



March 24, 2010

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Submitted electronically at intellectualproperty@omb.eop.gov

Regarding: Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan

Dear Ms. Espinel:

Elsevier is one of the world's leading publishers of science and health information and serves tens of millions of scientists, students and health and information professionals worldwide. Founded in 1880, Elsevier has a considerable presence as an established and integral contributor to the scholarly research community in the United States. Our U.S. workforce comprises nearly 3,000 members spread across more than 15 offices in 10 states. Annually, we publish over 2,000 journals and 260,000 journal articles, many of which are authored by U.S. researchers. We publish over 250 journals in partnership with U.S. scholarly societies, such as the American College of Cardiology, American College of Surgeons, and American Academy of Otolaryngology–Head and Neck Surgery.

Elsevier welcomes the opportunity to provide specific recommendations related to the following objectives of the Joint Strategic Plan:

- Reducing the supply of infringing goods, domestically and internationally;
- Identifying weaknesses, duplication of efforts, waste, and other unjustified impediments to effective enforcement actions;
- Strengthening the capacity of other countries to protect and enforce intellectual property rights.

Both within the United States and abroad, Elsevier continues to face significant challenges to the protection of its intellectual property. These threats not only undermine our company and our employees but the “innovation infrastructure” in which we invest continually that supports cutting-edge research in the U.S. and disseminates new discoveries to the public. Since 1999, there has been a dramatic increase in access levels for both researchers and the public. Researchers now have extremely widespread access to journals: a recent study showed that 94% of university and college-based respondents found access to information “very easy” or “fairly easy”, and access to journals is 14th on their list of concerns (lack of funding is number one; too

much paperwork is number five)¹. ScienceDirect, Elsevier's online journal platform, is used by around 14 million researchers globally. It hosts 10 million articles dating back to the 1820s and now has close to 600 million full text article downloads per year, approaching 2 million article downloads globally per day. Researchers now have access to significantly more content than they did in the print-only era: researchers now read from 25% more journals than in the mid-1990s and university faculty are reading 34% more articles². Public access has also expanded dramatically due to initiatives that publishers have led in collaboration with others to broaden access for researchers in developing countries, patients, the public and disabled persons. For example: Research4Life is a public-private United Nations initiative that makes thousands of journals available to over 5,000 institutions in over 100 developing countries at no or low cost. In 2009, Elsevier alone had more than 2.5 million articles downloaded as part of Research4Life initiatives. Elsevier has also created Patient Research, which gives patients and their family members desktop access to articles in 100 medical journals for a processing fee of less than \$5 per article. Elsevier's "walk-in" clause enables libraries licensing ScienceDirect to give any member of the public free electronic on-site access to any journal article licensed by a library. Other publishers have similar programs. Access for visually impaired persons (VIP) has also been increased as publishers have voluntarily implemented other formats and "read aloud" software for online sites.

By implementing the following four recommendations under the Joint Strategic Plan, the U.S. government will be able to more effectively and efficiently combat intellectual property infringement and protect U.S. workers, creators and drivers of innovation.

Joint Strategic Plan Key Recommendations

- **Recommendation 1:** Ensure that the Administration and Congress do not impose policies that will undermine the copyright of private sector works.
- **Recommendation 2:** In partnership with industry stakeholders, develop and coordinate capacity building and awareness programs on copyright protection measures within academic and research communities in China and other priority markets.
- **Recommendation 3:** Provide opportunities for industry participation in government dialogues on intellectual property protection and enforcement at the CEO-level, similar to private sector advisory groups supporting dialogues with India and the Asia-Pacific economies.
- **Recommendation 4:** The Administration should strongly urge state governments and their instrumentalities to (1) strictly adhere to the requirements of the federal copyright law and (2) waive sovereign immunity when they are sued for infringing the copyrights of others.

Recommendation 1: Ensure that the Administration and Congress do not impose policies that will undermine the copyright of private sector works.

- **Context:** A recent policy enacted by the National Institutes of Health (NIH) substantially diminishes copyright protection for thousands of non-profit and commercial journal publishers in the United States. In April 2008, NIH began requiring that non-profit and commercial publishers' peer-reviewed, value-added journal articles—reporting on research funded by the government—be made freely available one year after publication on NIH websites. Currently, OSTP is considering developing a policy that has the potential to

¹ Ware, Mark. "Access by UK small and medium-sized enterprises to professional and academic information," Mark Ware Consulting Ltd for Publishers Research Consortium (April 2009)

² Dr. Carol Tenopir, "How Electronic Journals are Changing Reading Patterns," April 2007.

expand the NIH model to all federal research agencies. Both the NIH policy and a potential government-wide public access policy that mandate access to peer-reviewed research articles directly undermine the copyright of U.S. rightsholders and the government's international trade and enforcement priorities.

- For many journal publishers, more than 50% of their revenue comes from overseas subscriptions. Mandatory submission of research articles, without compensation, for public, worldwide dissemination over the Internet would result in publishers having, in effect, only one year of copyright protection to recoup their substantial investments in (a) selecting among millions of scientific publications to publish only the best science; (b) conducting a critical peer review system by which the scientific community can know that the article is scientifically accurate; (c) editing, disseminating and promoting these journal articles using the latest technology platforms. With legitimate subscribers abroad now able to access U.S. copyrighted content for free, such mandatory policies not only restrict the copyright term but will likely result in substantial declines in export opportunities.
- The application of government public access mandates like the NIH Public Access Policy is indistinguishable from the imposition of an extraordinary and unprecedented exception to the most fundamental of rights under copyright—the exclusive right to distribute the copyrighted work. This unnecessary threat to IP protection in the U.S. will make it increasingly difficult for our trade agencies to prevent similar inroads on intellectual property protection (such as compulsory licensing) by our trading partners and threaten other IP industries that contribute significantly to U.S. exports, jobs and economic growth.
- Policies that mandate public access to peer-reviewed research articles will likely also increase piracy of U.S. scientific and scholarly journal articles globally. In China, for example, Chinese companies have been acquiring electronic copies of copyrighted U.S. scientific journal articles from government and university libraries and reselling them through online websites to the legitimate copyright owners' primary customers. U.S. publishers and scientific societies are facing annual losses of \$80 to \$100 million as a result of this expanding theft and have been working closely with USTR and Commerce to address this egregious problem. However, in recent months, we have found evidence that suggests Chinese pirate companies may also be mining full text articles from NIH websites and reselling these articles to their subscribers. These Chinese entities are now relying on a U.S. government website to facilitate the theft of U.S. intellectual property. Making peer-reviewed journal articles freely available via NIH websites appears to be contributing directly to piracy of copyrighted U.S. biomedical journals and journal articles, exposing publishers—many of which operate as small businesses—that employ some 30,000 people and indirectly support an additional 20,000 jobs in the U.S., to significant economic harm.
- **Key Action:** Any public access policy implemented by the government should enhance accessibility without undermining U.S. IP protection and enforcement. Non-profit and commercial publishers agree that the model enacted by Congress in 2007 in the America COMPETES Act, represents a policy solution that will ensure public access to government-funded research results, without undermining copyright protection in private-sector journal articles. Under the America COMPETES model, which established a public access policy for research funded by the National Science Foundation (NSF), each federal agency that provides funds for research would provide to the public in a timely manner and in electronic form through an agency website: (A) final project reports; (B) citations of published research articles resulting from research funded by the agency; and (C) readily accessible summaries of the outcomes of agency-funded research projects. **We urge the Office of Management and Budget (OMB) to work with OSTP and federal research agencies to implement a comprehensive public access policy that extends the NSF-model, allowing the Federal Government to broadly disseminate research results, while ensuring that copyright protections in private-sector research works are not weakened.**

- **Key Action: OMB should also work with the Congress to develop a long-term legislative solution that will ensure that government policies do not undermine fundamental copyright protections and U.S. trade policy priorities.** One such solution is the passage of the Fair Copyright in Research Works Act (HR 801) introduced by House Judiciary Committee Chairman John Conyers (D-MI) in February 2009. HR 801 will prevent the federal government from diminishing copyright protections for private sector works that report on research funded by the federal government where a non-governmental entity has provided substantial funding, or contributed a meaningful added-value and is not a party to the funding agreement. This protection has existed for over a century and provides a necessary incentive for publishers to invest in the peer-review and expert screening of research and to provide and maintain the infrastructure necessary to publish, distribute and archive scientific journal articles. The Fair Copyright in Research Works Act will allow the government to continue to disseminate research results, while ensuring that copyright protections in journal articles are not diminished.

Recommendation 2: In partnership with industry stakeholders, develop and coordinate capacity building and awareness programs on copyright protection measures within academic and research communities in China and other priority markets.

- **Context:** With support from administrators and weak enforcement by authorities, university communities in “Priority Watch” markets such as Argentina, Canada, Chile, China, India, Indonesia, Mexico and the Philippines have been systematically pirating copyrighted U.S. music, movies, textbooks, and scientific and scholarly journals. Universities are leading hubs of infringing activities abroad, directly or through third-party vendors. Accordingly, U.S. agencies with jurisdiction over IP protection and enforcement should jointly develop comprehensive, university-focused programs designed to build government and campus-wide capacity and awareness about the importance of copyright protection (and how it benefits students, universities, economic growth and innovation) and best practices to protect against infringement.
- **Key Action (China):** In coordination with industry as well as American and Chinese copyright experts in the legal, academic and corporate communities, the Department of Commerce (DOC), Patent and Trademark Office (PTO), Department of Justice (DOJ), and Department of State (DOS) should work with their Chinese government counterparts to organize capacity-building seminars at universities in key provinces. Each program would target the various types of infringement—music, movies, journals/textbooks—and highlight the benefits of strong copyright protection for Chinese stakeholders. Industry would help shape content, while copyright experts would provide legal expertise. Participation from High-profile academics and/or well-known actors would also attract students and raise the visibility of copyright issues on campus. In addition, these programs would aim to encourage provincial officials to:
 - Increase the number of cases transferred from administrative to criminal proceedings by actively encouraging the training of, and interaction between, local administrative and public security bureaus;
 - Increase the effective level of administrative penalties for IPR infringement by raising the statutory cap on fines for IPR infringement and encouraging local regulators to levy larger fines that will serve as more effective deterrents;
 - Encourage local investigators, such as administrations of industry and commerce (AICs) and PSBs, to tackle IPR enforcement proactively, and state explicitly that adequate enforcement of IPRs is an important component of their work and performance evaluations;
 - Create a system to monitor counterfeiters involved in previous seizures and list their names publicly’

- State explicitly that criminal liability applies to end users of infringed products, regardless of how they are obtained,

Recommendation 3: Provide greater opportunities for industry participation in domestic, bilateral and multilateral government dialogues at the CEO or senior executive level, similar to private sector advisory groups supporting dialogues with India and the Asia-Pacific economies.

- **Context:** The lack of tangible harm remains one of the primary obstacles to effective protection of IPR. Infringers and foreign government officials both are often far removed from rightsholders. Providing opportunities for senior industry representatives to interface with foreign officials will facilitate U.S. negotiating efforts to strengthen enforcement of IPR abroad. Senior executives not only provide a “face” for infringers and government officials but can directly highlight local benefits the company provides to the market in question. Corporate executives will be able to inform policy implementation for U.S. and foreign regulators and policy makers. For example, the APEC Business Advisory Council (ABAC) was created by leaders in the Asia Pacific Economic Cooperation (APEC) forum to provide advice on the implementation issues, specific business sector priorities, and to provide the business perspective on specific areas of cooperation. Similarly, the U.S.-India Private Sector Advisory Group (PSAG), which includes executives from both U.S. and Indian companies, helps the U.S.-India Trade Policy Forum (TPF) actively raise awareness on corporate governance issues and advise senior officials and regulators who are leading reform efforts. These kinds of collaborative mechanisms will help strengthen implementation of enforcement actions in priority markets.
- **Key Action (China):** As part of the reenergized U.S.-China Joint Commission on Commerce and Trade (JCCT), DOC and USTR should work with their Chinese counterparts to form a senior executive-level advisory group that includes both U.S. and Chinese industry leaders in key sectors, including IP. The advisory group would meet alongside the Ministerial to provide recommendations to leaders, disseminate best practices and practical lessons learned and provide technical support and contribute to capacity building.

Recommendation 4: The Administration should strongly urge state governments and their instrumentalities to (1) strictly adhere to the requirements of the federal copyright law and (2) waive sovereign immunity when they are sued for infringing the copyrights of others.

- **Context:** State governments and their instrumentalities are both major users and owners of copyrighted materials. Copyright owners of all kinds of works—e.g., journals, book, software, music and sound recordings, photographs, databases, graphic material, audiovisual works, etc.—market copies or license the public performance of their works to state entities. Moreover, unlike the federal government, which in general cannot secure copyright in the works of their employees (17 U.S.C. § 105), state governments operate under no such inhibition, are free to claim copyright in works created by their employees, and aggressively register their works with the Copyright Office. Not only can states reap the commercial benefits that result from exploiting their own copyrights, they enjoy a distinct commercial advantage when they use and infringe the copyrighted works of others. States can avail themselves of the full array of remedies, including injunctions and statutory and actual damages, when their copyrighted works are infringed. But, as a result of decisions by the United States Supreme Court and lower federal courts, states are immune from money damage awards when they infringe the copyrights of others.

- State immunity from money damage awards in copyright cases is of immense concern to copyright owners, not only because states and their entities are prodigious users of copyrighted materials, but also given the piracy threats caused by digital technologies that dramatically increase the scope and gravity of the piracy threats facing copyright owners today. While state officials can be enjoined from violating the Copyright Act under the doctrine of *Ex Parte Young*, injunctive relief in the absence of money damages is an insufficient deterrent to copyright infringements. In sum, these judicial decisions have created a fundamentally unfair situation by shielding states from financial responsibility for any harm that their infringements cause to copyright owners, while permitting states access to the full array of remedies when they are plaintiffs in copyright cases. This situation is greatly exacerbated by the fact that federal courts have exclusive jurisdiction over copyright cases.
- Elsevier is also concerned about the potential for foreign governments that do not value copyright as highly as the United States to assert immunity for their own subdivisions. In fact, shortly after the leading Supreme Court’s decision establishing this immunity, the sovereign immunity of states emerged as a subject of discussion between the United States and one of its trading partners. If the federal government were to engage in an active campaign to influence state governments to correct this inequitable situation, it may be easier in the course of such discussions to persuade those countries that they should not permit the use of similar doctrines to be used in their own countries to thwart meaningful enforcement of copyright laws.
- **Key Action:** The Administration should strongly urge state governments and their subdivisions to comply fully with the federal copyright laws and to seriously consider voluntarily waiving sovereign immunity in such cases. With these objectives in mind, the Administration should commence appropriate discussions with an array of groups that have real standing in the state government community, such as National Association of State Attorneys General, the National Governors’ Association, National Conference of State Legislatures and Association of American Universities. Through such conversations the Administration could, among other things, help prompt state entities to better understand their obligations under the federal copyright law, the unfairness worked by the doctrine of sovereign immunity, and the fact that while sovereign immunity may shield them from money damages, seeking special treatment for otherwise illegal activity is fundamentally counter to strong IP protection, which is critical to millions of jobs, economic growth and a positive balance of trade—nor does it stop them from being branded as copyright infringers.



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