



November 13, 2018

Vishal J. Amin
U.S. Intellectual Property Enforcement Coordinator
Executive Office of the President

RE: Response of Creative Commons to the U.S. Intellectual Property Enforcement Coordinator's Request for Comments on the Joint Strategic Plan on Intellectual Property Enforcement

Dear Mr. Amin:

Creative Commons welcomes the opportunity to provide comments on the development of the 2019-2021 Joint Strategic Plan on Intellectual Property Enforcement. Creative Commons (CC) is a global nonprofit organisation established in 2001.¹ We create, maintain, and promote open copyright licenses allowing creators to freely share their creative works under simple, standardized terms that fit their creation model, although all CC licences require that the author receive attribution.² CC licenses have been applied to over 1.4 billion copyrighted works around the world on over 9 million websites, and are relied on by major platforms including information sites like Wikipedia and ProPublica, and user-generated content sites like Flickr, YouTube, and SoundCloud.³ The licenses have also been used by federal agencies whose grants fund the development of open educational resources, and they've been recommended for sharing open data too.⁴

We appreciate the recognition of the importance of a balanced approach to intellectual property enforcement in the 2016 Joint Strategic Plan, especially the crucial holding that “nothing herein should be interpreted as limiting the scope of exceptions and limitations, such as fair use, under U.S. copyright law. To the contrary, the basic principles that have permitted the Internet to thrive must be safeguarded...”⁵

In addition, the plan goes on to say,

¹ <https://creativecommons.org/>

² <https://creativecommons.org/licenses/>

³ <https://stateof.creativecommons.org/>

⁴ <https://project-open-data.cio.gov/licensing-resources/>

⁵ <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/IPEC/2016jointstrategicplan.pdf>, at p. 10.

“The way people use and access content – which has led to new and innovative uses of media (e.g., remixes and mashups involving music, video and the visual arts), and fair use, for example – will undoubtedly continue to evolve. We must work to foster creativity, understanding the role of exceptions and limitations as not only part of our body of laws, but as an important part of our culture. Indeed, it is the combination of strong copyright rights with a balance between the protection of rights and exceptions and limitations that encourages creativity, promotes innovation, and ensures our freedom of speech and creative expression are respected. IP enforcement options must be crafted to allow for effective measures against actors that unlawfully prey on the works of rights holders, while ensuring that enforcement activities do not affect lawful activity.”⁶

The focus on enforcement actions is most appropriately targeted at large-scale, willful IP infringements. And we agree with prior commenters on the IP plan that small scale infringements—sometimes the result of incidental or accidental infractions—should be dealt with in ways that promote educational efforts and also looks for legal and policy mechanisms that prioritize legal streams of content that are affordable and easy access for users and consumers. Most importantly, any IP enforcement measures should not discourage authors from building appropriately upon the works of others, either through the use of open content licensing, or via limitations and exceptions to copyright, such as fair use.

Engagement with our trading partners

The U.S. should promote copyright balance if IP is to be discussed and negotiated as a part of trade agreements. As we wrote with others in the *Washington Principles on Copyright Balance in Trade Agreements*:

“To fully take advantage of the opportunities that new technologies offer to promote creativity, innovation, and access to knowledge, copyright must strike a balance between exclusive rights and limitations and exceptions to those rights that serve public interests. Trade agreements should include language requiring parties to promote such a balance, and should also include language protecting rights of countries to adopt open and flexible general exceptions like fair dealing and fair use.”⁷

First, we are disappointed that there is a 20 year copyright term extension included as a part of the US-Mexico-Canada trade agreement (USMCA). An additional 20 years of copyright protection does nothing to promote the creation of new works, and only exacerbates the orphan works problem.

Second, it is imperative that trade negotiations be transparent and participatory. The secrecy demonstrated in trade negotiations such as USMCA and the Comprehensive and Progressive

⁶ Ibid, at p. 10.

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<http://infojustice.org/wp-content/uploads/2017/11/Washington-Principles-on-Copyright-Balance-in-Trade-Agreements-November-15-2017.pdf>

Agreement for Trans-Pacific Partnership (CPTPP) left civil society organizations like Creative Commons that represent the broader public rather than entrenched interests at an extreme disadvantage, as only a privileged few stakeholders invited into the closed negotiation circle have had their interests fully considered. These negotiations should be made through procedures that are transparent to the public and which include all stakeholders. Increased transparency and meaningful public participation will lead to better outcomes.

Effective use of all our legal authorities

As mentioned above, we believe that expanding the ability for creators and users to leverage existing and new limitations and exceptions to copyright will foster creativity and culture. In addition, IPEC should look for ways to not just preserve but instead increase openness in copyright policy to enable and empower innovation, such as through support for open licensing policies at the federal level, which can improve access to publicly funded research, educational content, and data.

The federal government has already taken positive steps to improve the ability of the public to openly access and re-use publicly funded scientific research, such as through the NIH Public Access Policy, and the Executive Directive on Increasing Access to the Results of Federally Funded Scientific Research.⁸⁹ In addition agencies such as the Departments of Education, Labor and State have adopted open licensing policies for a subset of their grant programs that fund the creation of educational materials meant to be widely shared. Project Open Data recognizes the importance of managing federally created data and working to make it “available, discoverable, and usable [...] to create economic opportunity and improve citizens’ quality of life.”¹⁰

In addition to the IP enforcement measures outlined in the Joint Strategic Plan, the federal government should serve as a leader and look to other types of programs, projects, and policy that leverage IP in a positive fashion and could improve access to and re-use of educational, scientific, and other sorts of content funded by the public and meant to be widely shared.

Engagement and partnership with the private sector and other stakeholders

We understand that IPEC has already recommended various IP education and training programs, such as the USPTO’s Global IP Academy.¹¹ We encourage these and other education efforts to include topics, resources, and materials on open licensing practices and policy opportunities. Creative Commons already has an extensive collection of educational resources on open licensing developed through our CC Certificate course, and other education efforts such as CopyrightX are a wealth of useful information and educational content.^{12 13} In

⁸ <https://publicaccess.nih.gov/policy.htm>

⁹ <https://sparcopen.org/our-work/2013-executive-directive/>

¹⁰ <https://project-open-data.cio.gov/>

¹¹ https://www.whitehouse.gov/wp-content/uploads/2017/11/2018Annual_IPEC_Report_to_Congress.pdf

¹² <https://certificates.creativecommons.org/>

¹³ <http://copyx.org/>

addition, IPEC could look to build upon existing open licensing resources such as the Federal Open Licensing Playbook, developed by the State Department as an educational tool and guide for agencies looking to better leverage IP in service of the public interest.¹⁴

Again, thank you for opportunity to provide comments on the development of the upcoming Joint Strategic Plan on Intellectual Property Enforcement. We appreciate the work toward promoting a balanced approach to IP enforcement, and encourage the broader support for promoting limitations and exceptions that benefit creators and the public, and also exploring public policy opportunities to leverage IP in ways that can improve access to and re-use of publicly funded scholarly research, educational materials, and data.

We are open to answering any questions you may have.

Sincerely,

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Creative Commons

¹⁴ https://eca.state.gov/files/bureau/open_licensing_playbook_final.pdf