Before the
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION

In the matter of	)	
Request for Public Comment on the Scope of	)	
Views Represented on Industry Trade Advisory	)	
Committees	)	Docket No. 100416189-0189-01

COMMENTS OF PUBLIC KNOWLEDGE

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Public Knowledge commends the Office of the United States Trade Representative (USTR), the Department of Commerce, and the International Trade Administration for inviting comments in the above-mentioned docket.[1] Input from a broad range of interests on this vital issue will improve the process by which United States trade policy is formulated.

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. 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 these comments to the process by which the USTR, the Department of Commerce and other agencies solicit advice in the course of formulating the United States' IP policies. Specifically, we address the need for non-business representation on the Industry Trade Advisory Committee (ITAC) 15, the ITAC that is responsible for providing advice with respect to intellectual property issues.

Introduction

Increasingly, international obligations are influencing U.S. intellectual property (IP) law and policy. IP chapters of many international trade agreements have adopted unsettled interpretations of U.S. law to the benefit of rights owners ignoring the policy decisions made in our domestic laws, which promote learning, innovation, and culture by striking a balance between rights of owners and citizens generally. While representatives of 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 had 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, the composition of ITAC 15 should include non-business interests that represent the views of the public and institutions such as libraries, museums, archives and others impacted by IP policy. A 2002 report of the General Accountability Office (GAO) highlighted these problems pointing out that the composition of trade advisory committees was not optimal to provide advice to the executive branch and assure Congress that "negotiated agreements [were] fully in U.S. interests."[2] The report noted that one

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[1] 75 *Federal Register* 80, 22121 (April 27, 2010), *available at:* http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480ae1a28

[2] GAO, *International Trade: Advisory System Should be Updated to Better Serve U.S. Policy Needs*, GAO-02-876, p.29 (Washington, D.C.: September 24, 2002), ("GAO Report, 2002") *available at:* http://www.gao.gov/new.items/d02876.pdf

of these problems was the difficulty of incorporating non-business groups.[3] In 2009, the Director of the GAO in testimony before Congress indicated that these problems continue to persist.[4]

Non-business representation would improve the quality of information provided to the Secretary of Commerce and the USTR as the presence of both non-business and industry representatives would ensure the presentation of a balanced and nuanced view of U.S. IP law, which should be the basis of IP chapters adopted in trade agreements. In addition, inclusion of all interests without marginalizing any perspective would lend greater legitimacy to policy positions taken by the USTR in international negotiations. It would also enhance the public's confidence in the outcome of negotiated agreements.

Furthermore, for effective presentation of the non-business perspective, membership of these representatives on ITAC 15 is essential. Representation on other ITACs or tier 1 or tier 2 committees would not enable these representatives to provide the same focused, detailed, and particular comments that relate to IP aspects of trade agreements, as they could on ITAC 15.

We note that the ITAC 15 was recently re-chartered[5] and the Department of Commerce and the International Trade Administration are seeking new members for all ITACs, including ITAC 15.[6] We note that the qualifications for such membership do not seem to extend to non-business interests. Because such interests are impacted by IP policy, we urge the USTR and the Dept. of Commerce to modify or clarify the eligibility criteria, permitting such representatives to apply for and be appointed to membership on ITAC 15.

Presence of non-business views on ITAC 15 would promote trade agreements that reflect the interests of all Americans and lead to greater acceptance of trade agreements domestically

The purpose of IP law is to promote the progress of science and useful arts by rewarding artists and inventors.[7] This purpose is promoted not only by a system of exclusive rights, but also by

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[3] *Id.*

[4] *Hearing on the Trade Advisory Committee System Before the Subcommittee on Trade of the House Committee on Ways and Means,* p.8, 111th Congress, (July 21, 2009)(Testimony of Loren Yager, Director, International Affairs, GAO).

[5] *See* U.S. Dept. of Commerce and The Office of the United States Trade Representative, Charter of the Industry Trade Advisory Committee on Intellectual Property Rights, (February 17, 2000), http://www.ita.doc.gov/itac/committees/Charters/Intellectual_Property_Rights_ITAC.pdf

[6] Dept. of Commerce and International Trade Administration, Request for Nominations for the Industry Trade Advisory Committees, 75 Fed. Reg. 86, (May 5, 2010), *available at* http://frwebgate6.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=708746385941+5+2+0&WAISaction=retrieve

[7] U.S. CONST. art 1, § 8.

limitations on these rights. U.S. copyright and patent laws embody several provisions representing these limitations.[8] Because rights holders generally see the expansion of exclusive rights as beneficial to them, as representatives of IP industries on ITAC 15, they are likely to call for adoption of provisions in international agreements that would not only increase their market access, but also expand the scope and strength of exclusive rights.

As IP aspects assume greater importance in trade agreements, the obligations that the U.S. assumes in these agreements have greater domestic repercussions. As explained below, these obligations may often adversely affect the rights of users of copyright and patent products. However, the current qualifications for ITAC 15 membership and the current composition of the committee seems to be limited to business representation,[9] thereby preventing presentation of views that would reflect some of the negative impacts of expansive IP protection. Like the current ITAC 15, the previous ITAC 15 also had business representation only.[10]

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)....".[11] The U.S. Copyright Act does not extend protection to temporary copies of a work that are of a transitory nature, and U.S. courts leave uncertain as to how non-transitory reproductions must be to implicate the rights of copyright owners.[12] If temporary or transitory reproductions 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.

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[8] *E.g.* 17 U.S.C. §107 (provides that certain uses of copyrighted works without permission from the copyright owner are fair uses), § 108 (allows libraries and archives to preserve works in their collection), §109 (allows the owner of a copy of a lawfully made work to sell or lend that copy), and §110 (allows certain performances in the course of teaching); 35 U.S.C. §101 (requires patentable inventions to be useful); § 102 (requires inventions to be novel); §287(c)(2)(A) (exempts medical practitioners from liability for certain patent infringements)

[9] *See* Industry Trade Advisory Committee on Intellectual Property Rights ITAC 15, *available at:* http://www.ita.doc.gov/itac/committees/ipr.asp

[10] *See* Industry Trade Advisory Committee on Intellectual Property Rights ITAC 15, *available at: http://web.archive.org/web/20060926000407/http://www.ita.doc.gov/itac/committees/ipr.asp,* (shows membership of ITAC 15 as of September 26, 2006)

[11] 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.

[12] *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).

Like the U.S.-Australia FTA, the proposed Anti Counterfeiting Trade Agreement (ACTA) raises the specter of eroding user rights. The consolidated text of ACTA, recently released by the USTR,[13] reveals that ACTA would require establishment of a statutory damages regime in signatory countries, require Internet Service Providers (ISPs) to take down material that allegedly infringes copyright without proper safeguards to prevent misrepresentations in take down notices sent by copyright owners, and require institution of new seizure and forfeiture penalties for infringing goods and implements used to make these goods.

Each of these provisions pose several concerns for users of copyrighted works. The statutory damages regime in the U.S. has led to imposition of huge damages awards against individual infringers that many would argue bears little relation to the actual damage suffered by rights-owners.[14] Many have questioned the constitutionality of the regime.[15] The U.S. assuming an obligation to maintain the same regime under ACTA would limit Congresses ability to reform this regime.

The notice and takedown regime in the U.S. has promoted the development of the Internet by providing certain safe guards to ISPs against liability. However, a number of instances have shown that, absent appropriate safeguards, such a regime can easily be abused.[16] U.S. law provides one means of preventing this situation by providing for a penalty against those who make misrepresentations on takedown notices.[17] By requiring all ACTA signatories to have a similar notice and takedown regime without also requiring a remedy where there are wrongful takedown notices, ACTA would chill free speech in signatory countries.

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[13] *See* Consolidated Text Prepared for Public Release, Anti-Counterfeiting Trade Agreement, April 2010, http://www.ustr.gov/webfm_send/1883

[14] *See Capitol Records Inc. v. Thomas,* 680 F. Supp. 2d 1045 (D. MN. 2010) (remitting the jury statutory damages award of $2 million for infringing copyright on 24 songs and suggesting that the $2 million award did not bear any relationship to the actual damage suffered.); Ben Sheffner, *Oy Tenenbaum RIAA Wins $675,000, or $22,500 per song,* (July 31, 2009), http://arstechnica.com/tech-policy/news/2009/07/o-tenenbaum-riaa-wins-675000-or-22500-per-song.ars (reporting on a jury award of $675,000 against Joel Tenenbaum for infringing copyright in 30 songs); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing:The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 Tex. L. Rev. 525, 545-550 (2004)

[15] *See, e.g.* Pamela Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. Pa. L. Rev. PENNumbra 53 (2009), http://wwwpennumbra.com/debates/pdfs/CopyrightDamages.pdf; Barker, *supra* note 14.

[16] *See e.g.* Chloe Albanesius, *Update: YouTube Denies McCain DMCA Request,* (October 14, 2008), http://www.pcmag.com/article2/0,2817,2332528,00.asp (The McCain Campaign argued that disabling access to videos posted by political campaigns without doing even a cursory analysis of fair use amounted to a violation of free speech.)

[17] 17 U.S.C. §512(f); *See also Lenz v. Universal Music Corp.* 572 F. Supp. 1150, (N.D. Cal. 2008) (holding that a copyright owner's failure to make a preliminary assessment of fair use before sending a take down notice could amount to a misrepresentation under §512(f))

Like the statutory damages provision, ACTA's provisions on seizure and forfeiture would prevent Congress from reforming U.S. law. These provisions seem to track closely newly introduced changes to U.S. law.[18] These provisions are untested in U.S. law and yet ACTA seeks to solidify these in international obligations.

Under the current composition of ITAC 15, while representatives of industry have the ability to influence the design of these provisions, non-business interests do not. In order to ensure balance in views expressed by ITAC 15, representatives of non-business interests should be included in its makeup.

Furthermore, such representation is required by the Federal Advisory Committees Act (FACA). The Federal Advisory Committees Act requires membership of federal advisory committees to be "fairly balanced in terms of the viewpoints represented" on the Committee.[19] The Trade Act explicitly makes this provision applicable to the industry trade advisory committees.[20] Furthermore, legislative history of both FACA and the Trade Act support inclusion of public interest representation on industry trade advisory committees. In enacting FACA, Congress expressed an intention to "end industry domination of advisory bodies."[21] Similarly, in enacting certain amendments to the Trade Act in 1979, Congress indicated its intention to broaden the interests represented on tier 2 and tier 3 committees to include, among others, non-business interests[22]

Non-business 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, some even claiming that non-business representatives would release sensitive information to the public.[23] This argument either overlooks the fact that all members of tier 3 committees are bound

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[18] Article 2.16 (a) and (b) of the Anti Counterfeiting Trade Agreement requires countries to provide in their laws that competent authorities shall have the authority to order seizure and destruction of copyright infringing goods, and counterfeit trademark goods, materials or implements predominantly used in the creation of these goods, and assets derived from infringing activity. Consolidated Text Prepared for Public Release, Anti-Counterfeiting Trade Agreement, April 2010, http://www.ustr.gov/webfm_send/1883). Similarly §206 of the Prioritizing Resources and Organization for Intellectual Property Act, passed in 2008, provides for forfeiture and destruction of infringing and counterfeit goods and implements used in their creation. Prioritizing Resources and Organization for Intellectual Property Rights Act of 2008, Pub. L. No. 110-403, §206, 122 Stat. 4262 (2008), *available at:* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ403.110.pdf

[19] Federal Advisory Committee Act (5 U.S.C. App. ß 5(b)(2)) (1994).
[20] 19 USCS 2155(f)(2010).

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

[22] GAO Report, 2002, *supra* note 2, at 60.
[23] 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, (July 21, 2009)

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.[24] While clarity is essential, it is not necessarily compromised by presentation of nuanced views that account for interests of all concerned, including non-business interests.

Furthermore, inclusion of all perspectives would lead to greater domestic acceptance of trade policies pursued by the USTR. As public reaction to the ACTA negotiations indicates,[25] exclusion of points of view representing non-business interests leads to an atmosphere of mistrust. An approach that included advice from both business and non-business interests would likely assuage fears of industry capture and enhance confidence in the outcome of trade negotiations.

The non-business perspective should be an integral part of developing trade policy and negotiations

The request for public comment asks how a particular viewpoint would provide information and advice concerning a specific industry sector. As explained above, IP is not just a system of rights but an ecosystem of rights and limitations. The non-business sector's stake in IP policy is an integral part of the IP sector and should be an essential consideration in developing trade policy and negotiating positions. First, as members of the public, non-business interests are consumers of information with certain rights to enjoy IP products and services they purchase without undue restrictions. Second, they are producers of culture and innovations. Examples of such production include the large number of user-generated content hosted on cites like YouTube,[26] the many valuable films made by documentary film-makers incorporating pre-existing material, and the many follow-on works created by remix artists.[27] Third, non-business interests have speech

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(Testimony of Brian T. Petty, Chairman, ITAC 2)

[24] *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 Testimony of Timothy Hoelter, Vice President, Vice President, Government Affairs, Harley-Davidson Motor Company)

[25] *See e.g.* Nate Anderson, *The Real ACTA Threat (it's not iPod Scanning Border Guards),* Ars Technica, (June 2, 2008), http://arstechnica.com/old/content/2008/06/the-real-acta-threat-its-not-ipod-scanning-border-guards.ars; Rob Pegoraro, *Copyright Overreach Goes on World Tour,* Washington Post, November 15, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111300852.html.

[26] *See* American University Center for Social Media, *Recut, Recycle, Reframe: Quoting Copyrighted Material in User Generated Video,* January 2008, *available at:* http://www.centerforsocialmedia.org/files/pdf/CSM_Recut_Reframe_Recycle_report.pdf;

[27] Prof. Michael Welsh, *Appendix A to*, Comments of Electronic Frontier Foundation, In The Matter of Exemption to Prohibitions on Circumvention of Copyright Protection Systems for Access Control Technologies, (November 28, 2008), http://www.copyright.gov/1201/2008/comments/lohmann-fred.pdf

interests that could be stifled by overzealous copyright enforcement.[28] These interests should be accounted for in ITAC 15's membership. As the 2002 GAO report noted, the focus of the FACA in requiring a "fair balance" in views represented on the advisory committees was on groups "directly affected by the work of a committee rather than whether the committees represent business or non-business interests."[29]

Non-business Representation on tier-1 and tier-2 committees is not Substitute for Representation on ITAC 15

Public interest representation on the tier 3 ITAC 15 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.[30] Furthermore, tier 2 committees have been less active than tier 3 committees.[31] Also, tier 1 and tier 2 committees are general policy committees that will not be able to provide focused non-business perspective on specialized areas such as intellectual property. Therefore, a significant non-business 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, non-business representatives should not be relegated to a small minority whose views are ignored by the committee.[32] While the USTR cannot be expected to adopt all the views of non-business representatives and has discretion in appointing members of tier 3 committees, it should seek to avoid extreme imbalances in committee composition.

Conclusion

We thank the USTR, the ITC, and the Department of Commerce for soliciting public comments on this important issue.

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[28] *See e.g.* Chloe Albanesius, *Update: YouTube Denies McCain DMCA Request,* (October 14, 2008), http://www.pcmag.com/article2/0,2817,2332528,00.asp (The McCain Campaign argued that disabling access to videos posted by political campaigns without doing even a cursory analysis of fair use amounted to a violation of free speech.)

[29] GAO Report 2002, *supra* note 2, at 57.

[30] 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.)

[31] GAO Report, 2002 *supra* note 2, at 55.

[32] *See* GAO Report, 2002, *supra* note 2, at 41.

Respectfully submitted,

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