

# IN THE MATTER OF THE ANTI-COUNTERFEITING TRADE AGREEMENT

Docket No.: USTR-2010-0014

## COMMENTS OF PUBLIC KNOWLEDGE

### Introduction

Public Knowledge submits these comments in the above-mentioned docket. As the Office of the United States Trade Representative (USTR) considers signing the Anti-Counterfeiting Trade Agreement (ACTA) it should:

1. Seek to include, as part of the agreement, an agreed statement reflecting the understanding that ACTA would not require changes to U.S. law;
2. Not coerce non-ACTA countries to accede to the agreement; and
3. Learn from the mistakes committed during the ACTA negotiations and employ a more open and inclusive process as it negotiates the proposed Transpacific Partnership (TPP) agreement.

***The USTR should seek to include an agreed statement as part of ACTA reflecting the understanding that ACTA would not require changes to U.S. law.***

The USTR assured U.S. citizens and members of Congress several times during the negotiation process that ACTA would not require changes to U.S. law.<sup>1</sup> Other countries negotiating ACTA provided similar assurances to their citizens.<sup>2</sup> To reflect these assurances, the USTR should seek to include, as part of ACTA, an agreed statement reflecting the understanding that the agreement will not require changes to U.S. law. Further, this agreed statement should also reflect the understanding that ACTA must not be interpreted as influencing existing interpretations of U.S. law.

Inclusion of such an agreed statement is important in view of doubts surrounding the constitutional validity of the ACTA negotiation. The Constitution requires the president to seek the advice and consent of the Senate in concluding treaties<sup>3</sup>. While presidents have concluded

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<sup>1</sup> See Letter from Ambassador Ron Kirk to Senator Ron Wyden, (January 28, 2010), [http://www.ustr.gov/webfm\\_send/1700](http://www.ustr.gov/webfm_send/1700) (stating that “we do not view ACTA as a vehicle for changing US law.”)

<sup>2</sup> See e.g. Anti-Counterfeiting Trade Agreement, Department of Foreign Affairs and Trade, Australia, <http://www.dfat.gov.au/trade/acta/>. (“Australia has not joined ACTA to drive changes in Australian domestic laws.”); All You Want to Know About the Anti-counterfeiting Trade Agreement, European Commission, Trade, (October 20, 2010), <http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/> (“ACTA will not change the body of EU law as it is already considerably more advanced than the current international standards.”)

<sup>3</sup> U.S. Const., Art. 1, § 2, cl. 2.

non-treaty agreements without the advice and consent of the Senate, the Supreme Court<sup>4</sup> has held and prominent scholars<sup>5</sup> have explained that such power is confined to narrowly circumscribed circumstances, where the president's action derives from powers vested in him by the Constitution or a long acquiescence by Congress in the president's exercise of power. Treaties or agreements dealing with intellectual property are not part of such circumstances. In view of this ambiguity, the agreed statement should make clear that the purpose of ACTA is not to impinge upon a province reserved for Congress.<sup>6</sup>

Under international norms for treaty interpretation, such a statement would set the context for ACTA's interpretation<sup>7</sup> and prevent pressures on the U.S. to change its laws to comply with ACTA. In addition, it would signal to U.S. courts interpreting ambiguous provisions in U.S. law, that ACTA would not interfere with their freedom to adopt particular interpretations.<sup>8</sup>

***The USTR should not coerce non-ACTA countries to accede to the agreement***

ACTA represents an IP protection and enforcement regime that exceeds the current international standard embodied in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). TRIPS provides certain flexibilities in implementation of IP protection

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<sup>4</sup> See *Medellin v. Texas*, 552 U.S. 491 (2008) (observing that the President's power to enter into international agreements with binding effect on domestic law is circumscribed to very narrow set of circumstances. In this case, the court held that the ability to convert international obligations arising out of non-self-executing treaties into domestic obligations was not one of those circumstances. Similarly, with respect to ACTA, the President's power does not extend to entering into binding obligations with respect to intellectual property. The Constitution reserves the power to make laws with respect to this subject area to Congress.)

<sup>5</sup> Jack Glodsmith and Lawrence Lessig, *Anti-counterfeiting Agreement Raises Constitutional Concerns*, The Washington Post, March 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html>; Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 Va. L. Rev. 1573 (2007).

<sup>6</sup> See U.S. Const. Art 1, § 8 (reserving for Congress the power to enact laws with respect to copyrights and patents).

<sup>7</sup> Vienna Convention on Law of Treaties, art. 31(b), May 23, 1969, 1155 U.N.T.S. 331 (providing that instruments made by one or more parties in connection with the conclusion of the treaty and accepted by other parties form part of the context of the treaty and aid in its interpretation.)

<sup>8</sup> *Zicherman v. Korean Air Lines Co.*, 516 US 217, 226 (1996) (holding that the court will consider as aids in interpretation the negotiation and drafting history as well as the post ratification understanding of signatory nations)

requirements<sup>9</sup> and ACTA does not embody these flexibilities. Yet the USTR has stated that it would like developing countries to sign on to ACTA.<sup>10</sup>

Many developing countries are likely to see ACTA as harmful to their domestic interests and are likely to resist pressures to accede to it. First, these countries are likely to hold the view that high levels of IP protection will act as barriers preventing them from securing access to affordable education, the ability to conduct research, and technological advancement.<sup>11</sup>

Second, stringent IP enforcement requirements embodied in ACTA are going to require investment in resources that many developing countries may not have.<sup>12</sup> Countries must balance IP enforcement obligations with other, often more pressing, needs and their obligations under the UN Millennium Development goals.<sup>13</sup> The disproportionate allocation of national resources has impacts far beyond protection of foreign right-holders' IP rights. Thus, pressure to implement ACTA's provisions would limit these countries' policy options for achieving conflicting domestic policy priorities. Because the need for IP protection and enforcement often conflicts with developmental goals, the USTR should not use trade pressures to secure levels of IP protection incompatible with these interests.

Furthermore, as the U.S. seeks to double its exports and views the emerging economies of Asia as a prime market for these exports,<sup>14</sup> a coercive approach to get these countries to accede to ACTA would be counterproductive. Conclusion of beneficial, trade enhancing agreements are likely to be delayed or jeopardized because of needlessly controversial

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<sup>9</sup> See e.g. Final Text of the GATT Uruguay Round Agreements Including the Agreement Establishing the World Trade Organization, Annex 1C, Agreement on Trade Related Aspects of Intellectual Property Rights, art. 7, 8, April 15, 1994, (art.7 provides that IP protection should facilitate technology transfer to the "mutual advantage of producers and users of technological knowledge, art. 8 permits members to enact laws to promote public health and socio-economic and technological development and to take measures to prevent abuse of intellectual property rights.)

<sup>10</sup> Trade Facts: Anti-Counterfeiting Trade Agreement, Office of the United States Trade Representative, August 4, 2008, <http://www.ustr.gov/acta> (click on Fact Sheet at bottom right)

<sup>11</sup> See, Gaelle Krikorian, *FTAs and Neo Liberalism: How to Derail the Political Rationales That Impose Strong Intellectual Property Protection*, in GAELLE KRIKORIAN AND AMY KAPCZYNSKI, ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY, 293, 299; see also Peter Drahos, *IP Word – Made by TNC Inc.*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY, 197, 198-202 (arguing that more IP does not necessarily lead to social welfare and that therefore IP regimes have to be tailored to meet needs of individual countries.)

<sup>12</sup> Peter Drahos, *IP Word – Made by TNC Inc.*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY, *supra* note 12, at 212.

<sup>13</sup> See The South Centre, *Who Should Bear the TRIPS Enforcement Costs?*, Jan. 2008, available at [http://www.southcentre.org/index.php?option=com\\_docman&task=doc\\_download&gid=713&Itemid=68](http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=713&Itemid=68).

<sup>14</sup> See White House, Fact Sheet: The National Export Initiative: U.S.-India Transactions, November 6, 2010, <http://www.whitehouse.gov/the-press-office/2010/11/06/fact-sheet-national-export-initiative-us-india-transactions> (explaining that the President notes that India, with its tremendous economic growth is a key market for US export); Voice of America, *China Agrees to \$45 Billion in US Export Deal*, January 19, 2011, <http://www.voanews.com/english/news/Hu-Faces-Day-of-Rich-Ceremony-Tough-Talk-114193599.html>, (noting US efforts to promote exports to China)

negotiations over IP provisions. To the extent that the USTR has concerns with IP laws and policies of developing countries, a better approach would be to engage with these countries diplomatically and find a solution that respects the rights of IP owners, the international obligations of all countries, and the developmental needs of developing countries.

***Learning from the ACTA negotiating experience, the Transpacific Partnership Agreement negotiations should be open and inclusive.***

The ACTA negotiation process was flawed for two reasons: First, the process was shrouded in excessive secrecy, permitting privileged access to a very limited set of interests. This undermined its legitimacy as a tool to promote the interests of all and lead to the perception that the USTR only represents the interests of certain IP owners who represent a narrow section of the economy. Later attempts to include a larger range of interests, via a non-disclosure agreement process, did not change these perceptions.

Second, ACTA focused excessively on protection of IP owners to the detriment of other stakeholders. For instance, it ignored the rights of the Internet and consumer electronics industries that rely on IP limitations and exceptions to make and market their products and services and citizens who rely on IP limitations and exceptions to exercise their free speech rights. The USTR continued this approach despite protestations that absence of a robust limitations and exceptions regime in some ACTA countries, combined with ACTA's requirements to include high levels of IP protection would likely hamper Internet and consumer electronics companies in their efforts to expand their business in these countries. Such an approach was inconsistent with USTR's mission to foster trade in all products and services.

This flawed process caused significant resistance to ACTA among the USTR's negotiating partners, led to opposition by the public and the Internet and consumer electronics industries, and caused significant delays in conclusion of an agreement. In order not to repeat these mistakes, the TPP's IP chapter should be balanced and should include limitations and exceptions that foster trade not only in IP products, but also products and services of the Internet and consumer electronics industries. It should also secure citizens' rights to participate in culture and democratic discourse. In addition, the process of negotiation should be open and account for the interests of all stakeholders, including the public. Such an approach would allow the USTR to conclude the TPP without inordinate delay.

Respectfully submitted,

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