

**Testimony of Gigi B. Sohn
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**Before the
U.S. House of Representatives
Committee on Ways and Means
Subcommittee on Trade**

**Hearing on Trade Advisory Committee System
July 21, 2009**

Chairman Levin, Ranking member Brady and members of the Subcommittee, thank you for giving me the opportunity to submit this statement into the record in this hearing on behalf of Public Knowledge and the Electronic Frontier Foundation (EFF). Public Knowledge is an advocacy organization that seeks to ensure that copyright and communications policies promote citizens' access to and participation in culture and knowledge. Electronic Frontier Foundation (EFF) is a member based digital rights organization that focuses on defending free speech, privacy, innovation, and consumer rights. To achieve these goals, the public's voice should be present in the formulation of intellectual property laws and policies both domestically and internationally. We limit this testimony to the intellectual property aspects of trade agreements and the process by which they are negotiated.

Introduction

Increasingly, international obligations are influencing U.S. intellectual property (IP) law and policies. IP chapters of many international trade agreements adopt unsettled interpretations of U.S. law to the benefit of rights owners and ignore the policy decisions made in our domestic laws, which promote learning and culture by striking a balance between rights of owners and citizens generally. While U.S. IP industries such as the pharmaceutical industry, the motion picture industry, and the recording industry have considerable influence in the formulation of these agreements, the American public has very little input in the process. In order to correct this imbalance and ensure that IP aspects of trade agreements reflect the interests of all Americans, Congress should facilitate greater public interest input into the process by which trade agreements are formulated. To this end, Congress should:

1. Clarify that the "fair balance" requirement of the Federal Administrative Committees Act (FACA) requires that ITAC 15¹, or any future IP-related ITACs, represent the interests of *everyone* affected by the IP aspects of trade agreements, including non-business interests.
2. Amend the Trade Act to ensure that the USTR's power to close meetings and documents to the public does not result in all such meetings and documents relating to intellectual property negotiations being closed by default.

¹ ITAC 15 is the tier 3 Industry Trade Advisory Committee that deals with IP issues.

These changes would ensure that trade agreements will represent not only the interests of intellectual property owners but also American citizens generally.

1. Congress should clarify that the “fair balance” requirement of the FACA means that tier 3 industry trade advisory committees should represent interests of all affected, including non-business interests.

The USTR and executive agencies charged with administering industry trade advisory committees (ITACs) currently follow the policy of excluding non-business interests from representation on tier 3 committees.² As a result, ITAC 15, which deals with intellectual property issues, overwhelmingly represents the interests of IP owners.³

Perhaps because of this, intellectual property chapters of many U.S. trade agreements have tended to ignore the interests of the public and assume international obligations that are harmful to them. For example, the U.S.-Australia Free Trade Agreement (FTA) requires the U.S. and Australia to grant to copyright owners the exclusive right “to authorize or prohibit all reproductions, in any manner or form, permanent or temporary (including temporary storage in material form)...”.⁴ The U.S. Copyright Act does not extend protection to temporary instances of a work that are of a transitory nature, and U.S. courts are divided as to how non-transitory reproductions must be to implicate the rights of copyright owners.⁵ If temporary or transitory reproduction were considered a right granted to copyright owners, Internet Service Providers (ISPs), internet based services such as webcasters and online music stores, and consumers would all be exposed to liability for copyright infringement during the course of routine activities.

Like the U.S.-Australia FTA, the proposed Anti-Counterfeiting Trade Agreement (ACTA) raises the specter of eroding consumer rights and subjecting ISPs to unjustified burdens in order to prevent copyright infringement. The USTR has announced its intention to negotiate, as part of ACTA, provisions to counter Internet-based infringements of copyrights. In public comments filed with the USTR, content industry groups such as the Motion Picture Association of America (MPAA) and the Recording

² GAO, *International Trade: Advisory System Should be Updated to Better Serve U.S. Policy Needs*, GAO-02-876, p.63 (Washington, D.C.: September 24, 2002), (“GAO Report, 2002”); ITA International Trade Administration, Dept. of Commerce, *Become a Trade Advisor*, http://www.ita.doc.gov/itac/become_an_advisor/becomeanadvisor.asp

³ With the exception of one public health representative, *all* of the members of ITAC 15 represent IP holders.

⁴ US – Australia Free Trade Agreement, Article 17.4, January 1, 2005, *available at*: <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>.

⁵ *Compare MAI Systems Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993); and *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F.Supp. 356, 362-364 (E.D. Va. 1994) with *Cartoon Network LP. V. CSC Holdings*, 536 F.3d 121, 127-131 (2d. Cir, 2008); *CoStar Group Inc. v. Loopnet, Inc.* 373 F. 3d 544, 551 (4th Cir. 2004).

Industry Association of America (RIAA) have called for ACTA to contain measures that would require ISPs to reveal information of customers accused of copyright infringement, suspend Internet accounts of customers accused of repeat infringement, and require ISPs to filter their networks for infringement.⁶ These measures rely on ISPs and copyright owners making infringement determinations without judicial intervention and thus threaten consumers' privacy and due process rights. While representatives of the MPAA and the RIAA, as members of ITAC 15, have the ability to influence the design of these provisions, consumers do not.

In order to ensure balance in the views expressed by ITAC 15, consumer and public interest advocates should be included in its makeup. The law does not explicitly exclude public interest perspectives from the committee, and the legislative history of the Trade Act and the FACA, both of which govern ITAC 15, actually support their inclusion. In enacting FACA, which applies its "fair balance" requirement to trade advisory committees,⁷ Congress intended to end industry domination of advisory committees.⁸ Similarly, in enacting certain amendments to the Trade Act in 1979, Congress expressed its intention to broaden the interests represented on tier 2 and tier 3 committees to include, among others, public interest representation.⁹

Although Congressional intent is clear, the language of the Trade Act does not provide sufficient guidance about how the "fair balance" requirement should be applied. Consequently, as the GAO report noted,¹⁰ judicial decisions on this issue do not establish conclusively that FACA's "fair balance" requirement applies to tier 3 trade advisory committees.¹¹

In the absence of clear direction in the Trade Act, the USTR¹² and the Department of Commerce, which are responsible for administering certain ITACs, contend that tier 3

⁶ GREG FRAZIER, MOTION PICTURE ASSOCIATION OF AMERICA, RE: REQUEST FOR PUBLIC COMMENT ON THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA), March 20, 2008, available at: <http://www.publicknowledge.org/pdf/acta/mpaa-20080320.pdf>; NEIL TURKEWITZ, RECORDING INDUSTRY ASSOCIATION OF AMERICA, ANTI-COUNTERFEITING TRADE AGREEMENT: REQUEST FOR PUBLIC COMMENT, MARCH 17, 2008, available at: <http://www.publicknowledge.org/pdf/acta/riaa-20080317.pdf>.

⁷ Federal Advisory Committee Act (5 U.S.C. App. § 5(b)(2)) (1994).

⁸ *Northwest Ecosystem Alliance v. Office of the United States Trade Representative*, 1999 U.S. Dist. Lexis 21689, 20 (W.D.Wash.1999).

⁹ GAO Report, 2002, *supra* note 2, at 60.

¹⁰ GAO Report 2002, *supra* note 2, at 3.

¹¹ *Compare Northwest Ecosystem*, *supra* note 8 (finding that the "fair balance" applied to a tier 3 committee and ordering appointment of members representing non-business interests) with *Center for Policy Analysis on Trade and Health v. Office of the United States Trade Representative*, 540 F. 3d 940 (9th Cir. 2008)(holding that the "fair balance" requirement is not justiciable because it is not clearly defined).

¹² ITA International Trade Administration, Dept. of Commerce, *Become a Trade Advisor*, http://www.ita.doc.gov/itac/become_an_advisor/becomeanadvisor.asp.

committees “are not generally open to non-business interests.”¹³ In order to give effect to its intention and to promote public interest, Congress should clarify that FACA’s “fair balance” requirement extends to all tier 3 advisory committees. Such clarification would facilitate appointment of public interest representatives on the tier 3 ITAC that deals with intellectual property issues – ITAC 15.

Public interest representation at the tier 3 level is essential in addition to public interest representation on the tier 1 and tier 2 committees. As the 2002 GAO report noted, the tier 1 committee may not have any influence on the tier 2 and tier 3 committees.¹⁴ Furthermore, tier 2 committees have been less active than tier 3 committees.¹⁵ Also, tier 1 and tier 2 committees are general policy committees that will not be able to provide focused public interest perspective on specialized areas such as intellectual property. Therefore, a significant public interest presence on ITAC 15 is essential to ensure that the USTR promotes IP policy that is beneficial to all Americans.

In order to be effective, public interest representatives should not be relegated to a small minority whose views are ignored by the committee.¹⁶ While the USTR cannot be expected to adopt the views of public interest representatives and has discretion in appointing members of tier 3 committees, Congress should seek to avoid extreme imbalances in committee composition by providing adequate direction to the USTR. Further, there would be greater accountability within ITAC-15 discussions if the USTR adopted the practice of responding to all written suggestions, as well as requiring that more written consultations occur within the consultation process.¹⁷

Public interest participation would not cause many of the harms that detractors claim it would. For instance, many industry representatives on tier 3 committees claim that non-business representation would prevent members of the committees from providing candid advice for fear that non-business representatives would release sensitive information to the public.¹⁸ This argument either overlooks the fact that all members of tier 3

¹³ 2002 GAO Report, *supra* note 2, at. 63.

¹⁴ GAO report, 2002, *supra* note 2, at. 7 (noting that the trade act does not establish any formal relationship among tier1, tier 2 and tier 3 committees and does not authorize the first tier to exercise any control over the other two); *Id.*, at. 25 (noting that although the Trade Act and FACA do not forbid it, the USTR and the Dept. of Commerce do not routinely consult a cross-section of committees concerned with a particular issue.)

¹⁵ GAO, *International Trade: An Analysis of Free Trade Agreements and Congressional and Private Sector Consultations under Trade Promotion Authority*, GAO-08-59, p. 55 (Washington, D.C.: November 7, 2007)(“GAO Report, 2007”).

¹⁶ GAO Report, 2002, *supra* note 2, at 41.

¹⁷ *Id.* at 28, (noting that many advisory committee chairs complain that written suggestions from their committees do not elicit a response. Also noting that predominance of oral advice causes problems in tracking and distributing committee advice).

¹⁸ GAO Report, 2002, *supra* note 2, at. 43; *Hearing on the Trade Advisory Committee System, Before the Subcommittee on Trade of the House Committee on Ways and Means*, 111th Congress, (June 21, 2009) (Testimony of Brian T. Petty, Chairman, ITAC 2).

committees are bound to keep committee information secret, or suggests that the advisory committee process should be based on an assumption that non-business representatives are somehow less trustworthy than their commercial counterparts. Industry representatives also claim that too many differences of opinions within a committee would prevent the committee from providing clear advice to the USTR.¹⁹ While clarity is essential, it is not necessarily compromised by presentation of nuanced views that account for interests of all concerned, including the public.

2. The Trade Act should clarify that the USTR's discretion to close documents to the public should not result in a default rule of secrecy.

IP aspects of some trade agreements, including the ongoing ACTA negotiations, are shrouded in excessive secrecy. Members of the public have no access to information concerning the need for the agreement, how it would benefit or harm them, and the specific proposals that are under negotiation. Although the USTR has made available to the public a summary of the ACTA negotiations, this summary does not shed any light on the actual nature of the agreement. Furthermore, it undermines the credibility of USTR's stated intention to seek greater public input.

The USTR has offered several justifications for this excessive secrecy. First, the agency claims that secrecy is an accepted policy in trade agreements. Second, it claims that secrecy allows exchange of views in confidence and facilitates the negotiation and compromise that is necessary to reach agreement on complex issues. Neither of these reasons justify excluding the public from discussion of issues that could have harmful consequences for them.

That secrecy is accepted policy does not, in itself, mean that it is also in the public interest. Further, it is not the policy in many multilateral intellectual property negotiations. For instance, the U.S. negotiated the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty in the open. While secrecy may permit ease of negotiation, it does not necessarily facilitate the best outcome. While revealing certain information, such as U.S. negotiating positions before they are tabled before the negotiating partner, may in certain situations be counterproductive, the same concern does not extend to all information.

Intellectual property issues do not fit neatly within trade agreements. Yet chapters on intellectual property have been part of trade agreements since the GATT negotiations. The justifications for secrecy that may apply to traditional trade aspects such as tariffs do not apply to intellectual property issues. Opacity in formulating IP aspects of trade agreements can only harm the interests of consumers.

¹⁹ *Hearing on the Trade Advisory Committee System, Before the Subcommittee on Trade of the House Committee on Ways and Means, 111th Congress, (June 21, 2009)* (Testimony of Timothy Hoelter, Vice President, Vice President, Government Affairs, Harley-Davidson Motor Company)

The USTR should release information such as meeting dates, times and agendas; industry studies or other presentations made available to the USTR urging adoption of certain provisions in agreements; and draft negotiating texts after they are tabled before negotiating partners. These examples are not exhaustive and merely suggest certain steps towards greater transparency. Release of such information would allow the USTR to benefit from the expertise of members of the public. Further, it would be in accordance with provisions of the Trade Act that require the USTR to seek input from members of the public.²⁰ Ultimately it would lead to adoption of negotiating positions that reflect the interests of all Americans.

Lifting the veil of secrecy over IP aspects of trade agreements will become increasingly important if, as the parties to this testimony expect, the IP industries abandon multilateral IP forums like WIPO for agreements such as ACTA. While we believe that the proper forum for an agreement like ACTA is WIPO or a similar multilateral forum, if ACTA is to proceed as a trade agreement, it should be subject to the kind of transparency and public input that would attach to a multilateral IP treaty.

Conclusion

We urge Congress to implement the recommendations made above.

Thank you for giving Public Knowledge an opportunity to submit this testimony. We remain at your disposal to answer any questions.

²⁰ See 19 U.S.C.A. § 2155 (2006)

SUPPLEMENTAL SHEET

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