

October 28, 2010

President Barack Obama
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Obama:

As academics dedicated to promoting robust public debate on the laws and public policies affecting the Internet, intellectual property, global innovation policy and the worldwide trade in knowledge goods and services, we write to express our grave concern that your Administration is negotiating a far-reaching international intellectual property agreement behind a shroud of secrecy, with little opportunity for public input, and with active participation by special interests who stand to gain from restrictive new international rules that may harm the public interest.

Your Administration promised to change the way Washington works. You promised to bring increased truthfulness and transparency to our public policy and law, including the Freedom of Information Act. You promised that wherever possible, important policy decisions would be made in public view, and not as the result of secret special interest deals hidden from the American people.

Your Administration's negotiation of ACTA has been conducted in stark contrast to every one of these promises. In the interest of brevity, we'll focus here on the three principal ways in which your Administration's negotiation of ACTA undercuts the credibility of your previous promises.

First, ACTA's negotiation has been conducted behind closed doors, subject to intense but needless secrecy, with the public shut out and a small group of special interests very much involved. The United States Trade Representative (USTR) has been involved in negotiations relating to ACTA for several years, and there have been drafts of portions of the agreement circulating among the negotiators since the start of negotiations. Despite that, the first official release of a draft text took place only in April, 2010. And following that release the USTR has not held a single public on-the-record meeting to invite comments on the text. Worse, in every subsequent meeting of the negotiating parties, the U.S. has blocked the public release of updated text. The U.S. often has acted alone in banning the distribution of the revised text, contrary to the strong majority view of other negotiating partners to promote public inspection and comment. Because the negotiations have operated on a consensus basis, the U.S. vote against transparency has been dispositive.

This degree of secrecy is unacceptable, unwise, and directly undercuts your oft-repeated promises of openness and transparency. Rather than seeking meaningful public input from the outset, your Administration has allowed the bulk of the public debate to be based upon, at best, hearsay and speculation. Yet, ACTA is a trade agreement setting out a range of new international rules governing intellectual property; as the G-8 called it, a "new international framework." It is not (the claims of the USTR notwithstanding) related in any way to any standard definition of "national security" or any other interest of the United States similarly pressing or sensitive. The Administration's determination to hide ACTA from the public creates the impression that ACTA is precisely the kind of backroom special interest deal – undertaken in this case on behalf of a narrow group of U.S. content producers, and without meaningful input from the American public – that you have so often publicly opposed.

Second, the Administration has stated that ACTA will be negotiated and implemented not as a treaty, but as a sole executive agreement. We believe that this course may be unlawful, and it is certainly unwise.

Now that a near-final version of the ACTA text has been released, it is clear that ACTA would usurp congressional authority over intellectual property policy in a number of ways. Some of ACTA's provisions fail to explicitly incorporate current congressional policy, particularly in the areas of damages and injunctions.¹ Other sections lock in substantive law that may not be well-adapted to the present context, much less the future.² And in other areas, the agreement may complicate legislative efforts to solve widely recognized policy dilemmas, including in the area of orphan works, patent reform, secondary copyright liability and the creation of incentives for innovation in areas where the patent system may not be adequate.³ The agreement is also likely to affect courts' interpretation of U.S. law.⁴

The use of a sole executive agreement for ACTA appears unconstitutional.⁵ The President may only make sole executive agreements that are within his independent constitutional authority.⁶ The President has no independent constitutional authority over intellectual property or communications policy, the core subjects of ACTA. To the contrary, the Constitution gives primary authority over these matters to Congress, which is charged with making laws that regulate foreign commerce and intellectual property.⁷ ACTA should not be pursued further without congressional oversight and a meaningful opportunity for public debate.

The USTR has insisted that ACTA's provisions are merely procedural and only about enforcing existing rights. These assertions are simply false. Nearly 100 international intellectual property experts from six continents gathered in Washington, DC in June, 2010 to analyze the potential public interest impacts of the officially released text. Those experts – joined by over 650 other experts and organizations – found that “the terms of the publicly released draft of ACTA threaten numerous public interests, including every concern specifically disclaimed by negotiators.” The expert statement notes that:

¹ See Letter from Senator Bernard Sanders and Senator Sherrod Brown to David Kappos, Director of Patent and Trademark Office (Oct. 19, 2010), *available at* http://keionline.org/sites/default/files/senator_sanders_brown_kappos_19oct2010.pdf (requesting analysis on the potential implications of ACTA on areas of U.S. law that appear in conflict with the facial language of the agreement, including in reference to sovereign immunity, Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999), limitations of patent remedies against medical providers 35 U.S.C. § 287 (c), and for non-disclosed patents on biologic products 35 U.S.C. § 271(e)(6)(B)-(C), for non-willful trademark violation, 15 U.S.C. § 114 (2), and in certain cases of infringement in the digital environment, 17 U.S.C. § 512).

² See Anti-Counterfeiting Trade Agreement October 2010 Draft, art. 2.14.1, *available at* <http://wcl.american.edu/pijip/go/acta10022010> [hereinafter ACTA October Draft] (extending criminal copyright liability for any violations that bestow an “indirect” economic advantage).

³ See Shawn Bentley Orphan Works Act of 2008, S.2913, 110th Cong. (as passed by Senate, Sept. 26, 2008), World Health Assembly Res. 61.21, Global strategy and plan of action on public health, innovation and intellectual property, 61st Sess., May 19-24, 2008 (May 24, 2008); ACTA October Draft, *supra* note 2 at art. 2.14(1,4) (applying broad conception of aid-and-abet liability).

⁴ See *generally* Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (holding that U.S. statutes should be interpreted to avoid conflicts with international law).

⁵ See Jack Goldsmith & Lawrence Lessig, *Anti-counterfeiting Agreement Raises Constitutional Concerns*, WASH. POST, Mar. 26, 2010, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html>.

⁶ See *generally* Oona Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 Yale L.J. 140 (2009). There is no long history of the President making international intellectual property policy of this sort through sole executive agreements that could otherwise justify sole executive action in this area.

⁷ U.S. Const. Art. 1, § 8, cls. 3, 8.

- Negotiators claim ACTA will not interfere with citizens' fundamental rights and liberties; it will.⁸
- They claim ACTA is consistent with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); it is not.⁹
- They claim ACTA will not increase border searches or interfere with cross-border transit of legitimate generic medicines; it will.¹⁰
- And they claim that ACTA does not require “graduated response” disconnections of people from the internet; however, the agreement encourages such policies.¹¹

Academics and other neutral intellectual property experts have not had time to sufficiently analyze the current text and are unlikely to do so as long as there is no open public forum to submit such analysis in a meaningful process. Rather than create such a forum, the USTR has released text accompanied by the announcement that the negotiations are finished and the time for public comment, which was never granted in the first instance, is over. This is not meaningful, real-time transparency, and it is certainly not the kind of accountability that we were expecting from your Administration. We know enough to know that ACTA's provisions are of significant interest to the general public, because they touch upon a wide range of public interests and are likely to alter the substantive law governing U.S. citizens. It is clear that before ACTA negotiations proceed further, Congress must be involved.

Third, and finally, we are concerned that the purpose that animates ACTA is being deliberately misrepresented to the American people. The treaty is named the “Anti-Counterfeiting Trade Agreement”. But it has little to do with counterfeiting or controlling the international trade in counterfeit goods. Rather, this agreement would enact much more encompassing changes in the international rules governing trade in a wide variety of knowledge goods – whether they are counterfeit or not – and would establish new intellectual property rules and norms without systematic inquiry into effects of such development on economic and technical innovation in the U.S. or abroad. These norms will affect virtually every American and should be the subject of wide public debate.

Our conclusion is simple: Any agreement of this scope and consequence must be based on a broad and meaningful consultative process, in public, on the record and with open on-going access to proposed negotiating text and must reflect a full range of public interest concerns. For the reasons detailed above, the ACTA negotiations fail to meet these standards.

While you cannot go back in time, you still have the opportunity to allow for meaningful public input, even at this late date. Accordingly, we call on you to direct the USTR to halt its public

⁸ See Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), 2010 O.J. (C 147) 1.

⁹ Compare ACTA October Draft, *supra* note 2 at art. 1.X: Definitions, *with* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 51, 33 I.L.M. 81 (1994) [hereinafter TRIPS] (contrasting ACTA's definition of “counterfeit trademark goods” and “pirated copyright goods” as being based on the “the law of the country in which the procedures . . . are invoked,” including in export or in transit cases, with the definition under TRIPS art. 51, requiring the same terms to be defined by “under the law of the country of importation”).

¹⁰ *E.g.*, ACTA October Draft, *supra* note 2 at art. 2.X: Border Measures (promoting *ex officio* in-transit seizure of “suspect goods”, a term undefined in the Agreement).

¹¹ See ACTA October Draft, *supra* note 2 at art. 2.18(3) (containing requirements to promote “cooperative efforts” between internet service providers and the content industry).

endorsement of ACTA and subject the text to a meaningful participation process that can influence the shape of the agreement going forward. Specifically, we call on you to direct USTR to:

1. Signal to other negotiators that the U.S. will not sign ACTA before the conclusion of a meaningful public participation process and another round of official negotiations where public participation is encouraged;
2. Hold a meaningful open, on-the-record public hearing on the draft text, the results of which will be used to determine what proposed changes to the agreement the administration will propose;
3. Renounce its position that the agreement is a “sole executive agreement” that can tie Congressional authority to amend intellectual property laws without congressional approval and instead pledge to seek congressional approval of the final text;
4. Consider reforms to the USTR’s industry trade advisory committee (ITAC) process that would allow for a wide range of official advisors;
5. Propose new language for the creation of the ACTA Committee that would require open, transparent and inclusive participation that takes into account the viewpoints of other stakeholders, including inter-governmental organizations (IGOs) and non-governmental organizations, in line with the principles of the World Intellectual Property Organization’s development agenda.¹²

Signed,

¹² See WORLD INTELLECTUAL PROPERTY ORGANIZATION, THE 45 ADOPTED RECOMMENDATIONS UNDER THE WIPO DEVELOPMENT AGENDA No. 15, available at <http://www.wipo.int/ip-development/en/agenda/recommendations.html>

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