I. Commentator Information

These comments are submitted by the Institute for Intellectual Property and Social Justice (IIPSJ) by its Director, Prof. Lateef Mtima, and IIPSJ’s Associate Director for International Programs, Prof. Steven D. Jamar, in response to the request of Daniel H. Marti, United States Intellectual Property Enforcement Coordinator, Executive Office of the President, for Public Comments Regarding Development of the third Joint Strategic Plan on Intellectual Property Enforcement, as published in the Federal Register, Vol. 80, No. 169 /Tuesday, September 1, 2015 (FR Doc. 2015–21289). IIPSJ was established to address the social justice implications of intellectual property law and policy both domestically and globally. IIPSJ’s work ranges broadly and includes scholarly examination of intellectual property law from the social justice perspective; advocacy for social-justice aware interpretation, application, and revision of intellectual property law; efforts to increase the diversity of those who practice IP law; and programs to empower historically and currently disadvantaged and marginalized communities to exploit IP effectively.

II. General Comments

The Need for a Social Justice Approach to IP Enforcement

Intellectual property is the most valuable natural resource of the Information Age. The United States is a global leader in intellectual property development and dissemination, and a robust intellectual property system is vital to our nation’s cultural progress and economic growth. Even more important, the American exemplar of an IP regime expressly designed to promote the advancement of culture and the stimulation of useful innovation, particularly through inclusion of mechanisms such as the Fair Use Doctrine which preserve society’s interest in a socially balanced IP system, sets the global standard for a productive and
Some prevailing IP enforcement policies, however, obscure and even frustrate the social utility goals which underlie the American IP system. One-sided and myopic viewpoints and characterizations of important IP developments and controversies frequently curtail the beneficial impact of our IP regime.

In the field of patents, the current debates which surround patent assertion entities ("PAEs"), often pejoratively labeled as "patent trolls," present an important example. While some PAEs acquire patent rights in order to implement socially unproductive and extortionate business models, many critics and commentators overlook the challenges faced by many legitimate small and historically marginalized innovators who lack access to the financial capital and other resources needed to commercialize their patented inventions. Many of these inventors could barely afford the cost of obtaining a patent, and then discover that this expense is only a fraction of the total costs involved in bringing their inventions to market. For those who are unable to raise the necessary investment capital, the opportunity to see their inventions produced in the commercial marketplace remains an unfulfilled entrepreneurial dream. Labeling them (and those who may be willing to share the financial burden of enforcing their rights) as IP pariahs, simply because they assert the same rights which other patent holders exploit, defend, and sometimes even misuse, is a double injustice.

In the field of copyrights, the rights of authors to terminate their copyright agreements are granted by law but are far too often stymied by music recording companies and other institutional licensees. Disingenuous mischaracterizations of license agreements as work-for-hire relationships, combined with debilitating litigation tactics, not only frustrate the legislative intention to level the bargaining field between authors and corporate licensees, but also exacerbate the pecuniary injustices characterized by questionable royalty accounting and payment methodologies. These injustices ultimately diminish incentives for artists to create works and to disseminate their creative output widely for the benefit of everyone.

In the field of publicity rights, the Ninth Circuit United States Court of Appeals has properly held that the National Collegiate Athletic Association’s student athlete recruitment and non-compensation scheme violates the federal antitrust law. Nonetheless the court concluded that any compensation to student athletes for the exploitation of their likenesses, including even token, deferred trust fund compensation, is impermissible because it is somehow inconsistent with the NCAA’s amateurism policies. This so-called “amateurism” is a multi-billion dollar American business enterprise that many profit from—including universities, television networks and other media outlets, advertisers and advertising agencies, and many more—but not the student athletes whose rights and abilities the entire structure depends upon. Thus, while the IP rights and interests of universities and colleges are beneficially exploited and when necessary, vigorously protected by the courts, those same courts support depriving students of their recognized IP interests.
These and other examples of IP social injustice fuel a public perception of the national IP enforcement policy as nothing more than corporate protectionism intended to preserve entrenched IP commoditization interests and business models. American IP enforcement policy must incorporate and reflect the social justice ideals of equitable access, inclusion, and empowerment if it is to command the public respect and further the social goals which underlie the IP law. Policies which protect and expand corporate and institutional interests, while ignoring both vital social needs and blatant social injustice, only weaken public regard for the IP system, and ultimately diminish our nation’s ability to compete and to lead in the global IP marketplace.

III. Specific Comments

a. Internet Neutrality and Its Importance for Intellectual Property Development, Protection, and Dissemination

Net neutrality is important for new entrants that lack the resources of established large companies which can otherwise secure “sweetheart deals” to obtain favored treatment, such as faster, guaranteed throughput and generally superior service. The “undiscovered” artist, composer, or writer, and the small or marginalized entrepreneur need the same access to the Internet as large companies, such that their websites and content are not discriminated against by online service providers or Internet service providers. The FCC’s 2015 rules on net neutrality are a positive step that must be defended and embraced.

As new technologies are developed, as online services, resources, and products, including those dependent upon copyright, trademark, publicity rights, and patent output, proliferate and transmute, the regulatory framework and standards must keep pace. Non-discrimination with respect to access and distribution of content through the Internet remains the central value to be protected. At the same time, provision of service at the receiving end also matters, and choking download bandwidth discriminatorily among households is counter-productive. As with other public utilities, including landline telephony and electrical power, the general quality of service should not depend on where you live or your ability to pay for basic services. The regulators should guard against creating an Internet slow lane based on economic status.

Of course vigilance against discrimination on the basis of content must be maintained. Freedom of expression of ideas must be maintained on the Internet. The connection to intellectual property is tight, especially with respect to copyrighted material which conveys a controversial message. In short, socially equitable enforcement of IP rights today requires recognition of the importance of the modes of dissemination, especially the Internet.

b. Trans-Pacific Partnership Implementation Concerns

SOPA and PIPA were properly repudiated by the American public. These legislative measures which would have undermined intellectual property social utility must not be
allowed “back door reentry” through international treaties. If portions of the Trans-Pacific Partnership (“TPP”) are interpreted and applied in certain ways that the language could be construed to allow, that is precisely what could happen.

The TPP provisions on Fair Use and the ability of signatories to adopt and apply that doctrine and other copyright social balancing mechanisms are particularly susceptible to repressive interpretation and implementation. Consequently special care must be taken to insure that what is intended to open markets, protect content, and support dissemination of copyrighted and other IP works does not have the opposite effect. From a social justice perspective, the treaty language itself is less than desirable, albeit the language does provide for a range of implementation and forms of enforcement. Those interpretations and implementations that are more generous toward Fair Use, both its use and its adoption by signatory nations, as well as those interpretations and implementations which promote and preserve similar social balancing mechanisms such as fair dealing and copyright limitations and exceptions, should be the ones adopted.

Thus in implementing the TPP, if it is accepted by Congress, the Executive Branch must take care to interpret and implement it in ways that preserve the social justice concerns of access, inclusion, and empowerment in the development, protection, and dissemination of intellectual property.

IV. Strategic Recommendations

Effective IP enforcement must achieve more than the preservation of individual property rights: it must promote respect for and participation in the IP system. In prior public comments we have stressed that the “IP cop on the beat” should be revered as a symbol of justice and not merely tolerated as a representative of the state’s authority, or worse, considered a tool of the advocates of an unbalanced approach to protecting their IP. Commensurate with these values, IP enforcement policy must encompass protection for users’ interests, especially Fair Use and other rights to use and build upon intellectual property, and must not be limited to protection for economic incentives and commodification interests.

Federal IP enforcement initiatives and policies must also be non-partisan both in practice and in appearance. The Office of IPEC should coordinate with the Department of Justice and other government agencies to publicly condemn and redress institutionalized infringement upon the rights of marginalized artists, inventors, student athletes, entrepreneurs, and others who lack the bargaining power or financial resources to protect their interests. Such public initiatives could accomplish much toward reassuring the American public that the national IP enforcement apparatus serves all IP constituents, and is not a private police force protecting corporate IP interests. Similarly, the TPP should be deployed to assist American small and medium enterprises to reach foreign markets, as well as being used to advance international economic interests of major IP conglomerates.
Community grassroots IP education, outreach, and data collection and analysis initiatives in historically marginalized and underserved communities is essential to an enforcement schema that engenders new and inclusive generations of contributors to the storehouse of ideas. Toward the same ends, education and training as to the benefits of a socially balanced IP infrastructure, particularly the adoption of flexible social balancing mechanisms such as Fair Use, should be made available to countries that are developing and/or reevaluating their IP regimes, to promote understanding and respect for American IP values and mores, and to expand and diversify the community of nations dedicated to a stable, and social responsible, global IP system.

Finally, progressive enforcement policies anticipate future needs and opportunities, including the benefits to be had from innovative applications of intellectual property and evolving capabilities for producing new and different kinds of expressive and useful works. Many of the technological advances of the past century flourished under innovation-conducive legal measures such as the safe harbor provisions of the Digital Millennium Copyright Act. The proliferation of the Internet increased access to knowledge and information, introduced new conduits for expressive dissemination and exchange, and enhanced opportunities for private individuals to interact with commercially distributed and other IP output in non-passive ways. New channels for goods and services distribution emerged, opening opportunities for economic independence and advancement through entrepreneurial endeavor, especially in marginalized communities. Care must be taken to avoid crippling technological innovation and new methods of entrepreneurial exchange as the means for redressing special interest infringement concerns.

V. Concluding Comments

Efficacious IP enforcement is dependent upon socially just interpretation and application of IP law and policy. Notwithstanding the efforts of some major IP rights holders to blur the lines between private commercial agendas and genuine societal enforcement concerns, IP enforcement directives must reflect core values of human development, welfare, and dignity. American IP enforcement policy should be as socially balanced as the system and rights it is intended to preserve.

Respectfully Submitted,

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