



# **INSTITUTE FOR INTELLECTUAL PROPERTY & SOCIAL JUSTICE, INC.**

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DIRECT DIAL: 202 806-8012  
EMAIL: [LMTIMA@IIPSJ.ORG](mailto:LMTIMA@IIPSJ.ORG)  
FAX: 202-806-8428

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## **IIPSJ Comments on IP Enforcement by the Federal Government**

These comments are submitted by the Institute for Intellectual Property and Social Justice (IIPSJ) by its Director, Lateef Mtima, Professor of Law, Howard University School of Law, in response to the Request of the Intellectual Property Enforcement Coordinator, Victoria A. Espinel, for Public Comments Regarding Development of the Joint Strategic Plan on Intellectual Property Enforcement, as published in the Federal Register, Vo. 77, No. 123, p. 38088, Tuesday, June 26, 2012 (FR Doc. 2012-15477). IIPSJ was founded in 2002 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.

### **Restoring Respect for the American IP Regime: A Social Justice Approach to IP Enforcement**

Respect for American intellectual property rights is critical to American economic and cultural interests. American citizens and others will respect an intellectual property regime which they believe is fair and socially productive. Unfortunately, much of the current American IP law and enforcement policy is perceived by many as no more than corporate protectionism, designed to preserve entrenched IP commoditization interests and business models at the expense of IP social utility and social justice. While such characterizations may not accurately reflect the views and objectives of those who actually make and implement American IP law and policy, as long as these perceptions of American IP enforcement objectives persist, the efficacy of the American IP regime is imperiled.

The technological advances of the past century made it possible for individuals to experience and enjoy all kinds of intellectual property in unprecedented ways. Through digital information technology private individuals began to interact with commercially distributed IP output in non-passive ways, which in turn sparked discovery of new methods for using and re-

using pre-existing material to produce new works and even new forms of intellectual property. Through the Internet, many Americans enjoyed increased access to knowledge and information, as well as new channels for goods and services distribution and source identification, improving not only their quality of life as consumers but also presenting new opportunities for economic independence and advancement through entrepreneurial endeavor. Beyond our borders, people in many non-Western and developing nations gained broader access to American intellectual property and culture and found new ways to share and exploit their own indigenous knowledge and creative expression, enabling them to educate others about their aesthetic customs, utilitarian practices, and cultural beliefs while furthering their socio-political empowerment and economic uplift.

Unfortunately the intellectual property viewpoints of some major IP rights holders have not kept pace with these changes in the IP social landscape. Rather than evolving their perspectives to adapt to contemporary social obligations and opportunities, these rights holders have calcified their positions into an antediluvian stance of “IP Imperialism”, seeking not only to reinforce their control over traditional IP markets, but to extend it to the new IP frontiers. In their campaigns to expand their IP empires, even the most compelling social utility mandates for IP production, access, and dissemination are ignored, while short term business advantages are pursued at the expense of the nation’s overarching IP goals and aspirations.

In response, the American public has proven itself unwilling to subordinate its interest in IP social utility to commoditization priorities and business models. A burgeoning American IP social consciousness has ignited a national grassroots movement to restore the public interest to the core of American IP policy. A vociferous melting pot of IP stakeholders has demanded primacy for the Constitution’s intellectual property mandates of cultural and innovative progress, leading to the defeat of corporate protectionist stratagems such as the Protect IP Act and the Stop Online Piracy Act. And in the developing world, pandemic health threats, famine, illiteracy, and other legacies of Western colonialism continue to cause many to view American IP policies with skepticism and even antipathy. Absent a clear demarcation between corporate commoditization objectives and national IP interests, implementation of American IP law and enforcement policies will remain a Sisyphean challenge both at home and abroad.

## **Strategy Recommendations**

Effective IP enforcement achieves more than the preservation of individual property rights: it engenders faith in the IP system as a whole. Much the same as mechanisms employed to preserve local law and order, American IP enforcement policy should be perceived as a means for protecting legitimate national interests and enhancing the stability of the entire global community. 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.

Federal IP enforcement initiatives and policies must be domestically non-partisan both in practice and in appearance. The efforts of some major rights holders to characterize all unauthorized IP use as piracy blur the lines between private commercial agendas and genuine societal enforcement concerns and must be adamantly rebuked. Moreover, particular care must

be taken to avoid crippling technological and other methods of knowledge and information dissemination and entrepreneurial exchange as a means for redressing special interest infringement concerns. The technological integrity of the Internet must remain uncompromised. Progressive enforcement policies anticipate future needs and opportunities, including the benefits to be had from innovative applications of intellectual property and new and different kinds of contributions to the national store of creative works and utilitarian knowledge, especially those from marginalized and underserved communities. Such opportunities can only be preserved, however, by protecting common means of information and cultural exchange, and by pursuing symbiotic IP enforcement relationships with all IP constituencies and stakeholders and not only the established IP elite.

In implementing IP enforcement directives, human rights, welfare, and dignity must take precedence over commoditization concerns. Technical rights violations necessitated by health crises, epidemics, famine, and other human catastrophe are best redressed through private channels, with governmental agencies assuming a mediation role. By contrast, concrete threats to American health and safety arising from IP infringement activity, particularly where the poor, marginalized, and uneducated are at risk, should be met with prominent and decisive enforcement measures.

The Office of IPEC should coordinate with the Department of Justice and other government agencies to publicly target systemic violations of the IP interests of rights holders in marginalized communities, such as minority recording artists, amateur athletes, and small inventors and entrepreneurs. The IP rights of these stakeholders are just as important to the national interest as those of corporate rights holders, however, they typically lack the resources to protect their rights, especially against usurpation and misappropriation by powerful members of the IP establishment. A public initiative by the Office of IPEC to redress such IP social injustices would instill the perception that the national enforcement schema serves all IP constituents and is not merely a private police force protecting corporate IP interests.

IP rights education in historically marginalized and underserved communities should be affirmatively incorporated into enforcement policies and activities, in order to promote the development and exploitation of IP in these communities and enhance their stake in and respect for an effective IP regime. An intellectual property system that encourages and enables the fullest participation by citizens from all walks of life increases the incentive to everyone to contribute as well as the ultimate IP harvest. Applied to the global context, such initiatives will promote mutual respect for differing intellectual property and indigenous cultural customs and mores, and with respect to developing nations, the resulting socio-economic empowerment will increase and diversify the vested interests in a stable, global IP infrastructure.

## **Conclusion**

The forgoing recommendations are intended to address a public misperception that American federal IP enforcement policy is largely a surrogate for an IP elite corporate militia. Such misperception threatens the effectiveness and stability of American IP interests both domestically and in the global community. Moreover, an effective IP enforcement system not only addresses the means of enforcement side of IP protection, but also reinforces the social justice and social utility mandates of IP law and policy. Efficacious IP enforcement goes hand in hand with economic advancement and democratization through equitable inclusion in the fruits of advances brought about through IP development and exploitation. A wisely structured intellectual property regime promotes the broadest societal participation and accommodates new opportunities for marginalized groups to express themselves creatively and otherwise to profit from contribution to the national IP storehouse. When viewed through the lens of intellectual property social utility/social justice interdependence, IP enforcement policies thus align social empowerment and author/inventor property rights as mutually reinforcing interests, as opposed to mutually exclusive objectives, and advance the interests of all constituents in the global IP community.

Respectfully Submitted,  
Professor Lateef Mtima  
Howard University School of Law  
Institute for Intellectual Property and Social Justice