



ADVERTISING
PHOTOGRAPHERS
OF AMERICA

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To: Victoria Espinel, U.S. Intellectual Property Enforcement Coordinator and
Colleagues
Office of Management and Budget, Executive Office of the President

Re: Coordination and Strategic Planning of the Federal Effort Against Intellectual
Property Infringement: Request of the Intellectual Property Enforcement
Coordinator for Public Comments Regarding the Joint Strategic Plan

Date: March 24, 2010

On February 23, 2010 in the *Federal Register* (Volume 75, Number 35, pages 8137-8139) a request appeared for public comments concerning the Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement from the U.S. Intellectual Property Enforcement Coordinator (IPEC). Advertising Photographers of America is filing per that request of the IPEC.

Advertising Photographers of America (APA) is a nonprofit, 501(c)(6) organization with a goal to establish, endorse and promote professional practices, standards and ethics in the photographic and advertising community. Successful Advertising Photographers is our mission. APA is a member-based association of individual photographers that contribute to the economy and visual arts in the United States. APA Chapters bring education to our members throughout the country by hosting events in our chapter cities and other locations. APA Chapters are located in Atlanta, Charlotte, Chicago (Midwest), Los Angeles, New York City, San Diego, San Francisco, Seattle (Northwest) and Washington D.C.

Advertising Photographers of America is also a member of the Copyright Alliance that is also submitting to the IPEC request. APA fully supports the efforts of the Copyright Alliance and all its member organizations in the pursuit of strong, enforceable copyright laws and protections as well as copyright education.

APA would like to thank the U.S. Intellectual Property Enforcement Coordinator (USIPEC) for requesting public comments. With the creation of the USIPEC by the

Obama Administration and strong, vocal support from President Obama¹ and Vice President Biden,² APA is very hopeful for the advancement of enforcement and protection of intellectual property and our specific area of visual arts.

APA is submitting comments to the two parts of the request. The first part is related to the costs to the U.S. economy resulting from IP violations and the second part has recommendations on improving the Government's IP enforcement efforts.

PART I: Analysis of the Role of Intellectual Property Enforcement in the Performance of the U.S. Economy

The Role on the Economy

The United States economy and its Gross Domestic Product (GDP) is heavily dependent on IP contributors and copyright industries. Copyright industry contributions to the economy have in general been growing even during tough, economic times. But as every photographer experiences in his/her own business, these industries are experiencing rampant counterfeiting and piracy, down right theft, which leads to lost sales and infringement of the constitutional right of copyright.

Economist Stephen E. Siwek conducted a recent study that overwhelmingly shows IP is a major contributor to economic growth and GDP.³ The study showed that between 2004 and 2007 real annual growth rates from core copyright industries were more than twice that of the total U.S. economy. In 2004, 2005, 2006 and 2007, the real annual growth rates achieved by the total core copyright industries were more than twice the real growth rates achieved by the U.S. economy as a whole.⁴

During 2006-2007 core copyright industries contributed 22.4% of the U.S. economy's real growth and the total contribution of all copyright industries was

¹ See "Remarks by the President at the Export-Import Bank's Annual Conference," at the Omni-Shoreham Hotel in Washington, D.C., March 11, 2010 (<http://www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference>).

² The Vice President spoke at a dinner at the "Business of Show Business" at the U.S. National Portrait Gallery, April 21, 2010. See the White House press pool report (<http://thepage.time.com/pool-report-of-biden-remarks-at-mpaa-event/>)

³ See "Copyright Industries in the U.S. Economy: The 2003-2007 Report" prepared for the International Intellectual Property Alliance (IIPA) by Stephen E. Siwek of Economists Incorporated, 2009 (<http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf>).

⁴ Core copyright industries are those that create copyrighted works as their primary product. These industries include the motion picture industry, recording industry, music publishing industry, book, journal and newspaper publishing industry, computer software industry, legitimate theater, advertising, and the radio, television and cable broadcasting industries. See World-Information.org, *The Copyright Industry*, <http://world-information.org/wio/infostructure/100437611725/100438658710/?ic=100446326381>

43.06% of total real U.S. growth.⁵ The value added for total copyright industries in 2007 rose to \$1.52 trillion, or 11.05% of GDP.⁶

The U.S. Bureau of Labor Statistics' Bureau of Economic Analysis compiled 10 years worth of data that clearly shows personal use of creative works is steadily rising. Using data from sales of books, recorded audio, and video, the National Arts Index 2009 from the Americans for the Arts found 1998 sales of \$108 billion to \$169 billion in 2007, a 44% growth rate. Using a constant dollar rate of inflation over a 10-year period that is a 16% growth rate.⁷

In APA's own visual arts industry, photography, the infringement of copyright is significantly susceptible to online theft. This theft costs photographers and photo licensing agencies significant revenues every year and greatly impacts the ability of photographers to earn a standard of living that had been achieved before rampant online theft. Once an image is online, it is often just a right-click away from appearing elsewhere – online or offline – in an unauthorized display. In one study by the Stock Artists Alliance, approximately nine out of every ten images found online were unauthorized.⁸

In a follow-up to that study, 20,000 images from major stock photo agencies were identified across the Internet. The sample was limited to images not previously licensed for website use and not subject to royalty-free licensing. Infringements were tracked in only three countries, including the United States. Over a four-month period, 1,200 infringements were identified. Getty Images licensed Eighty percent of those images, and those images were infringed almost one out of every fifteen appearances. Based on that ratio and Getty's total image collection and an average license fee of \$600, Getty faced an annual loss in just those three markets of \$42 million per year.⁹ That is particularly significant when one considers there are thousands of stock image sites across the United States, many of them managed by non-profits such as museums and educational institutions.

PicScout, a company that conducts image use searches on the Internet, conducted another follow-up study, this time for the Picture Archive Council of America. They found that in 2009 the level of infringement was much more significant than in 2006. Of an estimated 5 million or more rights-managed images found on commercial websites, almost 80% were not properly licensed. Three times the

⁵ Siwek, "Copyright Industries in the U.S. Economy: The 2003-2007 Report," IIPA, 2009.

⁶ Siwek, "Copyright Industries in the U.S. Economy: The 2003-2007 Report," IIPA, 2009.

⁷ See "National Arts Index 2009: An Annual Measure of the Vitality of Arts and Culture in the United States" for Americans for the Arts by Roland J. Kushner of Muhlenberg College and Randy Cohen of Americans for the Arts, January 2010

(http://www.americansforthearts.org/information_services/arts_index/001.asp).

⁸ See "Infringements of Stock Images and Lost Revenues," Stock Artists Alliance, September 2007 (http://www.stockartistsalliance.org/files/SAA_Infringements_Report_2007a.pdf).

⁹ "Infringements of Stock Images and Lost Revenues," Stock Artists Alliance, September 2007.

amount in 2006.¹⁰

Even more significant to APA than this frightening statistic is the impact of this on individual photographers. Stock agencies like Getty only have a small fraction of the total number of images on the Internet. Think of all the photographers that have personal websites with portfolios of images for potential clients to view for their own commerce. Each of those images is susceptible to theft by any unscrupulous individual or company throughout the world.

Online theft creates a tremendous economic burden on all copyright industries. The Institute for Policy Innovation says that piracy costs the U.W. economy \$58 billion annually in total output, including revenue and related measures of gross economic performance.¹¹ Data of the motion picture, music, business software and entertainment software/video game industries from 2005 shows at least \$25.6 billion in lost revenue. The resulting loss in federal, state and local government tax revenues was at least \$2.6 billion.¹²

International Impact

Internationally, copyright industries face huge challenges because of the lack of respect and the enforcement of IP rights. Most U.S. copyright holders do not have the means to ensure legal markets are working abroad. As small business owners, the majority of photographic copyright holders depend on a proactive approach by all U.S. government agencies for enforcement.

Core copyright sales in international markets increased 8% from \$116 billion in 2006 to \$126 billion in 2007. Sales of U.S. copyrighted goods surpassed the aircraft, automobile, agricultural, food and pharmaceutical industries.¹³ In 2005 the IP industry comprised about 40% of the U.S. GDP in exportable products and services and contributed nearly 60% of U.S. exportable high-value-add products and services.¹⁴

International trade of goods and services in the copyright industries is significant and continues to grow. With that impressive growth however, comes the truth that the theft of those goods and services is booming in the international market. According to a study by the Organization for Economic Cooperation and Development (OECD) in 2005, the global trade of counterfeit and pirated goods may

¹⁰ PicScout works with stock agencies to track non-legitimate usage of rights-managed images using advanced visual recognition technology. PicScout provided this data to PACA on March 19, 2010.

¹¹ See "The True Cost of Copyright Industry Piracy to the U.S. Economy," prepared for the Institute for Policy Innovation by Stephen E. Siwek of Economists Inc., October 2007 (found at http://www.copyrightalliance.org/files/siwekcopyrightpiracy_study.pdf).

¹² Siwek, "The True Cost of Copyright Industry Piracy to the U.S. Economy," IPI, 2007.

¹³ Siwek, "Copyright Industries in the U.S. Economy: The 2003-2007 Report," IIPA, 2009.

¹⁴ Siwek, "Engines of Growth," NBC Universal, 2005.

have been as high as \$200 billion.¹⁵

An OECD follow-up study says the problem is continuing to grow. The study indicates that growth of counterfeit and pirated goods in world trade grew from 1.85% in 2000 to 1.95% in 2007. Trade in counterfeit and pirated goods grew more than 25% from 2005 to 2007, as much as \$250 billion.¹⁶ There is a very significant challenge that U.S. copyright industries face in competing in the global economy.

Intellectual Property and Jobs

There is growth in the number of professionals seen in the area of commercial and professional independent artists (photographers included), writers and performers. Numbers compiled by the U.S. Census Bureau show a 33.6% increase in individual artists in the U.S. between 2000 and 2007, from 508,608 to 679,247.¹⁷ This growth is seen by an increase in registrations for copyrights with the U.S. Copyright Office in the Library of Congress. When copyright registration fees increased in 2006 there was a drop in applications, but registrations have begun to increase since then. In 2007 there were 541,212 registrations recorded and in 2008 it was 561,428.¹⁸

Just like the copyright industries economic growth as a positive story, the job growth story is also positive. But just like economic growth is impacted by theft so is job growth. A 2007 study estimates that the U.S. economy loses 373,375 jobs annually due to piracy.¹⁹ The same report indicates that the loss of jobs results in a loss of \$7.2 billion from copyright industries and related retail industries.²⁰ Theft of copyrighted work directly costs American small business owners.

Enforcement

The 110th Congress noted a significant study by LECG on the economic return on investment by U.S. government spending on IP enforcement.²¹ This study was repeatedly cited in the development and passage of the PRO-IP Act of 2008. LECG supported the recommendations of the Coalition Against Counterfeiting and Piracy (CACP). Following those recommendations would increase U.S. economic output

¹⁵ See "Economic Impact of Counterfeiting and Piracy," Organization for Economic Co-Operation and Development, June 2008

(http://www.oecd.org/document/4/0,3343,en_2649_33703_40876868_1_1_1_1,00.html).

¹⁶ See "Magnitude of Counterfeiting and Piracy of Tangible Products: An Update," OECD, November 2009 (<http://www.oecd.org/dataoecd/57/27/44088872.pdf>).

¹⁷ Kushner and Cohen, "National Arts Index 2009," Americans for the Arts, 2010.

¹⁸ Kushner and Cohen, "National Arts Index 2009," Americans for the Arts, 2010.

¹⁹ Siwek, "The True Cost of Copyright Industry Piracy to the U.S. Economy," IPI, 2007.

²⁰ Siwek, "The True Cost of Copyright Industry Piracy to the U.S. Economy," IPI, 2007.

²¹ See "Economic Analysis of the Proposed CACP Anti-Counterfeiting and Piracy Initiative," prepared for the Coalition for Counterfeiting and Piracy (CACP) by LECG Directors Laura Tyson, Ph.D., Tapan Munroe, Ph.D., and George Schink, Ph.D., November 2007

(http://www.lexisnexis.com/documents/pdf/20080610072737_large.pdf).

from \$27 billion to \$54 billion annually and would boost U.S. employment by about 174,000 to 348,000 after three years.²²

In other words, federal tax revenues would increase by as little as \$2.90 to as much as \$9.70 with every dollar spent by the U.S. government on increased IP enforcement. An increase like that in economic output would reward state and local governments with as much as \$1.5 billion in additional revenues over three years.²³

PART I Summary

When writing the U.S. Constitution, the Founding Fathers realized that copyright provides an incentive to allow creative minds to pursue their expression to benefit all of society. Copyrighted works have an intrinsic and immeasurable value. The creativity found within the photographic industry provides images for the advertising of American products, images for the recording of news and historical moments, a record of products for retail services and the capture of memories and personalities of individuals and families. Our copyrighted images are both a component of our economy but are also a contributor to our culture.

PART II: Policy Recommendations

Advertising Photographers of America is very grateful for the February 12th, 2010 announcement by U.S. Attorney General Eric Holder for the creation of the Department of Justice Task Force on Intellectual Property as “part of a Department-wide initiative to confront the growing number of domestic and international intellectual property (IP) crimes.”²⁴ The Task Force – which the U.S. Department of Justice noted followed a “summit meeting convened last December by Vice President Biden, a long-standing champion of U.S. intellectual property rights-holders” – is a very positive development for all copyright owners.²⁵

APA urges the IPEC and the U.S. Department of Justice to quickly act on this policy commitment by the Obama Administration to “step up policy engagement with foreign law enforcement partners, develop a plan to expand civil IP enforcement efforts, and leverage existing partnerships with federal agencies and independent regulatory authorities such as the Department of Homeland Security and the Federal Communications Commission.”²⁶

²² See “Economic Analysis of the Proposed CACP Anti-Counterfeiting and Piracy Initiative,” CACP, 2007.

²³ “Sixth Annual BSA-IDC Global Software 08 Piracy Study,” BSA, 2009.

²⁴ See February 12, 2010, U.S. Department of Justice (US DoJ) announcement -- <http://www.justice.gov/opa/pr/2010/February/10-ag-137.html>

²⁵ February 12, 2010 US DoJ.

²⁶ February 12, 2010 US DoJ.

With the advent of the web and internet commerce, photographers have been able to promote to far more potential clients, deliver completed work through private sites, and to even register with the US Copyright Office our published and unpublished work. Along with these advantages has come the rapidly and immensely worrisome issue of web theft. Frankly, web theft is killing us by contributing to the demise of our industry. Physical theft is quite easy to do by simply grabbing and copying images from the web. As documented by the OECD, the growth in web sites offering unlicensed video through peer-to-peer technology, funded by user subscriptions transacted by credit card companies as well as hosted advertising is increasing.²⁷ These sites profit from infringement while putting consumers at risk of identity theft, as the Federal Trade Commission noted.²⁸ Even though the OECD report refers to unlicensed video the same can be said for still photographic images. In addition, it is often improperly rationalized under the guise of Fair Use and Public Domain claims.

The Fair Use Doctrine incorporated into the Copyright Act of 1976, 17 U.S.C. § 106 and 107 has been so egregiously misinterpreted to mean “free use.” The Fair Use Doctrine allowing for use in such things as news reporting, teaching and research is indeed fair however, it has been stretched to include derivatives of copyrighted images. Fair Use has also come into play with infringers claiming that the use is not for commercial purposes. The fact is that in most circumstances the alleged “fair use” does harm the potential market of the original. This fact alone is a major factor in the determination of Fair Use and how misinterpretation has had a negative financial impact on photographers being able to make a living.

The issue of Orphan Works is also a great concern to photographers. Because of APA's belief in copyright registration, the infringement of registered, copyrighted work has to be enforceable. The ability to find the creator or owner of a copyrighted image is important. Every effort should be made by someone seeking the use of an image to be able to find the copyright holder. The use of an image registry like the Picture Licensing Universal System (PLUS) will provide will greatly enhance the ability to find an image's copyright holder.²⁹

There are times when the copyright holder may not be found. Just as in Fair Use Doctrine, libraries, museums, educational institutions, scholars and researchers should have the ability to provide educational use of images. A system that allows for the commercial use of published works without the permission of copyright holders, whom cannot be found, is not acceptable. The very foundation of copyright

²⁷ OECD Piracy of Digital Content p. 28-32

²⁸ See “Widespread Data Breaches Uncovered by FTC Probe: FTC Warns of Improper Release of Sensitive Consumer Data on P2P File-Sharing Networks,” Federal Trade Commission alert from February 22, 2010. The FTC notified nearly 100 organizations that the private data of their organizations, employees and customers may have been compromised through data breaches caused by use of peer-to-peer file-sharing sites (<http://www.ftc.gov/opa/2010/02/p2palert.shtml>).

²⁹ Picture Licensing Universal System - <http://www.useplus.com/index.asp>

law, that when an image is created it is copyrighted, is threatened when images are used without permission of the copyright holder. Orphan works exclusions should be held to the same standards as Fair Use Doctrine; to libraries, museums, educational institutions, scholars and researches and only after a thorough search has been executed, and never for commercial applications.

APA believes in, and educates our members on, the business of licensing images. Licensing is a contract between the copyright holder and a user of the image that may cover many details such as a geographic region, an industry market, a set time period and of course, an agreeable usage fee. This business model allows for clients to have the ability to use an image for a purpose that is agreed to by the copyright holder. It provides a system that allows who uses images, how they are used, and for how much money, all of which effect how APA members and other photographers make a living. It is a practice that also allows for Fair Use within the framework of the law and would help in the search of copyright holders in the case of Orphan Works.

Conclusion

As a supporter of the PRO-IP Act (Public Law 110-403) and for the creation of the IPEC and appointment of Victoria Espinel, APA is very grateful for the opportunity to respond to the request of the IPEC. As Ms. Espinel said in her inaugural post on the White House Blog:

Intellectual property are the ideas behind inventions, the artistry that goes into books and music, and the logos of companies whose brands we have come to trust. My job is to help protect the ideas and creativity of the American public. One of the reasons that I care about this is because I believe it is enormously important that the United States remain a global leader in these forms of innovation – and part of how we do that is by appropriately protecting our intellectual property. Our intellectual property represents the hard work, creativity, resourcefulness, investment and ingenuity of the American public. Infringement of intellectual property can hurt our economy and can undermine U.S. jobs. Infringement also reduces our markets overseas and hurts our ability to export our products. Counterfeit products can pose a significant threat to the health and safety of us all. Imagine learning that the toothpaste you and your family have used for years contains a dangerous chemical. U.S. Customs officials have seized several shipments of counterfeit toothpaste containing a dangerous amount of diethylene glycol, a chemical used in brake fluid, and that in sufficient doses is believed to cause kidney failure. All of these are reasons why your government has renewed its efforts to challenge this illegal activity.

My job is to help coordinate the work of the federal agencies that are

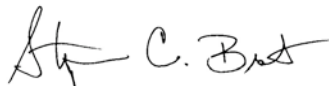
involved with stopping this illegal behavior. We are going to work together to develop a strategy to reduce those risks to the public, the costs to our economy and to help protect the ingenuity and creativity of Americans. We want to be able to reduce the number of infringing goods in the United States and abroad. The examples are almost endless: counterfeit car parts, illegal software, pirated video games, knockoff consumer goods, dangerous counterfeit medicines, and many other types of products – including very sophisticated technology. Our goal is to better use taxpayer dollars and other government resources to be more effective in reducing any threat to our economy and our safety.³⁰

APA and the IPEC share the same goals to protect the efforts of the copyright industries to contribute to the U.S. economy by creating jobs and products and services. APA has a focus on its members, photographic artists, to provide our share to those goals. Theft through copyright infringement considerably impacts the market of copyrighted works, negatively impacting photographers and other creative, copyright industry workers and the U.S. economy. It has been demonstrated that every dollar spent on Federal enforcement has a positive return to the U.S. economy and job creation.

Comments from individual copyright creators as well as associations like APA are coming in to the IPEC. Coalitions like the Copyright Alliance that APA is a member of are also making important replies to the request for comments by the public. It is also evident that those who believe in expanding the ability to use images and other copyrighted material on the Internet through Fair Use claims will reply. It is important that strong enforcement of existing laws and that new legislation enhances copyright protections. Do not listen to the cries of open usage through expanded Fair Use claims. Protect the right of photographers and other IP creators to make a living with strong enforcement.

Advertising Photographers of America thanks the Obama Administration and the IPEC for the opportunity to submit comments in the pursuit of stronger protection of intellectual property rights.

Sincerely,



Stephen C. Best
CEO
Advertising Photographers of America

³⁰ Victoria Espinel, "Intellectual Property and Risks to the Public," White House Blog, February 23, 2010 (<http://www.whitehouse.gov/blog/2010/02/23/intellectual-property-and-risks-public>).