March 24, 2010

BEFORE THE OFFICE OF MANAGEMENT AND BUDGET
EXECUTIVE OFFICE OF THE PRESIDENT

RESPONSE OF THE ASSOCIATION OF RESEARCH LIBRARIES, THE AMERICAN LIBRARY ASSOCIATION AND THE ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES TO THE INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR'S REQUEST FOR COMMENTS ON THE JOINT STRATEGIC PLAN

The Association of Research Libraries (ARL), the American Library Association (ALA), and the Association of College and Research Libraries (ACRL) appreciate this opportunity to respond to the Intellectual Property Enforcement Coordinator's (IPEC) request for comment, and we hope these brief remarks will be helpful to this Office as it prepares the Joint Strategic Plan envisioned in the PRO-IP Act.

ARL is a nonprofit organization of 124 research libraries at comprehensive, research-extensive institutions, national, state, and public libraries. ALA is a nonprofit professional organization of more than 65,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society. ACRL is a division of the American Library Association, representing more than 12,500 academic and research librarians and interested individuals. Together these organizations represent over 300,000 information professionals and thousands of libraries of all kinds throughout the U.S. and Canada.

Perhaps more than other institutions, libraries stand at the middle point between users and rightsholders, investing heavily in the development and acquisition of protected and public domain materials and at the same time providing broad access to these resources by the public. Libraries are major consumers of intellectual property. ARL member libraries, for example, spent over $1.36 billion acquiring materials in the 2007-08 academic year. At the same time, libraries serve our communities by providing them access to these materials, access made possible by provisions in the Copyright Act that protect educational uses such as lending, preservation, distance education, and interlibrary loan. We are at the fulcrum of a delicate legal balance between rightsholder control and public access and meaningful use.

Striking the Right Balance

The most important aspect for the IPEC to consider in the formulation of the Joint Strategic Plan is that the law in this area is designed to protect public access just as surely as it is designed to provide a reasonable reward for authors and publishers under certain circumstances. Indeed, the Constitution makes clear that the author's limited right to control her works is only a means to an end, a government granted monopoly necessary to promote the creation of cultural and scientific work.[1]

This utilitarian rationale is reflected (though imperfectly) in the limited nature of the rights that vest in authors and inventors. IP rights are not perpetual and boundless rights to control all dispositions of a given work. The rights of copyright owners, for example, are described in one section of the Copyright Act, while the following 15 sections describe a host of exceptions and limitations that protect the public and intermediaries.[2] After a defined (if ever-lengthening) time, a work loses all protection and becomes a part of the public domain, where anyone may use it in any way she pleases.[3]

In order to protect public access, the law also protects intermediaries like libraries, who facilitate access in ways that would be impossible in a system of absolute rightsholder control. For example, libraries as such could not exist if the rightsholder's right of distribution were to extend beyond the "first sale." § 109(a) codifies the common-sense premise that once someone buys a work, they may lend it without the rightsholder's permission. Libraries receive additional rights under § 108 of the Copyright Act, and of course libraries and their users rely heavily on the fair use provision in § 107 to provide a flexible, equitable exception that covers common practices such as photocopying and web searching. When libraries and universities provide Internet services, they receive special protections that allow them to host and

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[1] *See* U.S. Const. art. 1, § 8, cl. 8 ("Congress shall have the power . . . *To promote the Progress of Science and the useful Arts,* by securing *for limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries") (emphasis added).

[2] 17 U.S.C. § 106 (enumerating rights) and §§ 107-122 (limitations and restrictions on scope of right). *See also* §§ 411, 412 (requiring registration prior to infringement action and limiting remedies for unregistered works); § 1201(a)(1)(B), (C), (D) (describing triennial rulemaking to determine exceptions to anti-circumvention liability).

[3] 17 U.S.C. §§ 301-305.

transmit information without the unbearable burden of acting as a censor or policeman inspecting the millions of files uploaded or transmitted online at any given instant.[4] Without these protections, the Internet as we know it simply could not exist.

A body of law that represents such a careful balance of interests cannot be justly enforced or improved by a process that is responsive to only one group of stakeholders. We ask that the IPEC keep in mind that enlarging the control of rightsholders necessarily diminishes the rights of the public and of intermediaries, including libraries.

Costs to Private Companies and Costs to the Public Good

ARL, ALA, and ACRL believe it is very important that the IPEC has asked that assertions about the costs of intellectual property infringement clearly identify the methodology used and any critical assumptions relied upon to calculate those costs, as well as a copy or citation to the source of any data. As the comments of CCIA and the NetCoalition make clear, industry-commissioned studies rarely, if ever, rise to a level of rigor that justifies emergency intervention along the lines that content industries routinely demand. Rather, they are shot through with fallacies and sleights of hand that have done more to confuse and confound this discussion than to contribute to it.[5] We refer you to the comments of CCIA and the NetCoalition for a detailed discussion of the problems with these studies and the arguments that are made in connection with them.

The fundamental flaw of these studies is that they beg the question of whether a particular private business interest is entitled to government protection for perpetual, stable profits regardless of changing business conditions. The mere fact of declining profits in one business model does not constitute a cognizable harm that government

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[4] 17 U.S.C. § 512.

[5] *See, e.g.,* Julian Sanchez, *750,000 Lost Jobs? The Dodgy Digits Behind The War On Piracy*, ARS TECHNICA, Oct. 8, 2008, http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars (industry and government agencies repeatedly used job loss and revenue loss statistics whose origins suggest they were wild extrapolations from inadequate or nonexistent data); Mike Nizza, *Movie Industry Admits It Overstated Piracy on Campus*, N.Y. TIMES, Jan. 23, 2008, *available at* http://thelede.blogs.nytimes.com/2008/01/23/movie-industry-admits-it-overstated-piracy-on-campus/ (MPAA claimed for two years that college campuses accounted for 44% of all digital infringement, used the number to lobby successfully for special enforcement obligations for college campuses, but later discovered an error that revised the number down to 15%).

must step in to remedy. Government intervention in any area has costs for taxpayers, and in this area there are added costs to the public when IP policy becomes further slanted in favor of rightsholders and against public access and use.

The IPEC Should Focus On Counterfeit Goods And Threats to Health And Safety

The comments in this proceeding are sure to reflect the controversy that surrounds hot-button issues like Internet filtering and three strikes, but there are some kinds of intellectual property enforcement that all can agree should be pursued aggressively. Specifically, the IPEC asks for "specific strategies for reducing the threats to public health and safety caused by the use or consumption of infringing goods (for example, counterfeit drugs, medical devices, biologics, and ingested consumer products)." While ARL, ALA, and ACRL are not in a position to offer specific recommendations for improvement in this area, we hope that others will provide guidance on this issue, or that the IPEC will seek it out.

We expect that some rightsholders will submit comments seeking new protections for their aging business models, but we encourage you to consider the members of the public and the entities that serve them, such as libraries, before recommending changes that would disturb the delicate balance of copyright law. Instead, the government should focus its limited time and resources on enforcement that has unambiguous public benefits (health and safety) and that targets clear bad actors (counterfeiters who defraud the public into using and consuming unsafe goods).