November 13, 2018

Vishal Amin
Intellectual Property Enforcement Coordinator
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Re: Comments of Engine Regarding the Development of the Joint Strategic Plan

Dear Coordinator Amin:

Engine is grateful for the opportunity to submit comments in response to the Intellectual Property Enforcement Coordinator's (IPEC) request for public input on the development of the Joint Strategic Plan for Intellectual Property Enforcement.

Engine is a technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. Engine creates an environment where technological innovation and entrepreneurship thrive by providing knowledge about the startup economy and constructing smarter public policy.

The intellectual property regime impacts startup activity as much as virtually any other aspect of federal policy. We are encouraged that the IPEC is interested in understanding how intellectual property enforcement policy and the broader IP legal regime are "key to helping secure the future of our innovative economy and to maintaining our competitive advantage,"[1] particularly as the trajectory of IP policy has tended towards ever stronger protections and penalties that will likely end up diminishing innovation. Contrary to the arguments put forward by many IP maximalists, there is not a linear correlation between stronger intellectual property protections and more innovation; in fact, there is not even a clear correlation between stronger protections and diminished infringement.[2] While minimizing counterfeiting and the direct copying of valuable IP are important goals, it's imperative that policies meant to accomplish these goals do not end up inadvertently stifling innovation. Unfortunately, the current copyright regime fails in many respects to accurately reflect and promote the innovation found in the technology sector, which thrives on creative reuse and the ability to instantly share ideas and information throughout the world. When combined with the threat of massive damages awards out of

[1] Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement. Fed. Reg. Vol. 83, No. 178. September 13, 2018.
[2] *See, e.g.*, Ho, Michael, Joyce Hung, and Michael Masnick, "The Carrot or the Stick? Innovation vs. Anti-Piracy Enforcement," Copia Institute, (October 2015). https://copia.is/library/the-carrot-or-the-stick/.

proportion with the actual injury incurred, the uncertainty that permeates copyright law greatly diminishes the type of innovation that copyright rules are fundamentally meant to promote.

In Section 1, we briefly describe the negative impact on innovation that arises from poorly crafted copyright rules. In Section 2, we propose several avenues for copyright reform that would better realign copyright law and policy with the Constitutionally mandated goal of "promot[ing] the Progress of Science and useful Arts,"[3] as well as the Request's aim of spurring innovation and economic competitiveness.

I. Negative Impact of Copyright Maximalism

While some forms of copyright infringement are unambiguous (e.g. the unauthorized distribution of counterfeit DVDs, etc.), many of the activities subject to copyright litigation fall into a legal gray area. The doctrine of fair use is notoriously difficult to apply,[4] and numerous entrepreneurs who have attempted to comply with copyright obligations have nevertheless been held liable for secondary infringement. Statutory ambiguity is not unique to copyright law, but the particular combination of close legal judgments and enormous potential liability is. Consequently, launching or investing in startups that deal with copyrighted material (with the rise of software copyright, this encompasses virtually every startup) is an unduly risky proposition. Not surprisingly, venture investors tend to underinvest in companies that distribute content online for these reasons.

A study that Engine co-wrote surveying early-stage investors in eight countries regarding their investment activity in digital content intermediaries (DCIs) found that 85 percent of investors were disinclined to invest because of the threat of large statutory damages. More than three-fourths of those investors said they would be deterred from investing in DCIs that offer user-generated content if new anti-piracy regulations exposed such companies to increased secondary infringement liability.[5] Overall, 89 percent of surveyed investors said they are uncomfortable investing in DCIs altogether because of the ambiguous regulatory framework surrounding content distribution enterprises.[6]

A. Anti-Innovation Impact of Copyright Enforcement Proposals

The recent debate around policies mandating the deployment of content filtering tools clearly demonstrates the negative impact that copyright maximalism can have on innovation and startup activity. European policymakers concerned about the so-called "value gap"—the difference between the amount of money web platforms get from the digital distribution of copyrighted work and the amount copyright owners believe they should receive—have crafted a copyright reform proposal that, among other things, requires any platform hosting "large amounts of works and other subject-matter uploaded by their users"

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[3] US Const. art. I, sec. 8, cl. 8.

[4] The courts have often applied fair use inconsistently in their decisions. For example, in *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), the court found that an artist's sculptural version of a copyrighted photograph was not a fair use, but in a later case involving a different contemporary artist who similarly created a derivative work in a different medium based on a preexisting photograph, the Second Circuit found that the work was sufficiently transformative to potentially qualify for fair use protection. *See also*, *Associated Press v. Meltwater U.S. Holdings, Inc.* (S.D.N.Y. Mar. 21, 2013) (holding that clipping and sharing news not sufficiently transformative); *cf Fox News Network, LLC v. TVEyes Inc.* (S.D.N.Y. Aug. 25, 2015) (holding that recording television and radio content to enable transcript and video clip search services constitutes fair use).

[5] Engstrom, Evan, Matthew Le Merle, and Tallulah Le Merle, "The Impact of Internet Regulation on Early Stage Investment," Fifth Era and Engine Advocacy, (November 2014), at 5. http://www.fifthera.com/perspectives-blog/2015/3/20/6enku92k815grtyz9vfpmn83lqhfsx.

[6] *Id*. at 20.

to automatically identify and block copyrighted content from being uploaded to their sites. While requiring platforms to use technological measures to prevent the distribution of copyright infringements may seem at first glance like a sensible way to enforce IP rights, this proposal will likely have a minimal impact on online infringement but severely curtail startups' ability to compete with large platform incumbents.

As a preliminary matter, automated tools to identify copyrighted material only exist for a small subset of the types of media typically shared online. While some automated programs can identify audio, video and image files, no such tools exist for things like 3D printed objects, software binary executables, or industrial designs. Where tools do exist to automatically identify certain types of media files, they are severely error-prone and prohibitively expensive. One popular open source fingerprinting tool featured a 1-2 percent error rate.[7] In contrast, email providers generally consider spam filters with a 0.1 percent error rate to be insufficiently accurate.[8] These inaccurate systems come at a significant cost to providers; YouTube spent around $60 million to develop its Content ID system.[9] This does not take into account the resources required to review the system for accuracy and maintain it over time. Off-the-shelf products are not much cheaper: a survey of online platforms reported that medium-sized companies engaged in file-hosting services paid between $10,000 and $50,000 a month in licensing fees alone for a leading fingerprinting tool.[10]
Ultimately, IP enforcement policies that require UGC sites to deploy automated content detection tools will make it effectively impossible for small platforms to compete with dominant incumbents, decreasing innovation, competition, and creativity. As is often the case in IP enforcement, the proposed cure is worse than the disease. The United States should vigorously oppose such measures.

II. Pro-Innovation Copyright Reforms

In light of evidence suggesting that access to new legitimate content distribution platforms decreases copyright infringement as much or more than new anti-piracy regulations, increasing the severity of the copyright liability regime will likely harm startups, content companies, and the broader American economy while diminishing, rather than incentivizing, creative output.[11] To promote innovation and economic competitiveness, policymakers should focus on reforming a few key areas of copyright law riddled with uncertainty and potential liability and well out of step with the problems they are putatively meant to address.

As the respondents in our investor survey indicated, the combination of legal uncertainty and disproportionately high potential liability in the copyright regime threatens to undermine innovation and economic growth. While a comprehensive list of the sources of this uncertainty could fill volumes, there are several obvious areas for reform that would help realign copyright law with its fundamental purpose of promoting creative production.

A. Restore Balance to the Statutory Damages Regime

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[7] Engstrom, Evan and Nick Feamster, "The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools," (March 2017), at 16. http://www.engine.is/the-limits-of-filtering.
[8] *Id.*
[9] Hearing on Section 512 of Title 17 before the H. Judiciary Subcomm. on Courts, Intellectual Prop., & the Internet, 113th Cong. 47 (2014), at 49 (testimony of Katherine Oyama).
[10] Jennifer Urban, et al., "Notice and Takedown in Everyday Practice," at 64. http://ssrn.com/abstract=2755628.
[11] Ho, *Supra* note 2.

The overwhelming majority of surveyed investors expressed reluctance to invest in DCIs due to the threat of ruinous statutory damages.[12] Plaintiffs in a copyright infringement suit may elect to pursue a statutorily defined damages award of $750 to $30,000 per work infringed—with a possible increase to $150,000 per work if the defendant's infringement is found to be willful—in lieu of actual damages suffered.[13] While the statute also limits the award range for "innocent infringements," such innocent infringement limitations are rarely invoked. Crucially, statutory damages apply equally to direct infringers and secondary infringers, even though secondary infringers may have no actual knowledge of specific infringements taking place.[14]

Simply put, few areas of the law permit such windfall profits for plaintiffs and uncertain liability for defendants. The severity of the potential liability is alone significant enough to make investing in or starting a UGC or DCI company an unpalatable prospect for entrepreneurs and venture investors. And considering there is little consistency or predictability in the range of damages actually awarded, launching such a company is unreasonably risky.[15]

The large threat of statutory damages results in underinvestment in content distribution companies that—contrary to vociferous claims from copyright maximalists—have likely increased creative output by opening up new pathways for content creators to reach customers.[16] Even if a startup faces only a 5 percent chance of being held liable for secondary infringement—that is, a company that is almost certainly engaging in innovative, non-infringing activity—the expected value of that company to investors and founders decreases massively as the potential liability cost increases. Startups simply do not have the resources to fight even obviously deficient copyright infringement claims, as the cost of litigation in combination with the potential for ruinous damages makes litigation untenable. Restoring sanity to the statutory damages regime by requiring plaintiffs to prove actual damages—particularly in secondary infringement cases—will serve the dual purpose of restoring optimal investment in innovative, non-infringing content distribution startups and help further clarify the contours of copyright liability by making it more reasonable for startups to contest unreasonable copyright infringement claims that they would have otherwise been forced to settle due to the exposure to ruinous statutory damages awards.

B. Curb Abuse of the Notice and Takedown Process

The growth of the Internet economy was facilitated in large part on the sensible limitations on secondary liability found throughout the U.S. Code. Section 230 of the Communications Decency Act, preventing Internet services from being held liable for their users' actions, prompted the explosion of so-called web 2.0 companies that spurred the Internet to become the dominant platform for creative expression and economic growth in the world. Limits on indirect liability for Internet companies due to the actions of

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[12] Engstrom, *Supra* note 6.

[13] 17 U.S.C. § 504.

[14] Under 17 USC § 512(c)(1)(A)(ii), a DCI may be held liable for its users' infringements in the absence of actual knowledge of such infringements if a court finds that the DCI should have known of the infringing activity.

[15] *See, e.g. Macklin v. Mueck*, 2004 U.S. Dist. LEXIS 28416 (S.D. Fla. Dec. 29, 2004) (maximum statutory damages ($300,000) awarded, despite magistrate recommendation of statutory minimum).

[16] *See, e.g.* Oberholzer-Gee, Felix and Koleman Strumpf, "File Sharing and Copyright," NBER, Innovation Policy and the Economy, (February 2010), at 48. http://www.nber.org/chapters/c11764.pdf: "In 2000, 35,516 albums were released. Seven years later, 79,695 albums (including 25,159 digital albums) were published."

users are not as robust for copyright infringements, and the resulting potential liability has limited the growth of content distribution platforms.

The Digital Millennium Copyright Act (DMCA), the principal source of limited liability for Internet platforms, has largely been successful in fostering the growth of Internet content distribution companies. However, abuse of the DMCA's notice and takedown procedure has made it difficult for startups to compete with more entrenched DCIs. Under the DMCA, a company can avail itself of a “safe harbor” that limits its exposure to liability for the copyright infringements of its users if it complies with a number of legal obligations, including a requirement to remove access to any allegedly infringing content that a content owner specifically identifies to the company.[17] As described above, companies that fail to expeditiously remove access to such works can be held liable for up to $150,000 per work. This obviously creates a dire need to quickly and thoroughly process all takedown notices sent to a company, which helps align platform and content industry incentives. But because there is no real penalty for sending a false takedown notice, abuse of the takedown process is prevalent. The sender of a false takedown notice can only be held liable if the sender knew that the representation was false, even if no reasonable person would have believed that the identified work constituted an infringement.[18] Not surprisingly, copyright maximalists, unhappy with the weakening of their grip on content distribution channels, have taken this de facto immunity for sending false notices to absurd lengths, deluging DCIs with millions of faulty notices.

A 2006 study found that 31 percent of the takedown notices in its sample had problems with the underlying copyright claim—either because the flagged material was non-infringing because of a legitimate fair use defense, was non-copyrightable, or not a subject to the control of the claimant.[19] Similarly, data from blogging platform WordPress shows that it removes “some or all content” in response to 61 percent of DMCA notices, indicating that around 39 percent of notices it receives are defective or fraudulent.[20] These false takedown notices are not limited to overzealous enforcement actions by content industries uninhibited by the fear of legal reprisal; some studies show that a majority of all takedown notices are sent by businesses targeting competitors.[21]

Considering a DCI can be held liable for up to $150,000 for failing to expeditiously remove access to a piece of content, it is rather baffling that the sender of a malicious and false takedown notice cannot be held liable unless the DCI can prove that the sender subjectively knew that the notice was false—and even then, the sender's liability is limited to the actual damages incurred by the false notice. The perverse incentives that this system establishes impose huge compliance burdens on small companies that may not be able to bear the expense of responding to a litany of takedown notices, a great number of which are likely false and sent for anticompetitive purposes.[22] Until steps are taken to prevent the abuse of the DMCA's otherwise largely successful takedown and notice procedure, startups will remain

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[17] *See, e.g.,* 17 U.S.C § 512(c)(1)(C).

[18] *See Rossi v. Motion Picture Ass'n of America*, 391 F.3d 1000 (9th Cir. 2004).

[19] Urban, Jennifer and Laura Quilter, “Efficient Process or ‘Chilling Effects’? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act,” 22 Santa Clara Computer & High Tech. L.J. 621 (2005) at 667 et seq. http://lquilter.net/pubs/UrbanQuilter-2006-DMCA512.pdf.

[20] Automattic, “Report: Intellectual Property,” https://transparency.automattic.com/intellectual-property (last accessed November 13, 2018).

[21] Masnick, Mike, “Google Provides Numbers On Just How Often DMCA Takedown Process Is Abused,” TechDirt (March 18, 2009). https://www.techdirt.com/articles/20090315/2033134126.shtml.

[22] See, e.g. Karaganis, Joe and Jennifer Urban, “The Rise of the Robo Notice,” Communications of the ACM, (September 2015). http://cacm.acm.org/magazines/2015/9/191182-the-rise-of-the-robo-notice/abstract.

at a competitive disadvantage to more well-funded peers in running UGC and DCI platforms, limiting the innovation and growth of that important market.

C. Prioritize in U.S. Law in Trade Agreements

The copyright and intermediary liability framework found in U.S. law is the foundation for pioneering platforms used by billions of people for collaboration, communication, creation, distribution, and promotion. But this is only possible because U.S. law protects companies that host or serve as a platform for huge volumes of transactions, communications, and other activity by third parties. The U.S. should work to promote our current legal framework in trade agreements to allow innovators and creators to pursue the same business models abroad that they do at home. In the U.S., industries that rely on copyright exceptions like fair use generate $4.5 trillion in annual revenue and employ a large portion of the U.S. workforce.[23] This trend will only continue if we continue to have a clear legal framework guiding how content can be shared.

If trade negotiators want to ensure the success and prosperity of our digital economy, they should look to the U.S. legal framework, where a combination of a more predictable copyright regime and intermediary liability rules has allowed the U.S. to become the global leader in both content creation and technological innovation. As the U.S. seeks to negotiate trade agreements with Britain, the European Union, Japan, and potentially others, negotiators should look to current U.S. copyright law and the agreement reached in the new United States Mexico Canada Agreement. Protecting current exceptions and limitations to copyright law is critical to ensuring the success of American entrepreneurs and creators globally.

III. Conclusion

Engine urges the Intellectual Property Enforcement Coordinator, in crafting its enforcement strategy, to remain mindful of the negative impact that overly stringent copyright rules can have on innovative activity in the tech sector. Startups, in particular, cannot afford the risk of operating in a legal landscape rife with uncertainty and large potential damages. As copyright law has continued its seemingly inexorable slide towards maximalist protections, focusing on striking the proper balance of incentives and penalties will help copyright more closely promote its fundamental purpose of driving innovation and creativity.

Respectfully submitted,

Evan Engstrom
Executive Director
Engine

[23] Capital Trade. “Fair Use in the U.S. Economy.” http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf