

PUBLIC KNOWLEDGE HEARING STATEMENT

2010 SPECIAL 301 REVIEW

Public Knowledge thanks the United States Trade Representative (USTR) for providing us the opportunity to testify at this hearing and commends it for seeking comments from a wide range of stakeholders in this year's Special 301 Review process.

The Special 301 Review process is a powerful tool to ensure protection for U.S. intellectual property interests. Unfortunately this tool has been used in the past to force countries to enact draconian IP laws and accede to international treaties that are not necessarily in the interests of that country's citizens. Further, past review processes have not provided a clear justification for why a country have been placed on a watch list or priority watch list. All of these factors have harmed the credibility of the process as a means to secure US IP interests both in this country and abroad.

In order to remedy these shortcomings, we urge the USTR to: 1) be mindful of the importance of balance to U.S. copyright law and to promote this same balanced system abroad; 2) not to use the Special 301 process as a means to force countries to accede to or implement treaties; and 3) introduce greater transparency into its review process.

1. Promote a balanced system abroad

U.S. copyright law maintains a delicate balance between the rights of copyright owners and users. This balance has been responsible for fostering learning, creativity, and innovation within the U.S. Many U.S. industries have relied on the copyright systems limitations and exceptions to bring their products and services to market. For example, copyrights fair use doctrine has

facilitated the proliferation of devices like the VCR and the TiVO. The presence of a similarly balanced system of limitations and exceptions is vital to provide these industries greater ability to export their products and services to foreign markets.

Therefore, we urge the USTR to promote this balance abroad and not to be swayed by rights holder assertions that limitations and exceptions in foreign law amount to a denial of protection for IP. During the 2009 Special 301 review process rights-holder representatives, such as the IIPA even objected to limitations and exceptions similar to our own, such as Israel's fair use exception, or India's personal and noncommercial use exception, claiming that such exceptions – similar or narrower than our own – would violate the Berne Convention and TRIPS.

Such assertions are not consistent with U.S. copyright law. Furthermore, the Trade Act certainly does not mandate a reading of IP protection that is inconsistent with principles of US law. If exceptions such as fair use for personal copying are permitted in the US, they cannot constitute a denial of protection in other countries. This is so even when the details of how exceptions operate vary from country to country.

A corollary of the system of balance is a country's decision not to ratify or accede to certain treaties. Many countries may not acceded to treaties out of legitimate concerns that the provisions of the treaty would not promote a balanced intellectual property system in their country. For instance, Canada and Israel have not acceded to the WIPO Internet Treaties. In its 2009 comments Israel explained that it questioned the relevance of technological protection measures in protecting copyright and therefore, had decided not to accede to the WCT. Such decisions are the prerogative of sovereign nations and the Trade Act does not mandate accession to treaties a standard for evaluating a country. Therefore, the USTR should not place a country

on a watch list or priority watch list for failure to accede to a treaty. In particular, the process should not be used to pressure countries to accede to a possible ACTA in future. The ACTA is being negotiated as a plurilateral agreement among a little more than 30 countries to the exclusion of many others. There are indications that the ACTA contains provisions that are new to many domestic laws. The USTR should not use the Special 301 process to force countries to sign on to a treaty is testing such uncharted areas of law.

Finally, we urge the USTR to employ greater transparency in its Special 301 review process. Previous Special 301 Reports often fail to clearly indicate the basis on which a country was placed on a watch list. Often the reports have contained general statements such as a need to improve enforcement without providing further explanation of what that meant. A cleared understanding of why the USTR considers a particular country's enforcement standard to be lax could only be obtained by reviewing rights-holder comments.

Such vagueness leaves very little basis to evaluate the reason why a country was placed on a watch list. It also gives no indication of whether the country is being cited for its failure to enforce laws on its books or to enact new laws that derogate from limitations and exceptions or increase penalties.

Another concern with respect to transparency is the USTR's reliance on unsupported and unverified rights-holder assertions. The 2009 comments contained several assertions of counterfeiting and other practices in particular countries with no citation to any authoritative source. In addition, many experts have questioned the validity of industry loss numbers and the methodology used to compile them. In view of these concerns, we urge the USTR to:

1. make transparent the set of factors and standards it uses for evaluating countries in each year's Special 301 Report.
2. provide a clear written explanation stating the basis for identification of a country in the Special 301 report and placement on the watch list or priority watch list, or for an out-of-cycle review.
3. arrange for independent external verification of country data and statistics submitted by the IIPA before making factual determinations based upon it.

Finally, we request the USTR to provide meaningful opportunity for the public to file comments subsequent to, and in response to, initial round of submissions.