

**IN THE MATTER OF 2013 SPECIAL 301 REVIEW: IDENTIFICATION
OF COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1974**

Docket No. USTR - 2012 - 0022

COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge (PK) appreciates the opportunity to file comments in the above-mentioned docket. In these comments PK reiterates recommendations it made in previous Special 301 filings; urges the Office of the United States Trade Representative (USTR) to ensure that its 2013 findings are consistent with overall US interests; and explains that these comments are relevant even though they do not focus on a particular country.

I. Comments made in PK's previous submissions in the Special 301 proceedings remain true and relevant to this proceeding.

In 2010, PK and the Electronic Frontier Foundation (EFF) filed comments¹ in the USTR's Special 301 proceeding, presenting several points that remain true today. First, a balanced system is the hallmark of U.S. copyright law, and the USTR should promote the same balance abroad. Additionally, the evaluation standards applied in previous Special 301 Reports raise significant public policy concerns and are not mandated by section 182 of the Trade Act. The Trade Act does not require countries to be placed on the priority watch list or watch list for failure to accede to and implement particular international treaties. The USTR should not base identification in the Special 301 Report on countries' introduction of exceptions and limitations to national copyright law that comply with the international copyright framework. Also, the USTR must recognize the principle of proportionality in enforcement and allocation of resources for intellectual property infringements.

Our 2010 comments also emphasized the need for the USTR to engage in evidence-based decision-making. This approach would require that evaluation criteria for listing countries in the Special 301 Report be clear and transparent. Yet the 2012 Report only outlines a list of extremely generic criteria. These are: "trading partners' level of development, its international

¹ Comments of Public Knowledge and the Electronic Frontier Foundation, *In the Matter of the 2010 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, <http://publicknowledge.org/pdf/pk-eff-special-301-20100218.pdf>.

obligations and commitments, the concerns of rights holders and other interested parties, and the trade and investment policies of the US.”² Other than stating that these broad criteria will be applied on a case-by-case basis, it provides no further detail. Additionally, the empirical data upon which the USTR relies in making factual determinations that underpin the identification of countries in the Special 301 Report should be subject to independent review and evaluation. Independent review and evaluation is vital to the Special 301 process because it would protect against the risk of false or exaggerated claims by commenters, particularly those claims made without any citation to their sources. These concerns remain true today.

II. The Special 301 process must be consistent with overall US foreign policy goals and U.S. interests.

- a. Special 301 Report must be consistent with US foreign policy, an important aspect of which is to foster development.*

An important aspect of US foreign policy is to promote development in foreign countries.³ This approach, among other things, focuses on increasing educational opportunities. Reflecting this approach, many USAID programs support education.⁴ As one scholar has observed, “education and basic scientific knowledge are important components in creating an environment in which domestic initiatives and development policies take root. A well-informed, educated and skilled citizenry is indispensable to the development process.”⁵

Yet unbalanced copyright policies pose great impediments in facilitating access to education. Publishers use their exclusive rights to set prices of textbooks at levels unaffordable to students in developing countries.⁶ Similarly, “prohibitive subscription costs, legally endorsed

² Office of the United States Trade Representative, *2012 Special 301 Report*, 5, (April 2012), <http://publicknowledge.org/pdf/pk-eff-special-301-20100218.pdf>.

³ See, USAID, *What we do*, <http://www.usaid.gov/what-we-do>, (last updated February 4, 2013).s

⁴ See, USAID, *Education*, <http://www.usaid.gov/what-we-do/education>, (last updated February 1, 2013).

⁵ Margaret Chon, *Copyright and Capability for Education: An Approach ‘From Below’*, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS, Chapter 6, 5, available at: http://www.piipa.org/index.php?option=com_content&view=article&id=99, (citing Prof. Ruth Okediji, William L. Prosser Professor of Law, University of Minnesota).

⁶ *Id.*, at 6.

technological constraint (such as TPMs), and the relative absence of open content licenses,” among other factors, frustrate distance education efforts.⁷

To address these concerns, developing countries need to adopt copyright laws that provide for robust limitations and exceptions for educational uses of copyrighted works. Yet rights holders consistently oppose such limitations and exceptions. As the USTR evaluates rights holder claims, it must not consider educational limitations and exceptions as being inconsistent with protection of intellectual property. US law demonstrates that it is not, and furthermore, our foreign policy promotes education, which in many cases requires such limitations and exceptions.

b. Special 301 process must view US economic interests holistically.

While securing American IP interests is important, this goal should be pursued in a manner that does not hurt other US economic interests. A push for ever more expansive IP protection could easily run counter to this principle. In particular, it would compromise the ability of the Internet and consumer electronics industries to make and market their products in other countries.

As we have said in previous comments, these industries rely on copyright limitations and exceptions to make and market their products. For instance, Google relies on fair use to index entire web pages to facilitate search.⁸ Makers of devices such as sling box and MP3 players rely on the fair use to facilitate time and space shifting. Many of these companies sell or aspire to sell their products and services in other countries and need similar exceptions in the copyright laws of other countries to successfully market their products. However, the ability of other countries to craft such robust exceptions is often challenged and constrained by the USTR’s Special 301 process thereby harming many US interests. The Internet economy is one of the fastest growing sectors⁹ of the US economy and the USTR’s policies must not hurt this sector.

⁷ *Id.*, at 7.

⁸ Jonathan Band, *Google and Fair Use*, 3 J. Bus. & Tech. L. 1 (2008), available at: <http://digitalcommons.law.umaryland.edu/jbtl/vol3/iss1/14>

⁹ See McKinsey Global Institute, *Internet Matters: The Net’s Sweeping Impact on Growth, Jobs, and Prosperity*, 16, (May 2011), http://www.mckinsey.com/insights/mgi/research/technology_and_innovation/internet_matters.

III. These comments suggest a framework that the USTR must use to evaluate countries and are relevant even though they do not relate to a specific country.

The Federal Register notice requests commenters to identify “foreign countries’ acts, policies, or practices that are relevant to deciding whether” that country must be identified as a priority foreign country or placed on the Priority Watch List or Watch list.¹⁰ The Office of the United States Trade Representative (USTR) interprets this as a direction to provide country specific comments only. During past hearings, USTR officials have questioned the relevance of non-country specific comments.

PK respectfully disagrees with this view. The Special 301 Reports, while evaluating countries individually, reveal a generic, non-country specific view of IP policy and this view influences their findings. Therefore, any comments that offer a perspective on evaluation criteria aid in the preparation of the Report and are relevant. Due consideration of these comments will ensure that policy positions that undergird the Special 301 proceedings reflect a true domestic consensus.

- a. The Special 301 process adopts a generic, non-country specific view of intellectual property law and policy as it evaluates countries.*

The USTR adopts a generic, non-country specific framework in its evaluations. Previous Special 301 Reports have provided the broad outlines of the USTR’s criteria to be applied to every country. For instance, the 2012 Report states that in evaluating countries the USTR took into account “diverse factors such as a trading partner’s level of development, its international obligations and commitments, the concerns of rights holders and other interested parties, and the trade and investment policies of the United States.”¹¹

More importantly, the presence of non-country specific evaluation criteria is revealed by the USTR’s view of the purpose of IP law. That view appears to emphasize the importance of strong intellectual property protection and does not account for the importance of placing limits

¹⁰ 2013 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act, of 1974: Request for Public Comment and Announcement of Public Hearing, 70 Fed. Reg. 77178, available at: <http://www.regulations.gov/#!documentDetail;D=USTR-2012-0022-0001>

¹¹ Office of USTR, *2012 Special 301 Report*, 5, (April 2012), <http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report.pdf>.

on that protection in order to further social, political, or economic good. While not explicitly stated, several factors reveal that view: First, the Special 301 Reports list countries based on rights holder complaints, most of which take the view that the purpose of intellectual property laws is to secure maximum financial return for them. Second, civil society comments about why beneficial limitations and exceptions should not cause a country to be listed are never mentioned, and thus presumably not considered. Thus, the Special 301 Reports rarely excuse a country for adopting or proposing beneficial copyright limitations and exceptions, leading to a long list of countries being placed on the watch lists each year.

- b. Public interest representatives provide valuable perspectives, different from rights holder perspectives, on how the USTR must evaluate countries.*

Rights holder complaints about the IP practices of other countries have generally been two pronged: first, that countries do not adequately enforce the laws on their books; and second, that countries' copyright laws are not designed to provide adequate and effective protection for copyrights.¹² Both complaints view rights holder interest in a vacuum – divorced from other pressing social and developmental issues these countries face. Thus, the inadequate enforcement prong of complaints asks for dedication of more and more resources to IP enforcement, ignoring other law enforcement priorities, including combating violent crime.¹³ The inadequate laws prong seeks ever-expansive exclusive rights, showing active hostility to socially beneficial exceptions.¹⁴

¹² See ex International Intellectual Property Alliance, *2012 Special 301 Report on Copyright Protection and Enforcement*, (February 10, 2012), <http://www.iipa.com/special301.html> (providing extensive comments about state of intellectual property law and enforcement in various countries.)

¹³ For instance, the IIPA 2012 Comments claim that in Chile, intellectual property prosecutor's office is not dedicating time and resources to understand and build piracy cases. In addition, all enforcement authorities lack sufficient training and expertise. *Id.*, at Appendix A, 21. Similarly, the comments claim that India needs to establish new intellectual property courts with expert judges and trained prosecutors. *Id.*, at 63.

¹⁴ For example, IIPA's 2012 comments, in requesting that Canada be placed on the priority watch list, assailed several proposed beneficial exceptions. One such objection related to the addition of the word "education" as a category of use that would qualify for a fair dealing exception. The IIPA claimed that this exception would adversely impact collective licensing mechanisms, ignoring that educational use is one of the illustrative categories of fair use in US law. Similarly, it also complained against a proposed back up copy exception, even while conceding that the exception would have the following limitations: the user would have to own the copy; the original copy had to be non-infringing; the user must not have circumvented TPM to gain access

These comments, as well as those of many others in the public interest community, offer a valuable, counter-perspective urging the USTR not only to call for intellectual property laws that provide robust protections to rights holders but also provide limits to these rights in a manner conducive to strong user rights. With respect to copyright, this approach is ingrained in US copyright law and facilitates many socially beneficial outcomes such as robust political commentary and social dialogue, library and educational uses, and the development of a vibrant Internet industry.¹⁵ This is a model that the US must seek to promote globally.

A contrary approach, which assails countries for their lax enforcement and insufficient laws without regard for their ability to dedicate more resources to IP enforcement or their needs to tailor laws to their domestic needs, would be counterproductive. A recent study, *Media Piracy in Emerging Economies*, poignantly highlighted the impact of high prices and lack of competition on local economies and suggested that these factors were responsible for piracy to a far greater extent than lax enforcement or inadequate laws. Ignoring these factors and forcing countries to adopt particular regimes preferred by rights holders would result in “selective enforcement” and “spectacular punishment,” as the study called it. But this approach is not likely to change the extent of piracy.

Conclusion

PK and other public interest representatives have engaged in the Special 301 process for the past three years. Starting in 2010, the USTR sought the input from an increasing range of stakeholders, including public interest representatives. PK appreciates this approach. Yet this invitation to participate has not been followed by an active engagement with the public interest community. Thus, while we are allowed to file comments and testify, the Special 301 Reports do not reveal an understanding of our views. Worse still, they do not contain an acknowledgement of our engagement and an explanation about why our views did not prevail.

to the copy; the user must not distribute the copy; and back-up copies must be destroyed once the user stops owning or licensing the original copy. *Id.* at 13-14.

¹⁵ For further explanation of commenter’s views on this policy, see Comments of Public Knowledge and the Electronic Frontier Foundation, *In the Matter of 2010 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, p. 2-3, Docket No. USTR-2010-0003, <http://publicknowledge.org/pdf/pk-eff-special-301-20100218.pdf>.

This failure to engage hurts the legitimacy of the process and must be corrected in future proceedings.

Respectfully submitted,

/s/

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