



November 9, 2009

Senator Patrick Leahy, Chairman
Senator Jeff Sessions, Ranking Member
Senate Judiciary Committee

Senator Max Baucus, Chairman
Senator Chuck Grassley, Ranking Member
Senate Finance Committee

Representative John Conyers, Chairman
Representative Lamar Smith, Ranking Member
House Committee on the Judiciary

Representative Henry Waxman, Chairman,
Representative Joe Barton, Ranking Member
House Committee on Energy and Commerce

Representative Charles Rangel, Chairman
Representative Dave Camp, Ranking Member
House Committee on Ways and Means

Re: Missing Safeguards in ACTA present risks to consumers in the United States

Last week, the United States met behind closed doors with dozens of other countries in Seoul, South Korea to consider a global agreement on the enforcement of intellectual property rights. This agreement, though named the Anti-Counterfeiting Trade Agreement (ACTA), implicates changes to international intellectual property norms far broader than its name suggests. We write today to register our grave concerns with the provisions purportedly contained within ACTA, and their effects upon the public.

We have often expressed our concerns about the need for transparency of this negotiation, and have joined others in asking the Congress and the Administration to open this negotiation to public oversight and input, as is customary in other areas of global norm setting for intellectual property rules. Only through such openness can we ensure the legitimacy of any policy norms resulting from this process.

However, we also maintain serious reservations about ACTA's contents and substance, based

upon what is known about the negotiation from public press reports and credible leaked documents. While we would vastly prefer to rely upon official sources and documents in raising our concerns, the secretive nature of the ACTA process leaves us with no alternative in discussing these pressing matters. We urge you to insist that the Administration to provide the public with the actual text of the ACTA proposals so that all stakeholders, including the public, can have productive and informed discussions on substantive issues.

Given what has been disclosed so far, the U.S. and other ACTA parties are seeking to create a set of obligations for countries that expand upon certain elements of the World Trade Organization's Trade Related Aspects of Intellectual Property (TRIPS) agreement. Rather than taking as their starting point the entire TRIPS agreement, it would seem that the ACTA negotiators have identified certain parts of the TRIPS agreement most favorable to particular groups of intellectual property holders, including certain publishers, media conglomerates, and pharmaceutical companies. Left out of the ACTA text are the elements most favorable to consumers, including those intended to curb anticompetitive practices, and to protect innovation.

The result is an agreement that is therefore unbalanced. ACTA would appear to be an expanded version of the TRIPS enforcement sections, but without the balance and safeguards that have given TRIPS such legitimacy.

There is no evidence that ACTA contains any of the safeguards which are embodied in Articles 1, 6, 7, 8, 40 and 44.2 of TRIPS. These provisions provide a wide range of necessary protections, including:

- Article 1 of the TRIPS provides that countries are "free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."
- Article 6 of the TRIPS is a guarantee that the agreement will not limit the scope of the exhaustion of intellectual property rights, so that WTO members have flexibility when implementing policies concerning parallel trade or the first sale doctrine.
- Article 7 of the TRIPS provides that "[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."
- Article 8 of the TRIPS is a guarantee that WTO members may "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance" and take appropriate measures to "prevent the abuse of intellectual property rights by right holders."
- Article 40 of the TRIPS concerns the ability of countries to control anti-competitive practices, and curb abuses of intellectual property rights.
- Article 44.2. of the TRIPS allows governments to eliminate the possibility of injunctions

to enforce intellectual property rights, in certain cases where governments provide for remuneration to right owners. This flexibility is part of several sections of U.S. law, all of which are important to consumers and are at risk if the ACTA discards the flexibility now found in Article 44.2 of the TRIPS.¹

These different provisions, which are evidently being discarded or ignored, are collectively essential to protecting the public interest.

Meanwhile, other provisions of ACTA have apparently refashioned a number of TRIPS provisions in more restrictive ways. By specifying particular remedies and means of enforcement, ACTA restrains the application of Articles 41, 44.1, 45, 46, 47, 50, most of Section 4, and Article 61.

Current revelations about ACTA suggest that its provisions are overwhelmingly selected to advantage a narrow set of interests, failing to take into account its effects on the overall economy, the civil and economic rights of the public, and other elements of the public good.

In this regard, and for constructive comments on how enforcement policy should be designed, we call your attention to the recommendations of the Trans Atlantic Consumer Dialogue (TACD) Resolution on the enforcement of copyright, trademarks, patents and other intellectual property rights (IP 09-09), adopted June 2009.

The ACTA negotiations, while operating in extraordinary secrecy, are leading to a result that is anti-consumer and anti-innovation. The public should be allowed to raise its concerns in an open and democratic environment where everyone will be able to observe and influence these alterations to our intellectual property policy. We urge you to end this exercise in unbalanced, opaque policymaking. The ACTA negotiations should be made open, or they should be stopped.

Respectfully Submitted

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¹ For example, U.S. law places limits on the use of patents for civil nuclear energy [48 USC 2184], as well as limits on the use of patents, copyright and plant breeder rights by or for the U.S. government [28 USC 1498]. The treatment of injunctions in the ACTA is also relevant to the use of patents by medical practitioners: [35 USC 287 (c)(1)], the safe harbor infringement exception for generic medicines [28 USC 271 (e) (3)], and for the ability of the U.S. to acquire generic medicines for use in the President's Emergency Plan for AIDS Relief program, when products are shipped as "goods in transit" through countries with different intellectual property regimes and registered rights. <http://keionline.org/blogs/2009/07/31/acta-injunctions>.