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March 23, 2010

Victoria A. Espinel

United States Intellectual Property Enforcement Coordinator

Office of Management and Budget, Executive Office of the President

Intellectualproperty@omb.eop.gov

RE: Request for Written Submissions from the Public:

Coordination and Strategic Planning of the Federal Register Effort Against
Intellectual Property Infringement: Request of the Intellectual Property Coordinator
for Public Comments Regarding the Joint Strategic (DOCID: fr23fe10-127)

Dear Ms. Espinel:

Thank you for the opportunity to respond to the above inquiry regarding improved coordination among federal agencies toward improved enforcement of intellectual property laws.

As the lead copyright officer for the University of Michigan Library, my office works to provide informal education to our community about practical and policy aspects of copyright as it relates to the work of the university community. The University is concerned with the importance of rigorous enforcement of copyright and intellectual property laws. To that end, the University provides policies and resources to assist our community with the implications of their day-to-day activities in relation to intellectual property.

Universities spend considerable resources educating and enforcing intellectual property laws, relying in intellectual property in the arena of patent in our technology transfer and public-private partnerships to bring innovations from research to the market. With regard specifically to Part II, Section 16 of your inquiry, examples on our campus include the Information Technology Policies at the University of Michigan (<http://www.itcs.umich.edu/itpolicies/>) and Be Aware You're Uploading: Using Peer-to-Peer File Sharing Safely and Appropriately ("BAYU") (<http://bayu.umich.edu/>). Such awareness efforts have become relatively commonplace at American universities and are of increasing consequence in the K-12 arena (see 'Copyright Kids' from The Copyright Society of the U.S.A. at <http://www.copyrightkids.org/>).

The PRO-IP Act is a laudable next step in a long series of efforts to enforce intellectual property laws as noted in the GAO's report of December 9, 2009, 'Intellectual Property: Enhancements to Coordinating U.S. Enforcement Efforts, Statement of Loren Yager, Director, International Affairs and Trade (GAO-10-219T). Enforcement of existing intellectual property laws and improved coordination among federal agencies is of critical importance, especially in the arena of health and safety. We all want to be sure that our foods and medications are what they say they are. Further there is a basic level at which infringement is infringement and ought to be prevented or punished. In our global relations, we have a mutual obligation to our international trading partners to prevent and punish the smuggling of knock-off pharmaceutical drugs and designer handbags into the US - and see that existing laws prohibiting illegal copies of copyrighted software are enforced abroad.

In the case of copyright, however, there are limits that serve fundamental social, economic, cultural, and educational priorities. These are discussed and debated internationally in the arena of the World Intellectual Property Organization, among other fora. My concern is that the federal register inquiry focuses essentially on enforcement and cost of enforcement and does not in any way acknowledge the need to *balance* such enforcement with the statutory limitations on the exclusive rights of copyright.

Creators want their work protected. But in many arenas – libraries, museums, schools to name a few - there is a sense of fear and anxiety about what is permissible copying. Enforcement should be vigilant but it should not be misplaced in a way that wastes resources or creates a chilling environment of fear or censorship.

US copyright law *specifically recognizes limitations* to copyright to which the copyright holder's §106 rights are expressly subject. These limitations are intended to facilitate the progress of science and the useful arts. They are of critical importance for creation, scholarship, and education. The inquiry asks about how to share information for enforcement purposes but in no way acknowledges the benefits of sharing information and ideas through networks, which do benefit society and foster commercial activity. Commercial activity is essentially the focus of the inquiry but it is not the full or necessarily primary focus of copyright law. If it were, we would not be concerned when a nation like China tells a US company like Google that it must limit access to its citizens to information that the Chinese government deems acceptable. (See 'Remarks on Internet Freedom' by Hillary Rodham Clinton, Secretary of State at The Newseum, Washington, DC on January 21, 2010 (<http://www.state.gov/secretary/rm/2010/01/135519.htm>).

Copyright explicitly *does not protect ideas*; it protects expression fixed in a tangible medium of expression. 17 USC 102(8) provides that "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, or embodied in such work." Some of these concepts are protected under other areas of the law, but these must be considered in balance with societally important limits on copyright in the United States.

Limits on copyright are articulated throughout the Copyright Act. For example, Section 107 of the Act addresses fair use, which provides an equitable way of considering use of copyrighted material distilled from over a century of case law. *Fair use is not an excused form of infringement*; it is a limit on the exclusive rights of copyright. In thinking about costs of enforcement, the interagency intellectual property advisory council should consider the balance of cost and benefit.

Museums, libraries, schools, universities, professors, teachers, writers, students, and moms all rely on fair use. Moms? When a mother makes a rather silly but affectionate video of her child and shares it via YouTube, is it really worth the time and expense to enforce what could be a fair use as a purported infringement of the small portion of music by a popular artist? (See ‘The Home Video Prince Doesn't Want You to See: Pa. Mom Fights Back With Lawsuit Against Music Company’ by Chris Francescani, ABC News Law & Justice Unit, Oct. 26, 2007 at <http://abcnews.go.com/TheLaw/home-video-prince/story?id=3777651>) Or when a law professor uses a small portion of a song for commentary - recognized as a fair use as well as a implication of his first amendment rights - and is taken off the Internet in response to enforcement by the copyright holder - is this really a worthwhile use of our judicial and enforcement resources? (See ‘Bogus Copyright Claim Silences Yet Another Larry Lessig YouTube Presentation’ at <http://techdirt.com/articles/20100302/0354498358.shtml>)

The cost of enforcement is ultimately paid by taxpayers, consumers, and investors in the form of high enforcement costs (taxes), higher prices, and lower returns on investments; my hope is that we choose carefully where we enforce as a practical matter and as a culture. Copyright is unlike trademark and patent in that one need not enforce rights in order to have such rights. Thinking more effectively about the limits on copyright are likely to generate energy, productively creating new works and new business opportunities. The copyright term has been extended eleven times in the last century, and it is often difficult to determine the actual status of copyright. It seems there should be a general awareness that with a longer term of protection there should be a concurrent broader application of the limitations to ensure an equitable balance of interests. With the opportunity the Internet provides for distance learning, open courseware, open educational resources, and sharing of material (commercially and otherwise), we need to be careful that our efforts to enforce legitimate interests do not inadvertently squelch other valuable opportunities.

There are many statutory limits to the exclusive rights of copyright. They are not always easy to apply – copyright law relies heavily on judicial interpretation. However, the limitations on a copyright holders §106 rights (§§107-122) codify for the public uses of copyrighted works that *do not require authorization* and, therefore, the need for equitable decisions. These legislative limits on copyright were distilled over a century of judicial decision-making. In addition to fair use, the limitations include a wide range of concerns from permitted copying by libraries and archives to reproduction for blind or other people with disabilities (17 USC 108 and 121). They include limits that allow for the first sale doctrine making it possible to give copies of books away or have used bookstores (see 17 USC 109 though noting that there is no such right with an ebook unless the related license permits such transfer).

In closing, I want to express support for the comments submitted by the NetCoalition and CCIA as well as the comments of the Association of Research Libraries and the American Library Association, respectively.

Many thanks for your consideration.

Respectfully,

Melissa Levine

Lead Copyright Officer

University of Michigan Library