



**BEFORE THE  
U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR**

**Development of the Joint Strategic Plan on  
Intellectual Property Enforcement**

**COMMENTS OF THE COPYRIGHT ALLIANCE**

The Copyright Alliance welcomes this opportunity to submit comments on the IPEC's development of its next Joint Strategic Plan on Intellectual Property Enforcement.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

Copyright is a critical factor in the contributions of U.S. creative industries to the economy and to jobs. According to the most recent *Copyright Industries in the U.S. Economy* report,<sup>1</sup> the core copyright industries added \$1.2 trillion to the U.S. GDP and employed nearly 5.5 million men and women. From a global perspective, sales of U.S. recorded music, television, video and motion pictures, software, newspapers, books and periodicals in foreign markets amounted to \$177 billion, which exceeds exports of major U.S. industries such as chemicals, aerospace, agricultural, electrical, and pharmaceuticals.

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<sup>1</sup> Stephen Siwek, Int'l Intellectual Property Ass'n, *Copyright Industries in the U.S. Economy: The 2016 Report 2* (2016).

These figures show that a strong copyright system that rewards creativity and discourages piracy—domestically and abroad—is essential to a healthy and vibrant economy. We welcome the opportunity to provide input in the development of the next Joint Strategic Plan.

### **Promote the Involvement of Individual Artists, Creators, Innovators, and Small Businesses in Enforcement Efforts**

There are few factors as integral to the success of the American economy as small businesses and intellectual property. Small businesses consistently create more jobs in the aggregate than larger firms across the United States and employ nearly half of the private sector workforce.<sup>2</sup>

Giving a voice to individual artists, creators, innovators, and small businesses—who are often unable to participate directly in efforts to improve the protection of intellectual property rights—is among our core missions. Preserving a vibrant, trusted, and legal online marketplace is crucial to the ability of these creators and innovators to promote their work and to build their businesses. Many individual creators face enforcement challenges to their livelihood and are simply unable to respond in a meaningful way. In this vein, we ask the IPEC to proactively engage with individuals and small businesses as part of its enforcement efforts, and we respectfully offer the services and resources of the Copyright Alliance in fostering this important national conversation.

In addition, the IPEC can play an outreach role by promoting the resources available to copyright owners about enforcing their rights, including educational materials and tools and contacts for reporting copyright infringement.<sup>3</sup> Copyright law education is another one of our primary efforts, and our website—[copyrightalliance.org](http://copyrightalliance.org)—is a valuable educational resource for helping professional creators and small business understand the complexities of copyright law. Our *Copyright Law Explained* and educational videos provide easy to understand explanations of matters like copyright registration, licensing, copyright infringement and fair use. We also feature answers to common questions in our FAQ section—including questions answered directly by Rob Kasunic, Associate Register of Copyrights and Director of Registration Policy & Practice at the Copyright Office—and our blog-style *Ask the Alliance* series.

The Copyright Alliance partners with other organizations across the country to help educate professional creators and small businesses on copyright. For example, in celebration of World Intellectual Property Day this past April, we partnered with Volunteer Lawyers for the Arts organizations that provide legal, business, and accounting advice and education to creators to host educational events focused on copyright in cities like Nashville, New Orleans, Washington, D.C., St. Louis, Sacramento, Los Angeles, San Francisco, Chicago, New York, St.

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<sup>2</sup> See OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., UNITED STATES SMALL BUSINESS PROFILE 1 (2016), [https://www.sba.gov/sites/default/files/advocacy/United\\_States.pdf](https://www.sba.gov/sites/default/files/advocacy/United_States.pdf); see also OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., SMALL BUSINESS BULLETIN (June 2015), [https://www.sba.gov/sites/default/files/Small\\_business\\_bulletin\\_June\\_2015.pdf](https://www.sba.gov/sites/default/files/Small_business_bulletin_June_2015.pdf).

<sup>3</sup> See, e.g., Comput. Crime and Intellectual Property Section, U.S. Dep’t of Justice, Reporting Intellectual Property Crime (3d ed. 2018), <https://www.justice.gov/criminal-ccips/file/891011/download>; Int’l Trade Admin., STOPfakes.gov, <https://www.stopfakes.gov/welcome>.

Paul, and Austin. In the coming months and years, we hope to continue growing our network by partnering with other government and non-governmental organizations to bring copyright education to more cities, professional creators, and small businesses across the country.

In our current initiative, we are reaching out to all the Small Business Administration (SBA) District Offices in the United States to share our educational resources and see how we can be of more help to the small business communities. It would be very helpful for the IPEC to assist us in coordinating with the SBA to advance these efforts.

In addition to advocacy and education, we also help promote professional creators and small businesses by featuring them on our homepage as well as in our Q&A-style blog series, Creator Spotlight, which gives them the opportunity to share their experiences as creators firsthand, including experiences navigating the business side of their respective industries, dealing with infringement, and learning about how copyright supports and protects their work.

Infringement actions are particularly troublesome for visual and literary artists because of the nature of transactions, the volume of their work, and the excessive litigation costs required for bringing a claim in federal court.<sup>4</sup>

The IPEC has previously supported the consideration of alternative forums for enforcing rights in its Joint Strategic Plan.<sup>5</sup> Since then, bills have been introduced that would create a streamlined voluntary dispute resolution system modeled after the U.S. Copyright Office's recommendations in its 2013 report on Copyright Small Claims. Most recently, the "Copyright Alternative in Small-Claims Enforcement Act of 2017" (the "CASE Act"), H.R. 3945, introduced by Reps. Jeffries (D-NY), Marino (R-PA), Smith (R-TX), Collins (R-GA), Chu (D-CA), and Lieu (D-CA)—and co-sponsored by Ranking Member Nadler (D-NY), along with Reps. Cicilline (D-RI), Cohen (D-TN), Cramer (R-ND), Deutch (D-FL), Napolitano (D-CA), Poliquin (R-ME), DeFazio (D-OR), and Moore (D-WI)—would make very targeted, modest changes to the copyright law to address this inequity and give America's creators the tools to protect the fruits of their creativity.

The fundamental problem addressed by the CASE Act is that, because federal courts have exclusive jurisdiction over copyright claims and federal litigation is so expensive and complex, most individual creators and small businesses simply can't afford to enforce their rights. The American Intellectual Property Law Association estimates that the cost of litigating through the two appeals process averages \$350,000.<sup>6</sup> Few individual creators or small businesses have this

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<sup>4</sup> See Comment from Copyright Alliance to the U.S. Copyright Office on Copyright Protections for Certain Visual Works (2015). See also U.S. Copyright Office, COPYRIGHT SMALL CLAIMS 1-2 (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>. (noting the Authors Guild reported that a majority of members surveyed saw the need for a copyright small claims tribunal).

<sup>5</sup> U.S. Intellectual Property Enforcement Coordinator, Executive Office of the President, 2013 Joint Strategic Plan on Intellectual Property Enforcement at 24, 25 (June 2013), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/IPEC/2013-us-ipeec-joint-strategic-plan.pdf>. [hereinafter *2013 Joint Strategic Plan*].

<sup>6</sup> American Intellectual Property Law Association, Report of the Economic Survey 2011, at 35 (2011).

type of disposable income to spend on litigation, especially on small copyright claims where the damages are many times less than the cost of litigation.

Visual artists, authors, songwriters, bloggers, vloggers and small businesses are hurt most by the high cost of federal litigation because the value of their individual copyright claims are often too low to warrant the expense of litigation. While these financial losses may seem modest, all too often such sums represent a significant and devastating loss of income, especially since creators often experience multiple infringements at a time. This lost income could have covered business operating expenses, medical insurance premiums, tuition payments, car payments, rent and living expenses, or the cost of travel to a location where an author will research his next book or where a photographer will capture her next photo project.

Moreover, according to a survey by the American Bar Association, most attorneys won't consider taking a case if the amount at stake is less than \$30,000,<sup>7</sup> and federal litigation is much too complicated for any creator to undertake without the assistance of counsel. Thus, even if an individual creator or small business decides to litigate a case, finding an attorney willing to take the case is yet another obstacle that is difficult for them to overcome. It is no wonder that the vast amount of infringements regularly go unchallenged and many creators feel disenfranchised by the copyright system. Some suspend their businesses entirely.

### **Emerging Piracy Challenges**

Piracy undermines the commercial value of creativity and innovation, reduces competition, and erodes the rule of law, and it remains a persistent problem for most types of copyrighted works harming creators, those who invest in and distribute works, and, ultimately, the general public. Established channels of piracy, such as peer-to-peer and cyberlockers, remain popular,<sup>8</sup> while emerging threats such as illicit set-top boxes and stream-ripping services gain ground. An estimated six percent of North American homes have a Kodi set -op device configured to access pirated content,<sup>9</sup> and one consumer survey finds that over one third (35 percent) of all internet users accessed infringing music via stream-ripping in the past three months, which rises to 53 percent of internet users using such services among 16-24 year olds.<sup>10</sup> Addressing piracy requires a combination of civil and criminal enforcement, cooperative voluntary measures between copyright owners and third parties, and providing attractive legal options for enjoying copyrighted works.

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<sup>7</sup> American Bar Association, Re: Remedies for Small Copyright Claims: Response to Notice of Inquiry, at 7 (Oct. 19, 2012), [https://www.copyright.gov/docs/smallclaims/comments/noi\\_10112012/ABA\\_IPL.pdf](https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/ABA_IPL.pdf).

<sup>8</sup> See, e.g., *Global Movie and TV Piracy on the Rise as Web Video Piracy Growth Adds to Peer-to-Peer Piracy*, Irdeto (Aug. 7, 2018), <https://irdeto.com/news/global-movie-and-tv-piracy-on-the-rise-as-web-video-piracy-growth-adds-to-peer-to-peer-piracy.html>.

<sup>9</sup> *Spotlight: Subscription Television Piracy*, Sandvine (2017), <https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-subscription-television-piracy.pdf>.

<sup>10</sup> *Connecting With Music: Music Consumer Insight Report*, IFPI (Sept. 2017), <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>.

## Harmonizing Criminal Penalties

Criminal penalties for copyright infringement should not differ depending on whether a work is made available to the public to download or to stream. Accordingly, just as it did in previous Joint Strategic Plans, the IPEC should strongly support bringing criminal penalties for infringement of the public performance right, currently at most a misdemeanor, to the same level as penalties for infringement of the reproduction and distribution rights, which can result in felony charges for willful and egregious infringement.

Since the previous Joint Strategic Plan, streaming has become an even more vital business model for creative works. For recorded music, it is the dominant model: according to the Recording Industry Association of America (RIAA), streaming services provided 75% of U.S. music industry revenues in the first half of 2018.<sup>11</sup> And U.S. streaming video subscription services continue to grow robustly, generating an estimated \$20.1 billion in revenue in 2017, projected to pass \$30 billion by 2022.<sup>12</sup> Given the increasing popularity of streaming, “misdemeanor penalties are simply not sufficient to deter large-scale infringers,” as Acting Deputy Assistant Attorney General David Bitkower said in 2014.<sup>13</sup>

Other government officials have reiterated support for aligning criminal penalties in this fashion. In 2015, Register of Copyrights Maria Pallante told the House Judiciary Committee, “[w]hile Congress should carefully consider the operation of this amendment to ensure appropriate legal processes, there is no question that the change is warranted and overdue.”<sup>14</sup> And in its 2013 Green Paper on copyright policy, the Department of Commerce’s Internet Policy Task Force said, “The lack of potential felony penalties for criminal acts of streaming disincentivizes prosecution and undermines deterrence.”<sup>15</sup>

## Encourage and Monitor Voluntary, Private-Sector Agreements

Private-sector voluntary agreements are a critical tool for addressing online infringement. Such agreements have, as the previous Joint Strategic Plan discussed, addressed online advertising, payment processors, and internet service providers. The IPEC should continue to facilitate, encourage and monitor these cooperative efforts to ensure effective approaches with timely follow through.

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<sup>11</sup> *Mid-Year 2018 RIAA Music Revenues Report*, Recording Indus. Ass’n of Am. (2018), <https://www.riaa.com/wp-content/uploads/2018/09/riaa-mid-year-2018-revenue-report.pdf>.

<sup>12</sup> Michael Bloom, *PwC Report: OTT Video Streaming Steams Ahead In 2017 With \$20.1 Billion In Revenue*, Forbes (June 5, 2018), <https://www.forbes.com/sites/dbloom/2018/06/05/streaming-video-2017-revenues-pwc-netflix-amazon-hulu/#6bf36c505edb>.

<sup>13</sup> Copyright Remedies, Hearing Before the Subcomm. on Courts, Intell. Prop. And the Internet of the H. Comm. on the Judiciary, 113th Cong. (2014) (statement of David Bitkower, Acting Deputy Assistant Attorney General, Dept. of Justice).

<sup>14</sup> *The Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 13–14 (2015) (statement of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office), <http://copyright.gov/laws/testimonies/042915-testimony-pallante.pdf>.

<sup>15</sup> DEPARTMENT OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013), <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>.

The IPEC should also consider initiating discussions to encourage the creation of voluntary agreements to improve the operation of the Digital Millennium Copyright Act (DMCA) safe harbors, found in Section 512 of the Copyright Act. Creators and copyright owners face persistent challenges protecting their work online. While Section 512 remains a workable legal framework, it is evident that the statute is under strain and that additional stakeholder collaboration would enable the statute to live up to its potential as imagined by Congress. When Congress enacted the safe harbor provisions of the DMCA, the intent was to “appropriately balance[] the interests of content owners, on-line and other service providers, and information users”<sup>16</sup> by incentivizing “service providers and copyright owners to cooperate to detect and deal with copyright infringement” online.<sup>17</sup> That balance has not been achieved. While ISPs are routinely shielded from liability under the DMCA, the problem of online copyright infringement has grown enormously since 1998, leaving copyright owners to bear the brunt of the burden—with little to show for it. The fact that copyright owners shoulder most of the burden of enforcing against infringement is not, standing alone, the primary problem. The primary issue is that, when they do take on that burden and send takedown notices, the notices have little if any effect, as the infringing material is often immediately reposted. This results in the burden being almost exclusively placed on the creative community, and that is far from the balance and cooperation that Congress intended.

Today not only are stakeholders grappling with tens of millions of notices a year,<sup>18</sup> but even worse, the business models employed by certain bad actors actually take advantage of problematic judicial interpretations of this statutory scheme. The consensus from our individual creator membership is that online infringement has reached a point where content can be posted on hundreds of online infringement sites within days, and where individual creators—without access to effective tools—are unable to make any real impact in protecting their work. Online infringement has become so commonplace that it destroys once legitimate markets for creators’ works.

We also ask the IPEC to continue to facilitate and encourage dialogue between copyright owners and domain name registrars and registries to address online infringement, as it pledged to do in its previous Joint Strategic Plan.<sup>19</sup> In particular, Trusted Notifier programs, such as those entered into between the MPAA and domain name registries Donuts and Radix, have proven effective at fighting online infringement.<sup>20</sup> We urge the IPEC to encourage additional domain name registries and registrars to implement similar Trusted Notifier Programs.

Congress recognized that cooperation would lead to the most beneficial, effective enforcement of the law, and it is time for stakeholders to take voluntary action. The IPEC can help facilitate that action.

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<sup>16</sup> H.R. REP. NO. 105-551, at 21 (1998).

<sup>17</sup> *Id.* at 49.

<sup>18</sup> Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution for a Twenty-First Century Problem*, Center for Protection of Intell. Prop. (Dec. 5, 2013).

<sup>19</sup> 2013 Joint Strategic Plan at 36.

<sup>20</sup> See *One Year Later: Trusted Notifier Program Proves Effective*, [Motion Picture Ass’n of Am.](https://www.mpa.org/press/one-year-later-trusted-notifier-program-proves-effective/), <https://www.mpa.org/press/one-year-later-trusted-notifier-program-proves-effective/>.

## **Safeguard Accountability and Transparency in the Domain Name System**

The accuracy and accessibility of WHOIS data is vital to members of the entire copyright community in their efforts to sustain and build a legal marketplace for digital works and investigate infringement of those works. Thus, we are concerned about any efforts that would limit the continued public availability of WHOIS data.

In particular, we hold concerns over recent changes made by ICANN to WHOIS in light of new European privacy rules. We strongly support ICANN's stated objective to ensure compliance with applicable law while maintaining the existing WHOIS system to the greatest extent possible. In May, the ICANN Board adopted a temporary specification for gTLD registration data in response to the European Union's General Data Protection Regulation (GDPR) going into effect. The temporary specification unduly limits access to most domain registration data from public WHOIS—making copyright enforcement much more difficult and online piracy much easier.

More specifically, the Board's temporary specification falls short of the requests and advice provided by the Intellectual Property Community and the Governmental Advisory Committee, and it goes beyond what the GDPR requires. For example, the temporary specification would not make the domain name registrant's email address public, it does not distinguish between legal and natural persons (the GDPR only applies to individuals, not organizations), and it does not distinguish between registrants living in or out of European countries where GDPR applies. In addition, the temporary specification creates a good deal of uncertainty regarding access to non-public data for legitimate purposes. Registrars and registries are required to provide reasonable access to non-public WHOIS data to third parties with legitimate interests upon request except where such interests are overridden by the interests or fundamental rights and freedoms of the registrant. Because of the lack of clarity on that standard (which comes from the language of the GDPR itself) responses from registrars and registries have been inconsistent at best.

Ensuring the continued public access to WHOIS data is a top priority for the copyright community. We urge the IPEC to continue to support this priority through ICANN's Governmental Advisory Committee and with stakeholders where appropriate. As the U.S. Trade Representative made clear in its 2014 report on notorious markets, "[T]he IPR enforcement system can break down when the tools available to rights holders become ineffective, due to, among other things, the failure of domain name registrars or other similarly situated entities to follow rules intended to help combat illicit activity."<sup>21</sup>

### **Observe How Other Countries Are Enforcing Copyright Laws, and Whether Those Enforcement Methods Are Effective**

Data and other information can be used to aid in the identification of enforcement challenges and the development of recommendations to effectively and efficiently address those challenges consistent with freedom of expression and due process. As we noted in our previous

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<sup>21</sup> U.S. TRADE REPRESENTATIVE, 2014 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 10 (2015).

submission to the IPEC, the experience of other countries in enforcing copyright laws is a helpful source of data that the IPEC could draw upon.

For example, according to the Motion Picture Association – Canada, “Over the last decade, at least 42 countries have either adopted and implemented, or are legally obligated to adopt and implement, measures to ensure that ISPs take steps to disable access to copyright infringing websites, including throughout the European Union, the United Kingdom, Australia, and South Korea.”<sup>22</sup> Research shows such measures can have significant effect on shifting users toward legitimate services, with one study finding that “blocking 52 sites in 2014 caused treated users to increase their usage of legal subscription sites by 10% and legal ad-supported streaming sites by 11.5%.”<sup>23</sup> In addition to learning what remedies are effective, much can be learned from other countries in ensuring such remedies are proportionate and do not result in overblocking or other unwanted consequences.<sup>24</sup>

## Sovereign Immunity

Creators and copyright owners should have the right to be compensated when their works are used by others, unless the use is authorized by law. They should also have remedies for when their rights are infringed, regardless of whether the alleged infringer is affiliated with state government or is part of the private sector. Congress recognized these principles when it enacted the Copyright Remedy Clarification Act (CRCA) in 1990, which provided that any State, State instrumentality, or officer or employee of the State or State instrumentality is liable to the same extent as any other party for copyright infringement.<sup>25</sup>

Since then, however, courts have cast doubt onto whether Congress validly abrogated States’ Eleventh Amendment sovereign immunity with the CRCA.<sup>26</sup> In 1999, the Supreme Court held the analogous Patent Remedy Clarification Act did not validly abrogate States’ Eleventh Amendment immunity from suits for patent infringement.<sup>27</sup> The Fifth Circuit subsequently applied the Supreme Court’s decision to the CRCA in *Chavez v. Arte Publico Press*.<sup>28</sup>

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<sup>22</sup> Motion Picture Ass’n – Can., *In the Matter of an Application Pursuant to Sections 24, 24.1, 36, and 70(1)(a) of the Telecommunications Act, 1993 to Disable On-Line Access to Piracy Sites* (Mar. 29, 2018), <https://torrentfreak.com/images/mpa-can.pdf>.

<sup>23</sup> Brett Danaher, Michael D. Smith & Rahul Telang, *The Effect of Piracy Website Blocking on Consumer Behavior* (Mar. 2018), <https://ssrn.com/abstract=2612063> or <http://dx.doi.org/10.2139/ssrn.2612063>.

<sup>24</sup> See Barry Sookman, *Fact checking Michael Geist’s criticisms of the FairPlay site blocking proposal*, nn.12-15 (Mar. 28, 2018), <http://www.barrysookman.com/2018/03/29/fact-checking-michael-geists-criticisms-of-the-fairplay-site-blocking-proposal/> (collecting cases).

<sup>25</sup> Pub. L. No. 101-553, 104 Stat. 2749 (1990).

<sup>26</sup> The Eleventh Amendment of the U.S. Constitution states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

<sup>27</sup> *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 US 627 (1999).

<sup>28</sup> *Chavez v. Arte Publico Press*, 204 F.3d 601 (5<sup>th</sup> Cir. 2000).



This development undermines the ability of copyright owners to seek redress for infringement. Congress passed the CRCA after hearing evidence that States had been engaged in a pattern of depriving copyright owners of their rights.<sup>29</sup> The public record shows that this pattern of deprivation continued after the Fifth Circuit’s *Chavez* decision.<sup>30</sup>

The Copyright Alliance has in recent years filed a number of amicus briefs in cases where allegations of copyright infringement have been brought against State instrumentalities to help courts understand how important it is that copyright owners can enforce their rights against State entities.<sup>31</sup> We’ve also observed what appears to be an uptick in litigation against State entities that have asserted sovereign immunity.<sup>32</sup>

In order to effectuate Congress’s intent with the CRCA and improve the enforcement environment for copyright owners, we ask the IPEC to conduct a study to determine the nature and extent of State infringement of copyrights and the harms it causes copyright owners (or to recommend such a study be carried out by an appropriate Federal agency). Such evidence is critical to establish a valid abrogation of State sovereign immunity by Congress under the Eleventh Amendment.<sup>33</sup>

### **American Law Institute Copyright Restatement**

Clear and consistent rules are essential to a well-functioning copyright system, and to the rule of law more generally. We call the IPEC’s attention to the American Law Institute’s (ALI) ongoing Restatement of Copyright project, which would inject uncertainty and confusion into copyright law. Founded as a private entity in 1923 with the mission “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work,” ALI

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<sup>29</sup> See U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights* (June 1988); *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings on H.R. 1131 Before the Subcomm. on Courts, Intellectual Prop. & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. (1990); *The Copyright Clarification Act: Hearing on S. 497 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 101st Cong. (1990).

<sup>30</sup> See General Accounting Office, *Intellectual Property: State Immunity in Infringement Actions: Report to the Hon. Orrin G. Hatch, Ranking Minority Member, Senate Judiciary Comm. 1-2* (Sept. 2001); *Hearing on Sovereign Immunity and the Protection of Intellectual Property Before the Senate Judiciary Comm.*, 107th Cong., 2d Sess. 91 (2002).

<sup>31</sup> See Brief for Copyright Alliance as Amicus Curiae supporting Oracle, *Oracle v Oregon* (Nos. 15-35950, 15-35975) (9th Cir.) (parties settled before the Ninth Circuit reached a decision); Brief for Copyright Alliance as Amicus Curiae supporting Appellees, *Allen v Cooper*, No. 17-1522 (4th Cir. 2018) (holding Congress did not validly abrogate the Eleventh Amendment when it passed the CRCA). On October 31, 2018, the Supreme Court granted an extension to appellant Allen to file a petition for cert; that deadline is January 6, 2019.

<sup>32</sup> *Bynum v. Texas A&M University Athletic Department*, No. 4:17-cv-00181 (S.D. Tex. 2018); *University of Houston System v. Jim Olive Photography*, 01-18-00534-CV (Tex. App. 2018).

<sup>33</sup> Courts look at whether Congress is responding to a “history of ‘widespread and persisting deprivation of constitutional rights’” to determine whether it can properly enact prophylactic legislation subjecting States to suit under §5 of the Fourteenth Amendment. *Florida Prepaid* at 645, citing *City of Boerne v. Flores*, 521 U. S. 507, 526 (1997).

is highly regarded among the judiciary and the bar, and its restatements on areas of the law such as property, torts, and contracts have been cited by courts thousands of times.

Unlike those projects, ALI's Copyright Restatement project, launched in 2015, departs dramatically from ALI principles and has drawn significant criticism from academics, practitioners, industry stakeholders, and expert agencies within the U.S. government itself. For example:

- Under Secretary of Commerce for Intellectual Property and Director of the USPTO Andrei Iancu wrote, "I believe that the copyright Restatement project as currently conceived will create more confusion than enlightenment."<sup>34</sup>
- US Copyright Office Acting Register of Copyrights Karyn Temple, wrote, "Ultimately, as thoughtful and ambitious as it may be, the Restatement project appears to create a pseudo-version of the Copyright Act that does not mirror the law precisely as Congress enacted it and one that will quickly become outdated as Congress amends it or the courts clarify it."<sup>35</sup>
- The American Bar Association Section of Intellectual Property Law wrote, "[T]he drafts to date . . . all raise serious concerns because they (i) present black letter text containing material differences from the Copyright Act itself, and (ii) fail to provide a balanced description of the current state of the law."<sup>36</sup>
- Columbia University Law School professors Jane Ginsburg and June Besek wrote, "We have had – and continue to have – significant concerns about the project and the work to date," and "the Reporters neglect copyright's constitutional role in promoting the progress of knowledge by fostering authorship and, instead, give undue priority to the exclusions from and barriers to copyright protection."<sup>37</sup>
- The Copyright & Literary Property Committee of the New York City Bar Association opposes the project, saying "United States copyright law is particularly ill-suited to summary and explanation in the form of a Restatement," and a restatement of copyright law "potentially undermines ALI's reputation for producing accurate explanations of the law."

Should this project proceed, it will inject uncertainty into the interpretation of the Copyright Act, which would undermine the ability of copyright owners to protect and enforce their rights. It is also likely that the ALI would turn to other areas of intellectual property, such as

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<sup>34</sup> Letter from Andrei Iancu, Under Sec'y of Com. for Intell. Prop. and Dir. of the USPTO to American Law Institute (Oct. 3, 2018) (not published).

<sup>35</sup> Robert Levine, *Acting U.S. Register of Copyrights Sounds Alarm Over Legal Group's 'Pseudo-Version of the Copyright Act'* (Jan. 1, 2018), <https://www.billboard.com/articles/business/8094962/register-copyrights-karyn-temple-claggett-letter-american-law-institute>; the full letter from Temple to the American Law Institute is available at [https://www.authorsguild.org/wp-content/uploads/2018/01/usco\\_ali\\_letter\\_council\\_draft\\_1\\_11618\\_final.pdf](https://www.authorsguild.org/wp-content/uploads/2018/01/usco_ali_letter_council_draft_1_11618_final.pdf).

<sup>36</sup> Letter from American Bar Ass'n, Intellectual Property Section, to American Law Institute (Oct. 3, 2018) (not published).

<sup>37</sup> Letter from Jane Ginsburg and June Besek, Colum. U. Law Sch. Profs., to American Law Institute (Oct. 10, 2018) (not published).

patents, for future restatement projects, causing the same issues. We ask that the IPEC join the USPTO and US Copyright Office in sharing its concerns with the ALI.

### **Conclusion**

The Copyright Alliance thanks the IPEC for soliciting our views for the development of its next Joint Strategic Plan. We look forward to continuing to collaborate with the IPEC and welcome the opportunity to participate further or answer any follow up questions.

Respectfully submitted,

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