



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530
September 23, 2008

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 3325 – Enforcement of Intellectual Property Rights Act

Dear Mr. Chairman and Ranking Member:

The Departments of Justice and Commerce have reviewed S.3325, the Enforcement of Intellectual Property Rights Act of 2008 (“EIPRA”), and truly appreciate the bill’s intention to enhance the tools available for protecting intellectual property rights. Nevertheless, we have strong and significant concerns regarding Titles I and IV. We are deeply concerned that the proposed legislation will undermine existing intellectual property enforcement efforts by diminishing the effective use of limited criminal enforcement resources and creating unnecessary bureaucracy. It will also improperly micro-manage the internal organization of the Executive Branch. Accordingly, as outlined below, we strongly oppose S. 3325 as reported out of Committee on September 15, 2008.

We strongly oppose Title I of the bill, which not only authorizes the Attorney General to pursue civil remedies for copyright infringement, but to secure “restitution” damages and remit them to the private owners of infringed copyrights. First, civil copyright enforcement has always been the responsibility and prerogative of private copyright holders, and U.S. law already provides them with effective legal tools to protect their rights: they can obtain injunctions, 17 U.S.C. § 502; impound and destroy infringing articles, 17 U.S.C. § 503; recover their actual damages and costs, 17 U.S.C. § 504(b); obtain statutory damages, which are similar to punitive damages, 17 U.S.C. § 504(c); and obtain their costs and attorney’s fees in some circumstances, 17 U.S.C. § 505. These tools also provide strong incentives for all copyright holders, including individual copyright holders and small businesses not represented by trade groups or industry organizations, to enforce their rights.

Second, Title I's departure from the settled framework above could result in Department of Justice prosecutors serving as *pro bono* lawyers for private copyright holders regardless of their resources. In effect, taxpayer-supported Department lawyers would pursue lawsuits for copyright holders, with monetary recovery going to industry.

Third, the Department of Justice has limited resources to dedicate to particular issues, and civil enforcement actions would occur at the expense of criminal actions, which only the Department of Justice may bring. In an era of fiscal responsibility, the resources of the Department of Justice should be used for the public benefit, not on behalf of particular industries that can avail themselves of the existing civil enforcement provisions.

The Departments also strongly oppose Title IV of the EIPRA, which would move into the Executive Office of the President (EOP) from the Commerce Department the "U.S. Intellectual Property Enforcement Coordinator" (IPEC) position. This Presidentially appointed IPEC would have primary responsibility for developing and coordinating Administration policy for IP enforcement across the Executive Branch. While the Administration has been a long time supporter of strong inter-agency coordination -- and is willing to work with the Committee on this topic -- the statutory creation of an EOP coordinator with the duties described in the bill constitutes a legislative intrusion into the internal structure and composition of the President's Administration. This provision is therefore objectionable on constitutional separation of powers grounds.

The Administration has taken strong steps over the past eight years to ensure effective coordination and enforcement of intellectual property rights. The Administration put in place the Strategy for Targeting Organized Piracy (STOP!) Initiative which is currently being implemented by the National Intellectual Property Law Enforcement Coordination Council (NIPLECC) and led by the current U.S. Coordinator for Intellectual Property Enforcement. In summary, while we appreciate the need for continued coordination among Departments and agencies, the framework provided in the bill is unlikely to enhance criminal enforcement and, to the contrary, could pose significant and unnecessary challenges.

We look forward to working with the Committee to address these concerns. In the meantime, the Administration reserves judgment on the final bill. It is our hope that changes will be made so that the President's senior advisors can recommend that the President support the measure. The Office of Management and Budget has advised that there is no objection to the transmittal of this letter from the standpoint of the Administration's program

Very truly yours,



Keith B. Nelson
Principal Deputy Assistant Attorney General
U.S. Department of Justice



Lily Fu Claffee
General Counsel
U.S. Department of Commerce