

May 16, 2012

Dear Members of the United States Senate Committee on Finance:

We write as legal academics with expertise in Constitutional, international, and intellectual property law to encourage you to exercise your Constitutional responsibility to ensure that the Anti-Counterfeiting Trade Agreement (ACTA) is submitted to the Senate for approval as an Article II treaty, or to the Congress as an *ex post* Congressional-Executive Agreement. It is our studied opinion that the administration has failed to identify *ex ante* authorization of ACTA by Congress, and that these are thus the only Constitutional bases for U.S. entry into ACTA. It is clear that other ACTA negotiating parties – including the EU, Australia, Mexico, and others—are treating ACTA as a binding international agreement requiring legislative ratification under constitutional standards similar to our own. We encourage you to demand the same element of public process in our own country.

ACTA's subjects – including intellectual property and foreign trade – are matters delegated to Congressional power under Article I of the Constitution. The larger part of ACTA contains dozens of pages of new international law requirements on the shape and scope of domestic intellectual property enforcement legislation, including what types of infringement must be addressed through criminal law, when third party intermediaries may be civilly and criminally liable for infringement by others, and the scope of damages and other remedies that must be available for different classes of infringement. Regardless of whether ACTA requires changes in U.S. law (many claim that it does), these are matters subject to the legislative power vested in the Congress, not in the sole executive province of the President.

The Constitution dictates that the U.S. can bind itself to international agreements within Congress's Article I powers through one of three mechanisms:

- An agreement may be ratified through the Treaty Clause, requiring approval by a two-thirds vote of the Senate;
- Congress, through a law passed by both houses of Congress and signed by the President, can grant the Executive power to craft and enter the agreement through an *ex ante* authorization (the end product of which is referred to as an *ex ante* Congressional-Executive Agreement);
- Congress can approve the agreement *ex post*, by passing an Executive-negotiated agreement, subject to amendment, through both houses of Congress and signed into law by the President (the end product of which is referred to as an *ex post* Congressional-Executive Agreement).

Initially, the Executive maintained a position that ACTA could be entered as a Sole-Executive Agreement in letters from United States Trade Representative Kirk to Senator Wyden and in public statements. The latest communication on this issue, from Department of State Legal Advisor Harold Koh to Senator Wyden, abandoned the Sole-Executive Agreement justification for ACTA and instead described the agreement as an *ex ante* Congressional-Executive Agreement. ACTA was authorized, the letter claims, by Section 8113(a)(6) of the 2008 PRO-IP Act.

This argument fails on closer inspection.

First, the plain language of Section 8113(a) of the PRO-IP Act¹ does not authorize USTR to bind the U.S. to any international agreement. Rather, the section merely describes the purposes of a “Joint Strategic Plan against counterfeiting and infringement,” to be coordinated among multiple agencies by the Intellectual Property Enforcement Coordinator (IPEC). The purposes of the Plan include “working with other countries to establish international standards and policies for the enforcement of intellectual property rights.” Nowhere in Section 8113 does the PRO-IP Act mention the negotiation of international agreements. Rather, subsection (f), which describes specific means for “enhancing enforcement efforts of foreign governments,” requires only “programs to provide training and technical assistance to foreign governments for the purpose of enhancing the efforts of such governments to enforce laws against counterfeiting and infringement.”² Read in its context, the language cited by Koh as justifying ACTA does no more than require a multi-agency plan to provide technical assistance to foreign governments. Indeed, the cited passage is not addressed to USTR.

Second, the PRO-IP Act cannot be an *ex ante* authorization for ACTA because it was not temporally *ex ante*. The ACTA negotiation began in 2007. PRO-IP was not passed until 2008, and was passed at a time Congress was being told that ACTA would be entered as a Sole-Executive Agreement – requiring no Congressional approval at all. The administration did not seek, and Congress has not given, *ex ante* authorization to bind the U.S. to ACTA.

We thus conclude that the Administration currently lacks a means to Constitutionally enter ACTA without *ex post* Congressional approval. The present issue reaches far beyond the topical matters covered by ACTA,

¹ Sec. 8113 is part of a larger Subchapter providing for “Coordination and Strategic Planning of Federal Effort Against Counterfeiting and Infringement.” The subchapter creates, in Section 8111, the office of the Intellectual Property Enforcement Coordinator and mandates that the Office “coordinate the development of the Joint Strategic Plan against counterfeiting and infringement” by an advisory committee of federal agencies. Section 8113 describes the purpose and content of the strategic plan. Section 8113(a) states, in relevant part:

(a) Purpose

The objectives of the Joint Strategic Plan against counterfeiting and infringement that is referred to in section 8111(b)(1)(B) of this title (in this section referred to as the “joint strategic plan”) are the following:

...

(6) Working with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights.

(7) Protecting intellectual property rights overseas by –

(A) working with other countries and exchanging information with appropriate law enforcement agencies in other countries relating to individuals and entities involved in the financing, production, trafficking, or sale of counterfeit and infringing goods;

(B) ensuring that the information referred to in subparagraph (A) is provided to appropriate United States law enforcement agencies in order to assist, as warranted, enforcement activities in cooperation with appropriate law enforcement agencies in other countries;

² (f) Enhancing enforcement efforts of foreign governments

The joint strategic plan shall include programs to provide training and technical assistance to foreign governments for the purpose of enhancing the efforts of such governments to enforce laws against counterfeiting and infringement. With respect to such programs, the joint strategic plan shall -

(1) seek to enhance the efficiency and consistency with which Federal resources are expended, and seek to minimize duplication, overlap, or inconsistency of efforts;

(2) identify and give priority to those countries where programs of training and technical assistance can be carried out most effectively and with the greatest benefit to reducing counterfeit and infringing products in the United States market, to protecting the intellectual property rights of United States persons and their licensees, and to protecting the interests of United States persons otherwise harmed by violations of intellectual property rights in those countries;

(3) in identifying the priorities under paragraph (2), be guided by the list of countries identified by the United States Trade Representative under section 2242(a) of title 19; and

(4) develop metrics to measure the effectiveness of the Federal Government's efforts to improve the laws and enforcement practices of foreign governments against counterfeiting and infringement.

into the fundamental Constitutional issue of separation of powers. If Congress allows the Executive to claim that ACTA was authorized by language that clearly does not authorize the agreement, it will be ceding unprecedented power to the Executive.

Remedying this state of affairs is uniquely within Congress's province. Congress, and specifically the Senate, as the Constitutionally recognized chamber with responsibilities for the approval of treaties, should secure from the Administration a public pledge to send ACTA to the Senate as a treaty, or to the Congress as an *ex post* Congressional-Executive Agreement. Absent a pledge to this effect, we encourage the Committee to hold hearings and to pass legislation that would prevent the United States from binding itself to ACTA without express Congressional consent.

For further information, questions or correspondence, please contact Sean Flynn at sflynn@wcl.american.edu or Margot Kaminski at margot.kaminski@yale.edu.

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