

November 5, 2009

The Honorable Barack Obama
Office of the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

We are writing to express our deep concerns about the lack of transparency and openness surrounding the negotiations on a new Anti-Counterfeiting Trade Agreement (“ACTA”). The undersigned organizations represent a diverse array of public interest groups encompassing library, consumer, creator, and civil liberties organizations.

On the first full day of your term as President, you issued memoranda pledging increased openness and participation in executive decision-making and directing agencies to “take affirmative steps to make information public.” We applaud your promise of a more transparent, collaborative and participatory government. The continuing development of the Open Government Initiative indicates a strong commitment to applying these principles in practice, and your proclamation on World Trade Week further affirms this commitment to transparency, specifically in the process of negotiating trade agreements.

However, multiple aspects of ACTA fail to meet these standards.

Despite long-registered objections from our communities and others, the text of the agreement has never been made publicly available, and public communications as to its substance have been vague. Indeed, the Office of the United States Trade Representative (“USTR”) has actively resisted disclosure of relevant information during the course of litigation under the Freedom of Information Act.

Even for sections evidently authored by the United States, and thus not foreign government information, disclosure has been limited and subject to viewers having to sign a non-disclosure agreement (“NDA”), imposing a barrier to meaningful public discussion. The NDA process, by preventing those with exposure to the text from sharing its contents, does nothing to change the fundamentally closed environment surrounding the agreement text and its negotiation.

We appreciate USTR’s efforts to broaden access to the draft section and to solicit a broader range of views than is typically available through the ITAC structure. However, only a few public interest organizations were invited to view the text, while a much larger number of industry representatives have been granted access. More importantly, no amount of restricted access can substitute for open and public discussion of such a critical document. This modest increase in stakeholder participation is no replacement for true transparency and civic engagement. The organizations listed below, which include some

whose members have seen the draft text and some whose members have not, are confident that a truly open and participatory process can only help protect the interests of the United States.

Much of ACTA's transparency deficit stems from the disconnect between ACTA's apparent aims and its formulation as a trade agreement. In negotiating agreements focusing on traditional trade matters such as tariffs and trade barriers, confidentiality regarding some negotiating positions may be appropriate. But ACTA aims to set international legal norms, potentially driving changes to substantive intellectual property legal regimes on an international basis. Attempts to force a multilateral intellectual property agreement through trade processes unsuited for it does a disservice to citizens, public policy, and the USTR alike.

Styling ACTA as a "plurilateral" trade agreement, while its terms bode significant changes in the international legal landscape for intellectual property, simply serves to hide its purpose and effects from public scrutiny. The potential for these changes to be triggered by an executive agreement further removes the ability for the consequences of ACTA's provisions to be debated openly in Congress. As an instrument affecting multiple nations' laws and policy, ACTA should be negotiated in public, as has been done routinely with international intellectual property agreements in the World Intellectual Property Organization and the World Trade Organization.

With respect to ACTA's substance, we remain concerned that the terms may not adequately account for all of the interests that would be affected. Intellectual property law requires a balance between the benefits conferred upon creators and the rights of the general public to access and use those creations in free discourse and for the public good. Yet the public and the industries enabling such uses would face crippling liability under an improperly calibrated intellectual property regime. ACTA could increase the risk of participating governments taking an imbalanced approach.

All of these issues must be carefully considered, and the current rush to complete initiatives begun in the previous administration frustrates that careful consideration. The importance of intellectual property policy and the changing nature of technology demand thoughtful, measured initiatives. Hastily crafting an international agreement, out of the public eye, and without the necessary balance of interests is a recipe for laws and policies that will harm both the economic and the civic good.

Given these concerns, we ask that ACTA's provisions—particularly those drafted by the United States—be made publicly available for open discussions prior to any commitment to ACTA by the U.S. government.

The goals of a transparent, collaborative, and participatory government, as well as the need for balanced intellectual property policy, require no less.

Respectfully submitted,

American Association of Law Libraries
Center for Democracy and Technology
Change Congress
Electronic Frontier Foundation
Electronic Privacy Information Center
Future of Music Coalition
Internet Archive
IP Justice
Liberty Coalition
Medical Library Association
New America Foundation
Open Content Alliance
OpenTheGovernment.org
Public Knowledge
Special Libraries Association
Sunlight Foundation

cc

Gary Locke, U.S. Secretary of Commerce

Ambassador Ron Kirk, United States Trade Representative

Aneesh Chopra, Associate Director and Chief Technology Officer, Technology Policy,
Office of Science and Technology Policy

Beth Simone Noveck, Deputy Chief Technology Officer, Open Government, Technology
Division, Office of Science and Technology Policy

Andrew McLaughlin, Deputy Chief Technology Officer, Internet Policy, Technology
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