of their domain names constitutes a prior restraint on the site's users' rights to post and access information, suppresses lawful speech, and that the probable cause standard used to issue the seizure warrant was insufficient under *Ft. Wayne Books v. Indiana*.[18] CDT and other advocates filed a supportive *amicus* brief in the case, and believe that the seizure process for tangible property is not sufficient to countenance the attempted shutdown of forums for speech.[19] The case raises novel questions surrounding the intersection of seizure law and First Amendment doctrine.

Regardless of the outcome in court, the Administration should reexamine its approach towards the tactic of seizing domain names. The mooo.com and dajaz1.com examples reveal a "seize first and ask questions later" approach that is unacceptable when applied to essential elements of Internet communication. The dajaz1.com case also reveals a disturbing willingness to proceed via secretive and *ex parte* proceedings that prevent the accused party from presenting its case in anything close to a timely fashion. The Joint Strategic Plan should call for concrete steps to avoid future instances of heavy-handed and over-aggressive domain name seizures. In particular, if domain-seizures are to continue:

- The IPEC should work to develop or coordinate a stronger set of procedural safeguards to govern any such seizure proceedings, to better protect basic principles of fairness, due process, and free expression. Those safeguards should include a prior adversarial hearing that considers whether the seizure burdens speech interests no more than is necessary to further an important governmental interest.[20]

- The Joint Strategic Plan should call for guidelines regarding what due diligence is necessary to identify shared Internet resources in advance and avoid the kind of inadvertent overbreadth that occurred in the mooo.com case.

- The Plan should call for a full investigation into all that went wrong in the dajaz1.com case.

- The Plan should establish the expectation that, both in the dajaz1.com case and any future case where law enforcement missteps are evident, the Administration will seek to draw lessons for how to modify its practice and procedures to prevent any recurrence.

C. Trade negotiations regarding copyright should allow much greater public transparency.

In the 2010 Strategic Plan, "increasing transparency" is the second action item. The Plan expressly calls for "improved transparency in . . . international negotiations" regarding

[17] Briefs in the case, *Puerto 80 Projects v. U.S.* (2d, Cir. 11-3390-cv), are available at https://www.eff.org/cases/puerto-80-v-us.

[18] 489 U.S. 46 (1989).

[19] Brief of amici curiae EFF, CDT, and Public Knowledge, Sept. 23, 2011, https://www.eff.org/node/58613.

[20] *See United States v. O'Brien,* 391 U.S. 367 (1968) at 377.

intellectual property policymaking, while also calling for "consideration of the need for confidentiality in international trade negotiations to facilitate the negotiation process."[21]

For both the Anti-Counterfeiting Trade Agreement (ACTA) and the Trans-Pacific Partnership (TPP), however, insufficient transparency has proved to be a major flashpoint for opposition. There is significant concern that negotiations concerning intellectual property legal regimes stand to impact a wide range of stakeholders who are unable to participate in the process. Without access to the text of proposals being considered, many stakeholders and the public cannot assess or offer input on the extent to which agreements may (for example) alter some aspects of the balance of copyright law, constrain the ability to adopt needed reforms, or, as CDT has suggested, export a skewed vision of US copyright law to other countries.[22]

Full, real-time transparency may not be conducive to successful trade negotiations. But by the same token, some issues may not be well suited to resolution through deals cut behind closed doors. For copyright policy, mere outlines or high-level descriptions of negotiating proposals are of limited utility, given copyright law's delicate balance and the often-complex interactions between different legal provisions. In short, this is an area in which the details of actual language matter a great deal.

In the absence of an opportunity to comment on actual text, critics come to suspect that specific industries may be using the trade agreement process to try to achieve goals that would be unattainable in an open and public process. Moreover, policymakers are deprived of the benefit of input from the full range of stakeholders in assessing the likely legal and practical impact of proposals. Confidential negotiations may be the norm in trade policy, but intellectual property policy needs to be developed through more open processes. There are simply too many diverse stakeholders – from the Internet industry to library associations to the access-to-knowledge and access-to-medicines communities to Internet users at large – with interests that deserve to be expressed and carefully considered.

It is important to note that USTR's recent announcement that it would propose TPP text affirmatively embracing copyright limitations and exceptions, while a welcome sign of recognition that copyright policy involves a broader range of interests than just rightsholders, does not alleviate the transparency issue.[23] Indeed, it reinforces that issue; it left no way for parties who might potentially support USTR's proposal to determine whether and to what extent the new proposal would represent a real step forward, or to offer any input on how best to frame it.[24] Outside analysis has to rely on leaks. Most recently, a leaked draft of text for the proposal

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[21] 2010 Joint Strategic Plan on Intellectual Property Enforcement, June 2010, http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf, at 8.

[22] *See* CDT, *TPP Negotiations Renew Concerns About Lack of Balance in Copyright Trade Agreements,* Aug. 22, 2011, https://www.cdt.org/policy/tpp-negotiations-renew-concerns-about-lack-balance-copyright-trade-agreements.

[23] Office of the U.S. Trade Representative, *USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks*, July 3, 2012, http://www.ustr.gov/about-us/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision.

[24] *See* David Sohn, *As ACTA Tanks in Europe, USTR Announces Potentially Important Shift for TPP Talks,* July 5, 2012, https://www.cdt.org/blogs/david-sohn/0507acta-tanks-europe-ustr-announces-potentially-important-shift-tpp-talks; Professors Peter Jaszi, Michael Carroll, and Sean Flynn, *Public Statement on the U.S. Proposal for a Limitations and Exceptions Clause in the Trans-Pacific Partnership,* Aug. 2, 2012, http://infojustice.org/archives/26799.

has prompted concerns that the proposal in practice may operate to restrict limitations and exceptions rather than to promote their appropriate adoption.[25]

The Joint Strategic Plan should call for trade agreement negotiations, when they significantly address matters of copyright and other intellectual property law, to become more transparent – including greater opportunity for public comment and input on actual text of proposals. Openness to such concrete input from a broader range of perspectives is essential, both for getting the substance of agreements right and for getting the public to accept the resulting agreements as legitimate and balanced. The IPEC should work with USTR to make this happen, starting with the TPP, even if it requires some exceptions to or departures from normal USTR trade negotiation procedures. And if for some reason such transparency simply cannot be achieved in the trade negotiation context, then the Administration should scale back the use of trade negotiations to resolve major copyright questions.

D. Government should launch a process to consider user-focused reforms that could be included in future proposals for new policies, legislation, or trade agreements on copyright.

Traditionally, copyright statutes have tended to move in one direction: toward greater protection, higher penalties, and increased enforcement. Going forward, to help address the perception that copyright policy serves narrow private interests rather than public ones, it will be important for the Federal Government to pursue an agenda that clearly focuses not just on the interests of copyright holders, but on the interests of Internet users and other stakeholders as well. This will require more than just being sensitive to the ways that increased copyright enforcement can affect other interests and values, as discussed above. It also will require support for *affirmative* initiatives or reforms that focus on improving the copyright regime from the perspective of entities other than the major copyright industries.

USTR's recent announcement that it will seek a TPP provision concerning copyright limitations and exceptions could represent an important first step in this regard. It potentially suggests an expanded focus for copyright trade policy, affirmatively promoting the needs of citizens and businesses that use and disseminate information in addition to seeking ways to better secure the rights of copyright holders. It is important to note, however, that the details matter; some observers are already warning that USTR's proposal, by incorporating the "3-step test" from the TRIPS agreement, could end up having the opposite effect, constraining limitations and exceptions instead of promoting them.[26]

To continue in a positive vein, the Joint Strategic Plan could call for a process to consider possible initiatives or reforms that would serve the legitimate interests of Internet users and other stakeholders. The Administration could then make support of at least some such reforms part of its overall copyright agenda, or could incorporate them in future proposals for new policies, legislation, or trade agreements regarding copyright. Options might include, for example, orphan-works legislation or licensing reform to help facilitate the proliferation of lawful

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[25] Megan Guess, *Leaked: US proposal on copyright's limits: A TPP draft looks more restrictive than some had hoped,* ARS TECHNICA, *Aug. 5, 2012.*

[26] *See, e.g., Joint Statement of Civil Society Groups on U.S. TPP Copyright Proposal,* July 3, 2012, http://www.keionline.org/node/1453; Carolina Rossini, *New Leaked TPP Text Puts Fair Use at Risk,* Aug. 3, 2012, https://www.eff.org/deeplinks/2012/08/new-leaked-tpp-puts-fair-use-risk.

sources for access to copyrighted works. Outreach to a broad variety of stakeholders would likely generate additional ideas.

A sustained and committed effort to include and promote the interests of all stakeholders may help close the gaps between parties in the often contentious debate over copyright online. Focusing narrowly on the interests of rights holders, on the other hand, or even just creating the appearance that they are the only ones government is responsive to, would fuel continued distrust for the government's copyright enforcement efforts and growing disrespect for copyright law. Such attitudes cannot help but exacerbate the infringement problem and undermine the very goals that the Federal Government's copyright enforcement initiatives are intended to promote.

III. Voluntary Actions by Private Parties

There may be opportunities for progress in reducing copyright infringement through voluntary, collaborative efforts between copyright holders and other parties in the Internet ecosystem. Precisely because they lack the established safeguards of government processes, however, voluntary non-governmental enforcement schemes can also carry significant risks. The Joint Strategic Plan therefore should take a cautious approach toward voluntary measures. The Federal Government certainly should not indicate blanket support for voluntary enforcement actions and should limit its own involvement in collaborative efforts. Furthermore, it should express the expectation that voluntary collaborative initiatives should provide appropriate representation for consumer and innovation interests and include procedural safeguards to protect key values such as due process, freedom of expression, user privacy, and innovation.

A. Advantages and risks of voluntary, non-governmental enforcement

The principal advantage of private, voluntary efforts is their flexibility. They do not burden existing services and up-and-coming innovators with one-size-fits-all government mandates that might prove technically infeasible, too costly, awkward to implement, invasive of privacy or other user interests, or simply ineffective in some contexts. Companies and platforms can tailor their approaches to their specific circumstances. They can also respond to changing circumstances much more easily than when their actions are dictated by government regulation or court order. In addition, voluntary, private-sector efforts may avoid the constitutional questions (for example, due process or state restrictions on lawful speech) that can arise when government action is involved.

This flexibility, however, carries risks. Voluntary, private action may be less transparent than government action, making it more difficult for affected parties to evaluate and respond reasonably to whatever actions are taken. There is less obligation to follow fair procedures, including recourse for erroneous decisions.[27] There is less substantive protection for individual rights such as freedom of expression, association, or privacy. There is less accountability, since private actors are not subject to democratic checks and balances. Finally, there is a risk that

[27] *See* European Digital Rights, *The Slide from 'Self-Regulation' to Corporate Censorship: The Scale and Significance of Moves to Entrust Internet Intermediaries with a Cornerstone of Democracy – Open Electronic Communications Networks,* Jan. 2011, http://www.edri.org/files/EDRI_selfreg_final_20110124.pdf at 5 (warning that private companies "cannot reasonably be expected to provide the same level of impartiality, transparency and due process" as traditional government regulatory and law enforcement processes).

nominally voluntary enforcement may provide a vehicle for government to circumvent generally applicable constraints on its action and achieve through indirect pressure things that it would be prohibited from doing directly.[28]

For all of these reasons, private voluntary enforcement may be susceptible to unfair or mistaken application – whether due to sloppiness, resource constraints, competitive motives, or outright abuse. The extent of this risk will vary depending on the type and details of the proposed voluntary action. Drawing the line between constructive private-sector action and risky vigilantism is a crucial challenge for any effort to address infringement through voluntary action.

B. Industry-wide or multi-stakeholder frameworks for private enforcement

One important factor in evaluating voluntary action is the distinction between independent, individual actions and actions that are based on a broadly adopted common framework.

There are a variety of examples of individual parties taking their own approaches to reducing infringement. Many user-generated content websites have deployed content-filtering tools to address uploads of copyrighted material.[29] Individual payment systems have established procedures for cutting off payments to infringement websites.[30] Many individual ISPs have been forwarding copyright-holder warning notices to users suspected of infringement. Section 230 of the Communications Act, while not directly applicable to copyright, generally protects online service providers from liability for "any action voluntarily taken in good faith to restrict access to or availability of material the provider or user considers to be . . . objectionable."[31]

More recently, however, there has been a trend towards formalizing and standardizing private action through industry-wide or multi-stakeholder frameworks. As discussed in the IPEC's 2011 Annual Report, in 2011 the largest credit card and payment systems agreed to a set of best practices for preventing infringement sites from processing transactions; major ISPs reached an agreement with music labels and movie studios on a system for sending escalating warning notices to subscribers identified as peer-to-peer infringers; and a group of companies including domain name registrars, payment networks, and search engines collaborated on a new nonprofit organization to fight illegal online pharmacies.[32] In May 2012, national associations representing advertisers and advertising agencies adopted a best practices statement encouraging members to take affirmative steps to prevent their ads from appearing on infringement sites.[33] In addition to these specific examples of emerging multi-party frameworks

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[28] *See* Ian Brown, *Internet self-regulation and fundamental rights*, INDEX ON CENSORSHIP, Vol. 1, Mar. 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539942 (arguing that ISP self-regulatory actions "are often introduced under the threat of legislation or litigation, agreed and operated behind closed doors 'in the shadow of the law'").

[29] See, e.g., YouTube's Content ID System, http://www.youtube.com/contentid.

[30] *See Hearing on Targeting Websites Dedicated to Stealing American Intellectual Property Before the Senate Comm. on the Judiciary,* 112th Cong. (Feb. 16, 2011) (statement of Denise Yee, Visa, Inc.) at 11-14.

[31] 47 U.S.C. § 230(c)(2)(A).

[32] 2011 U.S. Intellectual Property Enforcement Coordinator Annual Report on Intellectual Property Enforcement, Mar. 2012, http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf (hereinafter *2011 IPEC Report*) at 5–6, 46–47.

[33] *Industry Groups Urge Marketers to Take Affirmative Steps to Address Online Piracy and Counterfeiting*, May 3, 2012, http://www.ana.net/content/show/id/23407.

for private action, the OECD in 2011 endorsed "multistakeholder co-operation" as a successful model for Internet policymaking generally.[34]

On the plus side, creating industry-wide or multi-party frameworks may provide the opportunity for joint development and vetting of sound best practices. Ideally, the resulting voluntary actions can be less ad hoc, more subject to careful process and minimum standards, and more generally understood and accepted than actions reflecting the independent decisions of individual parties. Broader participation may also make such frameworks more effective at achieving their goals than uncoordinated action by individual parties.

But a common framework also magnifies the risks. Having all or most of an industry reading from the same playbook may leave legitimate parties nowhere to turn if they suffer unfair or disproportionate impact from the private enforcement framework.

Perhaps even more important, industry-wide and multi-stakeholder frameworks are to some extent stand-ins for government action. They aim to set general rules of the road that will carry broad impact. In some cases, they may assume quasi-judicial or other decisionmaking functions more traditionally associated with government. They may address questions that, but for the voluntary framework, might have commanded more government attention.

The more multi-party voluntary agreements stand in for government action, the more they raise significant questions of legitimacy and fairness.[35] Government, after all, governs based on an electoral mandate and subject to the limitations created by legal instruments from the Constitution to human rights treaties; it must respect rights including free expression, privacy, and due process.

At a minimum, therefore, any joint framework for private action must seek to emulate key aspects of democratic process. To its credit, the IPEC has already recognized this, noting that voluntary frameworks must be implemented "in a manner . . . consistent with our commitment to due process, free speech, fair use, privacy, cybersecurity, and other important public policy concerns."[36]

Stating this general principle, however, is far easier than achieving it in practice – especially if one of the goals of a voluntary framework is avoiding the full formality of a government-led approach. The Joint Strategic Plan, to the extent it addresses voluntary efforts, should move beyond a general statement and establish more concrete benchmarks for multi-party voluntary enforcement frameworks:

- The Plan should affirmatively endorse the OECD's recent conclusion that "multi-stakeholder processes should involve the participation of all interested stakeholders and occur in a transparent manner."[37] Consumer and innovation interests of users need

[34] *See* OECD, *Communique on Principles for Internet Policy-Making*, June 28–29, 2011, http://www.oecd.org/dataoecd/33/12/48387430.pdf (hereinafter *OECD Principles)* at 4.

[35] CDT recently explored some of the key legitimacy-related questions raised by multistakeholder governance. *See* CDT, *Multistakeholder Organizations, Legitimacy, and Rights: A Supplementary Research Agenda*, Feb. 2012, https://www.cdt.org/files/pdfs/Multistakeholder-Organizations-And-Legitimacy.pdf.

[36] *2011 IPEC Report* at 46.

[37] *OECD Principles* at 4.

to be represented as collaborative frameworks are developed, and the Administration should establish this as a clear best practice.

- The Plan should state unambiguously that, if the Federal Government convenes discussions or otherwise catalyzes the development of a common framework for voluntary action, it will insist that the discussions be structured to involve a broad range of stakeholders at an early stage, well before any final deal is cut. This should include civil society groups that aim to represent the interests of the public.
- The Plan should suggest that, when an industry is developing a common framework for voluntary action, it consider posting an outline or description of its initial proposal online, to give the public an opportunity to comment on any potential shortcomings or unintended likely impact.
- The Plan should establish the expectation that any common framework should be transparent regarding both its processes and its results or decisions; include procedural safeguards to prevent mistakes and abuse from occurring; and provide opportunity for recourse in the event that mistakes or abuse nonetheless occur.[38]

C. Actions that educate users versus actions that block access

Another crucial factor in evaluating voluntary action is the type of action and the scope of the consequences if the action is misapplied.

In particular, informational efforts aimed at educating or warning users can sidestep many of the more serious concerns. Much of the challenge in reducing infringement lies in changing norms about what constitutes normal and appropriate behavior, so education is crucial.[39] And educational measures need not significantly impair anyone's rights even if they are applied in a somewhat imprecise or overbroad manner.[40] Thus, CDT believes the Copyright Alert System can be an important and constructive educational vehicle – if it is implemented in a way that emphasizes its educational purpose and avoids imposing disproportionate sanctions such as

[38] These echo some of the guiding principles CDT and Harvard's Berkman Center for Internet & Society suggested in a 2011 paper regarding best practices for voluntary action leading to account deactivation and content removal. Erica Newland, Caroline Nolan, Cynthia Wong, and Jillian York, *Account Deactivation and Content Removal: Guiding Principles and Practices for Companies and Users,* September 2011, https://www.cdt.org/files/pdfs/Report_on_Account_Deactivation_and_Content_Removal.pdf.

[39] As CDT noted as long ago as 2005, "[c]opyright law can be a technical area, and consumers' initial assumptions about what is and is not permitted are often not fully accurate. Public education is needed to help shape consumer expectations and norms concerning the use of copyrighted works in a digital world – because without effective public education, new technological capabilities . . . may create their own 'facts on the ground' with little regard for law or policy." CDT, *Protecting Copyright and Internet Values: A Balanced Path Forward*, Spring 2005, https://www.cdt.org/paper/protecting-copyright-and-internet-values-balanced-path-forward, at 9.

[40] This is not to say that educational measures are inevitably benign. There remains a possibility that skewed or incomplete information could paint an inaccurate picture of copyright law, misinforming the public rather than educating it. There is likewise a possibility that overaggressive warnings could discourage recipients from engaging in fair use or other legitimate activities.

suspension of user accounts.[41] Efforts by other parties in the Internet ecosystem to educate users about infringement and its potential consequences may play a useful role as well.

By contrast, voluntary actions that impose concrete sanctions on individuals, entities, or websites pose much more serious concerns. These types of actions effectively put private parties in a quasi-judicial role, adjudicating matters that can result in substantial consequences for third parties. At a minimum, this makes strong safeguards essential.

Especially serious are voluntary actions that directly interfere with users' communications, such as by restricting users' Internet access or blocking access to particular websites. These types of voluntary actions can impose major burdens on users' free expression rights – the rights both to impart and receive information. In many cases, they may also carry broader consequences that private parties may be poorly situated to appreciate or even consider. For example, as discussed in the debate over PIPA and SOPA, various kinds of blocking could undermine the global, unified nature of the Internet and encourage increased reliance on blocking as a strategy for an ever-growing list of purposes – a result that would undermine the openness that the OECD recently observed is a core feature of the Internet's success.[42]

Individual communications platforms may be able to find creative options for reducing the risks. For example, YouTube seeks to minimize the impact of filtering on users by encouraging revenue-sharing partnerships that enable unauthorized postings to be monetized by the rightsholder rather than blocked. Mandated or industry-wide blocking agreements, however, could well stifle such innovative arrangements.

Actions focused on financial flows – addressing the business relationships that enable flagrant infringers to profit from their illegal activity – may avoid at least some of the broader harms associated with actions focused directly on the communications infrastructure. Because financial sanctions can have severe impact on the individuals or entities targeted, however, this remains an area where actions carry significant risk and require, at a minimum, careful process, narrow targeting, and strong safeguards against mistakes or abuse.

To reflect the major differences between different types of voluntary action, the Joint Strategic Plan should:

- Single out educational initiatives as distinct from other types of voluntary collaboration;
- Avoid any endorsement of voluntary agreements calling for privately-enforced restrictions on communications networks or platforms; and
- Emphasize that any widely adopted collaborative agreements that contemplate potential sanctions on third parties should (i) target only egregious and straightforward cases, where the bad actor's status is flagrant and clear; (ii) take great care to craft a fair process that affords the opportunity to answer allegations, considers a wide range of factors including potential hardship, unintentional violations, and impact on innocent third parties; and (iii) provide an avenue for appealing decisions.

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[41] CDT, Public Knowledge Joint Statement on "Copyright Alert System," Jul. 7, 2011, https://www.cdt.org/pr_statement/cdt-public-knowledge-joint-statement-copyright-alert-system; David Sohn, *ISPs and Copyright Owners Strike a Deal,* Jul. 7, 2011, https://www.cdt.org/blogs/david-sohn/isps-and-copyright-owners-strike-deal.

[42] *See OECD Principles.*

D. The role of government

Government's role in voluntary, private-sector approaches needs to be limited. Where government plays a significant role – either directly, or by exerting pressure on private parties – the resulting agreement may no longer be truly voluntary, as entities may feel obliged or coerced to participate. Government involvement can heighten constitutional questions concerning due process or the agreement's impact on lawful speech, by raising the possibility that the initiative could be viewed as government action. Finally, government participation in ostensibly private, voluntary negotiations may raise both the perception and the real possibility that government is doing an end-run around the procedural safeguards and accountability that normally apply to governmental activities.

The Federal Government may be able to serve as a convenor, providing a neutral forum and perhaps even some degree of facilitating for multiparty discussions. But it should be careful to avoid imposing coercive pressure, either direct or implied. Where it does convene discussions, its main substantive contribution should be to insist on input from a full range of stakeholders and appropriate transparency and procedural safeguards, as discussed above.

CDT appreciates the opportunity to offer our views concerning the development of the next Joint Strategic Plan for intellectual property enforcement. We are available for further discussion on these and other digital copyright issues as the IPEC works to develop and implement the Plan.

Respectfully submitted,

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