

## COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY ON THE INTELLECTUAL PROPERTY ENFORCEMENT JOINT STRATEGIC PLAN

The Center for Democracy & Technology (CDT) submits these comments in response to the September 1, 2015 Federal Register notice requesting public input regarding the development of an updated Joint Strategic Plan on Intellectual Property Enforcement.<sup>1</sup> CDT is a non-profit, public interest organization dedicated to preserving and promoting openness, innovation, and freedom on the decentralized Internet.

These comments focus specifically on copyright enforcement. The growth of the Internet and new digital technologies has led to novel factual disputes and areas of legal uncertainty on copyright issues. Some of the more general principles set forth in these comments may be useful for other areas of intellectual property as well. However, those areas raise distinct issues that the Intellectual Property Enforcement Coordinator (IPEC) must take into account when determining how best to craft enforcement strategies and devote resources to them. For example, counterfeiting poses serious risks to health and safety that copyright infringement does not.

On copyright matters, CDT seeks balanced approaches to policy and enforcement that respects the rights of creators without curtailing the Internet's tremendous potential for fostering innovation and free expression. We support vigorous enforcement of existing copyright laws and view such enforcement as consistent with both innovation and free expression. However, the Joint Strategic Plan (JSP or Plan) should focus on tactics and practices that do not impose significant costs on innovation or constrain free expression. We remain concerned about the lingering perception that federal copyright enforcement and policy serve a narrow set of interests and discount important competing values, particularly in the area of international trade.

After discussing this perception and how to change it, these comments frame the remaining observations and suggestions in terms of the four principles first announced in CDT's 2010 comments<sup>2</sup> on the Plan:

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<sup>1</sup> Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement, 80 Fed. Reg. 52800 (Sept. 1, 2015), <http://www.gpo.gov/fdsys/pkg/FR-2015-09-01/pdf/2015-21289.pdf> ("Request for Comments").

<sup>2</sup> Written Submission of the Center for Democracy & Technology Re: Intellectual Property Enforcement Joint Strategic Plan (Mar. 24, 2010), [https://www.cdt.org/files/pdfs/CDT\\_comments\\_for\\_IPEC.pdf](https://www.cdt.org/files/pdfs/CDT_comments_for_IPEC.pdf).

- In the area of copyright, the Plan should target enforcement against true bad actors and avoid ratcheting up copyright protections across the board in a manner that would impair legitimate business activity and chill technological innovation and fair use.
- The Plan should not call for imposing new network-policing roles on Internet intermediaries.
- For copyright, the Plan should focus on effective and efficient use of existing tools, rather than seeking to increase penalties, expand the scope of copyright liability, or otherwise make substantive changes to the copyright regime.
- The Plan’s goal for copyright should be realistic: making participation in widespread infringement relatively unattractive and risky, compared to participating in legal markets.

Finally, these comments offer some thoughts on the IPEC’s call for “transparency, accountability and data-driven governance.”<sup>3</sup> A data-driven enforcement policy that balances copyright enforcement with innovation and free expression is essential to effectively allocating enforcement resources and avoiding duplication of efforts. Openly, transparently, and accurately assessing the costs and benefits of copyright enforcement should be a central goal of the JSP.

## **I. Transparency and Balance Should Be Core Principles of the Joint Strategic Plan**

### **A. There Is Still a Perceived Lack of Balance in Federal Copyright Enforcement and Policy**

CDT’s previous comments on the JSP observed that one lingering outcome of the debate over the Stop Online Piracy Act (SOPA) was the “widespread public perception that the Federal Government’s approach to copyright policy serves a narrow set of corporate interests and pays little attention to the ways those interests are sometimes in tension with other important values such as free expression, due process, or Internet freedom.”<sup>4</sup> That perception persists and not entirely without reason. For example, the Solicitor General still tends to file in support of rightsholders in high-profile copyright cases between private litigants.<sup>5</sup>

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<sup>3</sup> Request for Comments at 52801.

<sup>4</sup> Written Submission of the Center for Democracy & Technology Re: Intellectual Property Enforcement Joint Strategic Plan (Aug. 2012) at 4, <https://cdt.org/files/pdfs/CDT%20IPEC%20comments%208-2012.pdf> (“2012 Comments”).

<sup>5</sup> See, e.g., Brief for the United States as Amicus Curiae Against Petition for Writ of Certiorari, *Google Inc. v. Oracle America, Inc.*, No. 14-410, (cert. denied June 29, 2015), <http://www.justice.gov/sites/default>

CDT has recommended a number of measures that the IPEC could take to ensure a more balanced approach to copyright enforcement and policy. These included rigorously assessing a policy's likely effectiveness and its collateral impact on legitimate content and entities, clarifying policies and guidelines regarding criminal prosecutions to minimize the risk of inadvertent collateral damage, increasing transparency in trade negotiations, and creating a process to consider user-focused reforms for new policies, legislation, or trade agreements.<sup>6</sup> Although some of these considerations appear in the Department of Commerce's July 2013 Green Paper, "Copyright Policy, Creativity, and Innovation in the Digital Economy,"<sup>7</sup> there is more that could be done. For example, CDT's comments to the Green Paper recommended creating a set of guidelines for courts to consider when assessing statutory damages.<sup>8</sup> The IPEC could play a key role in that undertaking.

## **B. The Lack of Transparency in the Negotiation of Trade Agreements Provisions Related to Copyright Is Not Sustainable**

The 2013 Joint Strategic Plan called for greater transparency in international negotiations and intellectual property policymaking generally.<sup>9</sup> In the trade context, that call appears to have gone unheeded. Civil society organizations must rely on leaked texts to determine what a trade agreement holds in store for the interests and values they represent, and have few avenues to act on what they find. It is simply unrealistic to expect such organizations, many of which are thinly resourced, to join an industry trade advisory committee (on which they would be heavily outnumbered) or travel to negotiating rounds, intersessional meetings, and stakeholder forums held around the world. The chilly reception that the now-concluded Trans-Pacific Partnership (TPP) agreement's intellectual property provisions have received from civil society is as much a reaction to the way the agreement was negotiated as the substance of the agreement itself.

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[/files/osg/briefs/2015/06/01/14-410\\_google\\_v\\_oracle\\_us\\_cvsg\\_brief.pdf](#); Brief for the United States as Amicus Curiae Supporting Petitioners, *American Broadcasting Companies Inc. v. Aereo, Inc.*, No. 13-461, [http://www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2013-0461\\_mer.ami.pdf](http://www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2013-0461_mer.ami.pdf).

<sup>6</sup> 2012 Comments at 5-12.

<sup>7</sup> Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy*, July 2013, <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>.

<sup>8</sup> Comments to the US Commerce Dep't Internet Policy Task Force Copyright Policy, *Creativity, and Innovation in the Digital Economy*, at 10 (Nov. 13, 2013), <https://cdt.org/files/pdfs/CDT%20Comments%20on%20Copyright%20Green%20Paper.pdf>

<sup>9</sup> 2013 Joint Strategic Plan on Intellectual Property Enforcement (June 2013), <https://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf>, at 15 [2013 JSP"].

If the rationale for conducting negotiations behind closed doors is that full transparency is not conducive to the successful negotiation of trade agreements, then we need to reconsider whether trade agreements are an appropriate vehicle for crafting and implementing copyright policy and enforcement. As stated in CDT’s 2012 comments, “this is an area in which the details of actual language matter a great deal.”<sup>10</sup> Provisions on term extension or anti-circumvention liability can take works out of the public domain or cast shadows of legal risk on activity considered valuable or even necessary by consumers and innovators. On such matters, the public needs more than high-level descriptions and an uncertain or burdensome avenue for direct engagement. CDT therefore renews its call for greater public opportunities to access and comment on the actual text of proposals or, alternatively, dramatically scaling back the use of trade negotiations to resolve major copyright questions.

## **II. Targeting Enforcement on Truly Bad Actors and Clear-cut Cases**

CDT’s previous comments on the JSP suggested focusing enforcement resources and efforts on truly bad actors, while avoiding collateral damage to innocent users and innovators. Of particular concern are domain seizures pursuant to powers granted by the PRO-IP Act.<sup>11</sup> Through “Operation in Our Sites,” Immigration and Customs Enforcement (ICE) has seized thousands of domain names for alleged copyright infringement, in some cases relying almost entirely on information provided by rightsholders or failing to provide adequate notice or process for the owner of the site to challenge the seizure.<sup>12</sup> Unlike the notice-and-takedown regime of the Digital Millennium Copyright Act (DMCA), which targets specific infringing content, domain name seizures can remove entire websites, or groups of websites, that contain both infringing and noninfringing content. Overbroad seizures present serious concerns with respect to free expression and due process.

It is unclear to what extent enforcement initiatives have taken into account the continued migration to cloud-based services. Questions about the possibly unintended effects of the seizure of cloud computing resources surfaced following the 2012 seizure of Megaupload, and remain unanswered. Three years on, one Megaupload user represented by the Electronic Frontier Foundation is still asking for his files back.<sup>13</sup> Overbroad seizure of cloud computing resources may also arise in the context of trade secrets. The

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<sup>10</sup> 2012 Comments at 10.

<sup>11</sup> 18 U.S.C. § 2323(a)(1)(A).

<sup>12</sup> See Ben Sisario, *Music Web Sites Dispute Legality of Their Closing*, N.Y. Times (Dec. 19, 2010), <http://www.nytimes.com/2010/12/20/business/media/20music.html>.

<sup>13</sup> Vera Ranieri, Electronic Frontier Foundation, “Once Again, Megaupload User Asks Court for His Files Back,” <https://www.eff.org/deeplinks/2015/08/once-again-megaupload-user-asks-court-his-files-back>.

“Defend Trade Secrets Act,” introduced by Senator Hatch in July of this year, creates an avenue for private parties to seek a seizure order to prevent disclosure of trade secrets.<sup>14</sup> The legislation appropriately directs the court to limit seizure orders to “the narrowest seizure of property necessary” and requires that “the seizure be conducted in a manner that minimizes any interruption of the business operations of third parties[.]”<sup>15</sup> Nonetheless, there is a risk that the property seized contains the data of multiple parties, some of whom are engaged in entirely legitimate conduct that relies on shared computing resources. The Plan should address how to properly conduct seizures so as to minimize their potential impact on innocent parties and legitimate content.

### **III. The Joint Strategic Plan Should Not Call for New Policing Roles for Intermediaries**

The importance of Section 230 of the Communications Act and Section 512 of the DMCA to free expression and innovation on the Internet cannot be overstated. The United States owes its position as a global leader in Internet commerce and innovation in part to the legal certainty these statutes give to intermediaries regarding the ability to provide services, conduits, and forums that allow users to create new content, and access and comment on other user-generated content. CDT’s 2012 comments cautioned strongly against saddling Internet service providers or search engines with “gatekeeping” or surveillance functions that would disempower users or create new obligations and liabilities for the services on which they depend.<sup>16</sup> Although some intermediaries do use automated content filtering, the decision whether to do so should be a matter of choice rather than legal compulsion.

Issues of site blocking and similar enforcement remedies are arising in new venues, including the International Trade Commission (ITC). Following the ITC’s *Certain Digital Models* decision<sup>17</sup> interpreting the ITC’s exclusion authority to reach digital “articles” transmitted via the Internet, some rightsholders may be contemplating using ITC exclusion orders as a way to block traffic from foreign websites with infringing content.<sup>18</sup> As detailed more fully in comments filed jointly with Public Knowledge and

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<sup>14</sup> Defend Trade Secrets Act of 2015, S.1890, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1890/text>.

<sup>15</sup> Defend Trade Secrets Act, § 2(a) (amending 18 U.S.C. § 1836 with new section (b)(2)(B)(ii)).

<sup>16</sup> 2012 Comments at 3.

<sup>17</sup> *In re Certain Digital Models, Digital Data & Treatment Plans for Use in Making Incremental Dental Positioning Adjustments, the Appliances Made Therefrom, & Methods of Making the Same*, Inv. No. 337-TA-833, slip op. at 55 (U.S. Int’l Trade Comm’n, Apr. 9, 2014).

<sup>18</sup> See Russell Brandom, *The MPAA has a new plan to stop copyright infringement at the border*, (January 2, 2015) available at <http://www.theverge.com/2015/1/2/7481409/the-mpaa-has-a-new-plan-to-stop-copyright-violations-at-the-border>.

other organizations, the use of the ITC’s statutory authority to require Internet service providers to block website traffic would pose the same risks as carrying out that remedy through new legislation. It would also conflict with the Administration’s “broader Internet policy principles emphasizing privacy, free speech, competition, and due process.”<sup>19</sup>

Some rightsholders are also looking to the International Corporation of Assigned Names and Numbers (ICANN) as a forum in which domain name registrars may be conscripted into the fight against online copyright infringement. The USTR’s *2014 Out-of-Cycle Review of Notorious Markets* for the first time listed a registrar as a notorious market based on its failure to take action when notified of infringing content on websites that registered domains through that registrar.<sup>20</sup> The registrar in question landed on the Notorious Markets List in part because it was deemed to be out of compliance with the Registration Accreditation Agreement (RAA) that each registrar enters into with ICANN. In the current cycle, rightsholders have once again nominated a registrar for the Notorious Markets List based on its failure to “take action” against the registrar’s clients pursuant to the RAA. Requiring registrars to take action against their clients saddles them with vague but unavoidable obligations to police the activity of websites. Invoking the RAA for that obligation also thrusts ICANN into an unwanted role in policing Internet content.<sup>21</sup>

Clarification from the IPEC that the Plan does not envisage such a role for ICANN could remove one potential source of concern from what is already a complicated transition of the Internet Assigned Numbers Authority. More broadly, a clear statement that the Joint Strategic Plan is not intended to alter any Internet intermediaries’ obligations or immunities would be welcome by innovators and the user community.

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<sup>19</sup> See Comments of Public Knowledge, et. al., *In re: Development of the Joint Strategic Plan on Intellectual Property Enforcement*, FR Doc. 2015-21289, (October 16, 2015) at 5.

<sup>20</sup> United States Trade Representative, *2014 Out-of-Cycle Review of Notorious Markets*, March 5, 2015, at 12, available at [https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20-%20Published\\_0.pdf](https://ustr.gov/sites/default/files/2014%20Notorious%20Markets%20List%20-%20Published_0.pdf).

<sup>21</sup> See Allen R. Grogan, ICANN Chief Contract Compliance Officer, “ICANN Is Not the Internet Content Police, June 12, 2015, available at <https://www.icann.org/news/blog/icann-is-not-the-internet-content-police>.



#### **IV. The Joint Strategic Plan Should Prioritize the Efficient Use of Existing Tools and Voluntary Efforts to Combat Copyright Infringement**

##### **A. Coordinating the Efforts of Federal Agencies and Authorities**

As detailed in the 2013 Joint Strategic Plans, the IPEC has performed significant work to harmonize the efforts of IP enforcement staff and projects and build further capacity for such efforts.<sup>22</sup> The sheer number of departments and agencies involved in these efforts is daunting. For example, the interagency working group is comprised of representatives from “DOC (USPTO, ITA, and CLDP), DOS (EB and INL), and USAID, the Department of the Treasury, DOJ (CCIPS, FBI, and the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT)), DHS (CBP and ICE), USTR, and the Copyright Office[.]”<sup>23</sup> CDT supports the IPEC’s efforts to coordinate cross-agency efforts, eliminate duplication, and to better track resource allocations for intellectual property enforcement.

Again, those efforts and resources should focus on genuine bad actors and prioritize violations of intellectual property laws that pose a risk to public health and safety. The Plan should not task this interagency working group with proposing or evaluating changes to substantive copyright law. It is unclear that an interagency group focused primarily on enforcement can appropriately balance the need for effective enforcement with the equally important need to promote innovation and free expression in the digital environment.

##### **B. Cooperation and Transparency in Voluntary Enforcement Efforts**

The 2013 JSP highlighted the Administration’s approach of encouraging the private sector to implement cooperative and voluntary initiatives to reduce infringement.<sup>24</sup> Payment processors, advertising networks, websites, and search engines have undertaken such initiatives, sometimes working in concert and sometimes on their own. CDT supports such efforts and believes they can form an essential part of the Joint Strategic Plan. At the same time, such efforts must remain transparent, flexible, and genuinely voluntary. As CDT noted in its 2012 comments, voluntary private action may be less transparent than government action, making it more difficult to evaluate and respond reasonably to whatever actions are taken.<sup>25</sup>

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<sup>22</sup> 2013 JSP at 22-23.

<sup>23</sup> *Id.* at 23.

<sup>24</sup> *Id.* at 35.

<sup>25</sup> 2012 Comments at 12.

Transparency is particularly important when it comes to automated filtering or graduated response mechanisms. The possibility of unilateral action or a voluntary agreement leading to automated removal of information from the Internet inherently raises free expression concerns. And there have been clear cases of automated content identifiers malfunctioning.<sup>26</sup> The Plan should encourage transparency in reporting on the implementation and operation of automated content filtering.

Similarly, any graduated-response mechanism should be open to review. Initiatives like the Center for Copyright Information's (CCI) Copyright Alert System can educate users about digital copyright, deter infringement, and encourage the use of legal alternatives. At the same time, graduated responses involving degrading connections or redirecting users deemed repeat offenders implicate issues of free expression, privacy, due process, and proportionality. CCI states that it uses a "rigorous process ensur[ing] the content identified is definitely protected by copyright and that the notice is forwarded to the right Subscriber" before sending an Alert to the user.<sup>27</sup> Such rigor is essential for any graduated response mechanism.

## **V. The JSP Should Maintain a Realistic Focus on Reducing Infringement, Increasing Education, and Encouraging Legal Alternatives**

It is unrealistic to expect that copyright infringement will vanish entirely from the digital, Internet-enabled world. The PRO IP Act's focus on reducing -- rather than eliminating -- infringing goods from the supply chain is entirely appropriate.<sup>28</sup> Willful infringement on a massive scale is the most appropriate target for coordinated enforcement actions. For individual, incidental, or accidental infringers, the Plan should emphasize education and the promotion of legal channels for content to make illegal alternatives appear riskier and less attractive by comparison.

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<sup>26</sup> See, e.g., Sam Machkovech, "DMCA takedown laser brings down Vimeo videos with 'Pixels' in the title," *Ars Technica*, Aug. 9, 2015, <http://arstechnica.com/tech-policy/2015/08/dmca-takedown-laser-brings-down-vimeo-videos-with-pixels-in-title/>.

<sup>27</sup> "What Is A Copyright Alert?" Center for Copyright Information. <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/>.

<sup>28</sup> Prioritizing Resources and Organization for Intellectual Property (PRO IP) Act of 2008, Pub. L. No. 110-403 (2008), § 303(a)(1).



## **A. Government-Sponsored and Voluntary Education Efforts**

The 2013 Plan appropriately placed emphasis on public awareness about copyright generally and also education on the issue of fair use.<sup>29</sup> Education can be a central component of voluntary efforts to deter piracy. For example, CCI makes a number of educational resources available on general copyright policy matters as well as specific, practical guidance to deter unwitting facilitation of copyright infringement via unsecured Wi-Fi routers.<sup>30</sup>

The Copyright Office's Fair Use Index was a significant undertaking that created a valuable resource for academics, policymakers, and individual creators with questions about what prior cases may say about their intended use of copyrighted works.<sup>31</sup> Given the highly contextual nature of fair use, the ability to consult relevant precedent is helpful. For the same reason, forward-looking guidance for specific types of uses is important. To this end, libraries and other institutions have promulgated best practices tailored to potential uses of works most relevant to the communities they serve.<sup>32</sup> The JSP should encourage the further development of such resources.

## **B. Legal Alternatives to Copyright Infringement**

Providing legal means to access works may be one of the most effective means of diverting users from illegal ones. When services such as Spotify and Netflix launch in new markets, copyright infringement tends to decrease.<sup>33</sup> Connecting users to legal sources is as important as deterring the use of illegal ones.

Of course, those services must exist in the first place. While CDT filed in support of neither party in the *Aereo* litigation,<sup>34</sup> the case points to a significant issue that arises repeatedly when our copyright system confronts emerging digital technologies. Those technologies give users new abilities to access works in the time and place, and on the device of their choosing. However, laws and licensing arrangements can make it legally impermissible to do what is technologically possible and desirable. The Joint Strategic

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<sup>29</sup> 2013 JSP at 18.

<sup>30</sup> Center for Copyright Information, "Resources & FAQ," <http://www.copyrightinformation.org/resources-faq/>.

<sup>31</sup> U.S. Copyright Office Fair Use Index. Last updated September 2015. <http://copyright.gov/fair-use/>.

<sup>32</sup> See, e.g., Association of Research Libraries et al., Code of Best Practices in Fair Use for Academic and Research Libraries (2012), available at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

<sup>33</sup> See, e.g., Janko Roettgers, "Charts: How Spotify is killing music piracy," GigaOm, Jul. 18, 2013, <https://gigaom.com/2013/07/18/charts-how-spotify-is-killing-music-piracy/>.

<sup>34</sup> *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

Plan should consider whether there are ways, short of legislation, to encourage rightsholders and service providers to cooperate on efforts to expand user choice in accessing content.

## **VI. Transparency, Accountability, and Data-Driven Governance Are an Appropriate Focus of the Strategic Plan**

CDT supports the IPEC's focus on transparency, accountability, and data-driven governance in the formulation of the next strategic plan.<sup>35</sup> Enhanced information sharing and open access to datasets is central to furthering those objectives. The Government Accountability Office's (GAO) April 2010 *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods* noted that it could not substantiate the results of three widely cited government reports on the costs of counterfeiting because the underlying data was unavailable.<sup>36</sup> Two years later, the lack of data on matters such as substitution rates between infringing and non-infringing content obstructed the GAO's own efforts to quantify the cost of counterfeiting and infringement.<sup>37</sup> Both rightsholders and online services may have useful data regarding fluctuations in the use and sale of services or content that could help quantify infringement's impact on legal services and, conversely, the impact of new legal services on infringement. The Plan should encourage the sharing of those data on an entirely voluntary basis.

The IPEC might also consider ways to encourage more entities to issue transparency reports. Google, Twitter, Tumblr and other Internet commerce companies regularly release reports that quantify both government information requests and copyright and trademark actions. Other entities might be more inclined to do so if they were certain that the information could not be used to derive conclusions about business practices or market share.

To be clear, CDT does not propose that the IPEC's office collect this information itself. Any information voluntarily shared should be aggregated, anonymized, and maintained by a non-governmental custodian adhering to strict privacy and data security practices. However, the IPEC (or a designee) can provide a clearinghouse for information on the government's own intellectual property enforcement efforts. More granular and open

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<sup>35</sup> Request for Comments at 52801.

<sup>36</sup> Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods, Government Accountability Office, April 2010. <http://www.gao.gov/new.items/d10423.pdf> at 18.

<sup>37</sup> Intellectual Property: Insights Gained from Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods, Government Accountability Office, July 2013. <http://www.gao.gov/assets/660/655781.pdf> at 8.

data on enforcement efforts may help both the IPEC and interested observers determine whether resources are being deployed efficiently and fairly.

## **Conclusion**

The Center for Democracy & Technology appreciates the opportunity to submit these comments on the Joint Strategic Plan. CDT believes that the IPEC's work can further an effective, balanced approach to intellectual property enforcement that respects the rights of creators as well as the public's interest in innovation and free expression. We look forward to working with the IPEC on this objective.

Respectfully submitted,

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