

COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge submits these comments in response to the request for written submissions published in the Federal Register of February 15, 2008.¹ Public Knowledge is a Washington D.C. based non-profit organization dedicated to promoting innovation and citizens' rights in the emerging digital culture.

Introduction

In pursuing the worthy goals of protecting consumers, enforcing copyrights, and combating counterfeiting, the USTR should ensure that the proposed Anti-Counterfeiting Trade Agreement (ACTA) is narrowly tailored against bad actors. An overbroad set of enforcement laws and mechanisms would detrimentally affect legitimate users of copyrighted works, as well as technological innovators whose new creations might not be adequately accounted for in current law.

We appreciate the opportunity to comment on ACTA at this preliminary stage of the proceedings, and would hope that the process moving forward will be an open one, allowing interested parties and the general public the ability to comment on the agreement when its actual draft text is available. At present, the lack of anything more than a sparse outline prevents a more detailed discussion of the many complex issues that can and will be encompassed by such an agreement.

These comments therefore will address several broad themes discussed in the USTR's Fact Sheet, as well as more specific proposals that, while not mentioned in the Fact Sheet, have been recently discussed in the context of copyright and trademark enforcement.

Ensuring Targeted Enforcement

An extremely wide and disparate range of activities can be encompassed by the terms "counterfeiting and piracy." While each represents a type of offense related to intellectual property, the particular risks to the public created by each are distinct, and therefore the enforcement response should be tailored to the type of infringement as well as to the severity of the threat to the public.

For instance, the public harm posed by counterfeit pharmaceuticals or tainted food products is clear and considerable. On the other hand, counterfeit designer clothing or pirated music and movies, while representing non-trivial losses to rightsholders, do not threaten the public health and safety in the same way. It is critical for any policymaking in this realm to draw these distinctions between different violations, and recognize the relative priority that enforcement authorities with finite resources will logically give them.

¹ Anti-Counterfeiting Trade Agreement (ACTA): Request for Public Comments, 72 Fed. Reg. 8910 (Feb. 15, 2008).

Even within the smaller scope of copyright alone, myriad fact patterns and situations can all be classified under the terms of "infringement" or "piracy." An industrial optical disc manufacturer, a single P2P downloader, and a student burning a mix CD can all be liable for copyright infringement, and classified as "pirates," even though each of their activities stems from a different motivation and can be addressed with differing levels and methods of enforcement.

Aside from the general themes outlined in the USTR Fact Sheet, several specific proposals for copyright enforcement have been much-discussed in the press and in international enforcement circles of late.² Public Knowledge urges the USTR to resist attempts to enshrine such technology-specific enforcement mechanisms in the requirements of a multilateral agreement. Enforcement efforts in affected countries must account for a wide variety of variables, including the state of national intellectual property laws, the cultural and economic needs of individual and institutional users, and the resources available to local law enforcement.

For instance, in countries lacking a robust and flexible regime of limitations and exceptions, many legitimate uses remain unlawful, but are permitted through non-enforcement. Requiring specific enforcement practices in such a situation, before legitimate uses can be recognized and codified into local limitations and exceptions, will frustrate the balance of intellectual property required to ensure creativity and innovation.

We discuss some of these specific proposals below.

Technological Mandates for Internet Service Providers

One of the legal measures being considered under ACTA is the creation of a legal framework to deal with piracy via the Internet. In doing so, the framers of ACTA should exercise caution in the scope of the agreement, given that binding multilateral agreements such as the so-called WIPO Internet Treaties³ already create a system of requirements for governing intellectual property and secondary liability on the Internet. The United States' implementation of the WIPO Internet Treaties already accounts for Internet Service Provider (ISP) liability via the safe harbor provisions of the Digital Millennium Copyright Act (DMCA).⁴ Furthermore, the diplomatic conference adopting the WIPO Internet Treaties adopted an "agreed statement" noting that ISPs should not be held liable

² Tim Wu, *Has AT&T Lost its Mind? a Baffling Proposal to Filter the Internet*, SLATE, Jan. 16, 2008, <http://www.slate.com/id/2182152>; Brad Stone, *AT&T and Other I.S.P.s May Be Getting Ready to Filter*, BITS, N.Y. TIMES BLOGS, Jan. 8, 2008, <http://bits.blogs.nytimes.com/2008/01/08/att-and-other-isps-may-be-getting-ready-to-filter/>; Bobbie Johnson, *Pirates face crackdown over movie downloads*, THE GUARDIAN, Nov. 24, 2007, at International 30, available at <http://www.guardian.co.uk/technology/2007/nov/24/crime.france>; Danny O'Brien, *Three Strikes, Three Countries: France, Japan, and Sweden*, EFF DEEPLINKS BLOG, Mar. 18, 2008, <http://www.eff.org/deeplinks/2008/03/three-strikes-three-countries>.

³ Specifically, the WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997) (*hereinafter* "WCT"); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997).

⁴ 17 U.S.C. § 512; U.S. Senate Executive Report 105-25 (105th Cong., 2d Sess.).

when acting as a mere conduit for communication.⁵

Therefore, in assessing the legal framework of preventing Internet piracy, ACTA should not oblige countries to impose further requirements on ISPs that would compromise consumer privacy, create new responsibilities to monitor content, and impose unfair penalties on consumers. In particular, ISPs should not be required to reveal the identities of their customers accused of copyright infringement without adequate procedural safeguards. Nor should ISPs be required to enact experimental measures such as filtering content for copyright infringement, automatically terminating access, or blacklisting accused infringers from the Internet.

Disclosure of user identity

In order to safeguard the essential values of privacy and trusted communication on the Internet, ISPs must have strong legal grounds before disclosing the identities of their users. There is a significant history in the United States of false or groundless claims intended to reveal a user's personal information.⁶ Any provisions regarding disclosure should contain adequate procedural safeguards to protect privacy and prevent harassment. Rightsholder requests for information about the identity of customers should be subject to judicial scrutiny. The targeted ISP should be required to notify its customer of the request, and the customer in turn should have the opportunity to object to the request. Such safeguards are necessary to prevent the unwarranted erosion of Internet users' privacy and anonymity and to promote the free exchange of information.⁷

Network filtering

ACTA should not oblige member countries to require ISPs to filter their networks in order to prevent copyright infringement. Such a filtering mandate could seriously invade users' privacy, would be unworkably burdensome and expensive for ISPs, and would have an adverse impact on lawful uses of copyrighted content. In addition, such measures would be ineffective in preventing piracy.

Implementing a filtering technology based on content inspection would require ISPs to inspect every bit of information passing over their networks, giving rise to serious privacy concerns. Apart from the question of legality, ISPs required to institute content inspection would have to fundamentally reconfigure their networks. This would not only increase the costs of operation, it would slow traffic dramatically. In an era of increasing demand for the critical services provided by the Internet, it is unfair and unjustified for all consumers to pay more for poorer service in order to protect private rights against the occasional infringer.

⁵ See WIPO Copyright Treaty, Agreed statements concerning Article 8, Dec. 20 1996, 36 I.L.M. 65 (1997).

⁶ See, e.g., Shaun B Spencer, *CyberSLAPP Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. MARSHALL J. COMPUTER & INFO. L. 493 (2001).

⁷ See Brief of Amici in Support of Verizon's Opposition to RIAA's Motion to Enforce, Recording Industry Association of America, Inc. v. Verizon Internet Services Inc., Civ.No. 1:02MS00323 (D.C. August 30, 2002).

In addition, all filtering technologies are by design unable to distinguish between infringements and lawful uses. While network filters may be able to recognize copyrighted content, they would be unable to distinguish the context in which the work was being used. Copyrighted content may be lawfully transmitted over a network for the purpose of fair use or other lawful uses. Meanwhile, determined infringers could circumvent network filters by encrypting content. Thus filters would on the one hand prevent lawful uses and on the other be ineffective against piracy.⁸

Termination of Internet access

Recently, proposals have been put forward in some nations mandating ISPs to terminate customer access to the Internet in response to alleged infringement. While abuse of an account may subject a customer to termination, the critical importance of an Internet connection requires that any such action be procedurally sound, allowing the accusation of infringement to be contested by the customer and reviewed judicially.

Some proposals go further, requiring ISPs to penalize infringement by the "blacklisting" of infringing users, permanently terminating their Internet access. Such a measure would be a completely disproportionate response to alleged infringement. It would ignore the fact that Internet is not merely a conduit through which consumers access copyrighted content, but also a vital means of communication for millions who otherwise would be unable to speak to a global audience, or to participate in a global exchange of ideas. Internet access therefore is a vital outlet for citizens to both provide and receive civic and political information.

Given the myriad ways in which the Internet is of crucial importance to individuals, terminating access should not be a penalty for individuals merely because they are liable for infringement via the Internet. While it is entirely appropriate that infringers compensate copyright holders for their losses, depriving users of a forum for speech and expression is a uniquely disproportionate penalty divorced from any relationship to the losses suffered by the copyright holder or the unjust enrichment of the infringer.

It should also be noted that proposals like network filtering and access termination are still in their infancy. Absent any evidence of their comparative efficacy or efficiency in the countries in which they have been proposed, mandating such systems multilaterally would be at best premature, and at worst require a uniformly poor and onerous solution to be implemented worldwide.

Additional protections for technological protection measures

In addressing the intersection of copyright infringement and evolving information technologies, ACTA should not contain any provisions relating to Technological

⁸ For additional explication of these arguments, see Reply Comments of Public Knowledge, *et al.*, on Broadband Industry Practices, FCC 07-52, July 16, 2007, available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519558072.

Protection Measures (TPMs) and remedies against circumvention. Any TPM provision in ACTA would, at a minimum, be duplicative. The WCT already obliges member countries to provide adequate legal protection measures and effective legal remedies against the circumvention of TPMs used by copyright owners⁹. As a signatory to the WCT, the United States has already passed domestic legislation to give effect to these provisions. Any ACTA provision requiring such measures would thus be redundant, and could potentially conflict with existing agreements.

Furthermore, any ACTA-required protection for TPMs would reinforce a system that, at least in the United States, has failed to adequately account for a range of lawful uses. The DMCA, which implements the WCT,¹⁰ imposes a blanket ban against circumvention of technological protection measures with extremely narrow exceptions that do not account for fair use and other lawful uses.¹¹ It also prohibits trafficking in devices that would permit such legitimate circumvention¹². As a result, a person who desires to circumvent a TPM for a lawful use is prevented from doing so. Additionally, the law has been used in ways Congress never intended: in attempts to prevent free expression and security research, as an anticompetitive measure, and as a method of frustrating fair use.¹³ The range of problems associated with TPMs has even been recognized by large segments of the various content industries, who are in growing numbers removing copy restrictions from digital media such as e-books¹⁴ and digital music.¹⁵

Discretion in assessing penalties for copyright infringement

The USTR Fact Sheet notes the importance of "strengthening enforcement measures." This, we assume, would include increasing minimum penalties for infringement.

An obligation to increase penalties in U.S. law would create further imbalances in an already imbalanced copyright remedies regime. Currently, civil damages for

⁹ WIPO Copyright Treaty, Article 11, Dec. 20 1996, 36 I.L.M. 65 (1997).

¹⁰ The DMCA, in fact, goes beyond the requirements of the WCT. Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 521 (1999).

¹¹ See 17 U.S.C. § 1201(a).

¹² 17 U.S.C. § 1201(b).

¹³ ELECTRONIC FRONTIER FOUNDATION, UNINTENDED CONSEQUENCES: SEVEN YEARS UNDER THE DMCA, (Apr. 2006), <http://www.eff.org/wp/unintended-consequences-seven-years-under-dmca>.

¹⁴ Rachael Deal, *Random Audio's DRM Decision Renews Debate*, PUBLISHERS WEEKLY, Mar. 3, 2008, available at <http://www.publishersweekly.com/article/CA6536974.html?industryid=47152>; Richard Wray, *Penguin audiobooks to be free of copyright protection*, THE GUARDIAN, Mar. 4, 2008, at Financial 24, available at <http://www.guardian.co.uk/technology/2008/mar/04/digitalmusic.booksnews>.

¹⁵ See, e.g., Erik Schonfeld, *Amazon Completes DRM-Free Roster With Sony-BMG*, TECHCRUNCH, Jan. 10, 2008, <http://www.techcrunch.com/2008/01/10/amazon-completes-drm-free-roster-with-sony-bmg/>; Catherine Holahan, *Sony BMG Plans to Drop DRM*, BUSINESSWEEK, Jan. 4, 2008, available at http://www.businessweek.com/technology/content/jan2008/tc2008013_398775.htm; Nate Anderson, *Three down, one to go: Warner Music Group drops DRM*, ARS TECHNICA, Dec. 27, 2007, <http://arstechnica.com/news.ars/post/20071227-3down-1-to-go-warner-music-group-drops-drm.html>.

copyright infringement in the U.S. are tilted heavily in favor of copyright owners. For example, a district court ordered a Minnesota woman to pay statutory damages of \$222,000 for sharing 24 songs on a peer-to-peer network.¹⁶ Similarly, a piece by Utah law professor John Tehranian highlights the disproportionate nature of damages.¹⁷ Cataloguing the ordinary activities of a hypothetical person—forwarding emails, passing out news articles, reciting a poem—Tehranian finds that these mundane acts of a single day can expose this imaginary person to \$12.45 million in damages, all without a single act of P2P file sharing or other commonly recognized "bad acts."

Increasing penalties also creates problems in evolving areas of copyright law. For instance, a number of copyright questions remain unsettled in the United States regarding the nature of incidental copies, the distinction between digital distributions and digital performances, and many other issues. Other nations involved in ACTA may likewise have unsettled areas of law that will be affected by these measures. As the balances between users, rightsholders, and the public are calibrated in each jurisdiction, each country should be free to decide the measure of remedy for violation of law based on its social structure and legal culture.

Therefore, any provisions that contemplate increasing or instituting new criminal penalties such as increased fines, prison terms or forfeiture of property for copyright infringement should be mindful of the differences between large-scale commercial pirates and individual infringers. The provisions should also allow for maximum legislative flexibility in accounting for these differences as well as the evolution of technology.

Conclusion

We anticipate that a number of submissions will indicate areas of counterfeiting and piracy that might benefit from a multilateral enforcement agreement. In lieu of repeating the benefits of enforcement against violations of intellectual property rights, Public Knowledge submits the above comments in the interest of ensuring that measures taken to protect intellectual property do not also prejudice the rights of consumers or the creativity of technological innovators.

¹⁶ See Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, October 5, 2007, available at <http://www.nytimes.com/2007/10/05/business/media/05music.html>.

¹⁷ John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L.REV. 537 (2007).