



ELECTRONIC FRONTIER FOUNDATION SECOND SUBMISSION TO OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE ON THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT

The Electronic Frontier Foundation (EFF) appreciates the opportunity to submit the following comments to the Office of the United States Trade Representative (USTR) in response to the Notice of Public Hearing on the Proposed Anti-Counterfeiting Trade Agreement, published in the Federal Register of September 5, 2008 (Volume 73, Number 173, pages 51860-1). These comments supplement the concerns raised in the comments we submitted to the Office of the USTR on March 21, 2008.

1. Lack of Transparency and Opportunity for Meaningful Consultation

EFF remains deeply concerned about the lack of transparency surrounding the contents of the proposed Anti-counterfeiting Trade Agreement (ACTA). While we appreciate the opportunity to provide comments to the USTR, we believe that the effectiveness of this consultation is lessened significantly by the limited information that has been made public on the proposed agreement's content.

EFF is one of over 100 global public interest groups that called upon ACTA negotiators on September 15, 2008 to make public the draft negotiating text of ACTA. We respectfully request that Ambassador Schwab and USTR officials make the draft negotiating text of ACTA and previous background documents available to the public so that we can provide meaningful comments. We hope that the USTR will provide further opportunities for informed public comment once the draft text of ACTA is eventually made public.

In the absence of a draft text or any specific information about ACTA's contents to comment upon, we wish to comment on several matters concerning Internet intermediaries that have been requested by U.S. intellectual property rightsholders in their submissions to the USTR, which raise significant public policy concerns.

2. Comments

Based on submissions to USTR in March 2008 that have been made public on the USTR's website, EFF is concerned that ACTA may require significant changes to several aspects of current U.S. law. We respectfully request that USTR officials address how these matters comport with existing U.S. law in the forthcoming consultation on September 22, 2008.

Monitoring of Internet communications

We note that the submission of at least one major copyright owner industry group has requested that ISPs and Internet intermediaries be required to adopt "technical measures", including filtering of their networks, and monitoring of customer communications, in order to find evidence of potential copyright infringement.

If adopted in ACTA, these proposals are likely to dramatically alter the Internet's fundamental architecture and require changes to current U.S. law. Section 512 (m) of the U.S. Copyright statute makes it clear that ISPs' ability to avail themselves of the U.S. copyright safe harbors is not conditioned upon ISPs' monitoring their service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a "standard technical measure" complying with subsection 512(i) of the Copyright statute. That section only requires ISPs to accommodate and not interfere with "standard technical measures" that have been developed by a broad consensus of copyright owners and service providers in an open, fair, voluntary and multi-industry standards process. This does not extend to proprietary copyright filtering technologies and services developed by or for copyright rightsholders in a non-public, and non-transparent process.

These proposals would require ISPs and Internet intermediaries to monitor their networks in an unprecedented manner. This directly threatens citizens' privacy rights and makes it more likely that ISPs will be deemed to have constructive knowledge of online copyright infringement taking place on their networks, thus disqualifying them from the safe harbors that have previously safeguarded their businesses. At the same time, adopting such filtering measures is not likely to be technologically effective because encrypting communications can defeat them. Thus, while mandatory network filtering is not likely to reduce online copyright infringement, it is likely to lead to violation of citizens' privacy rights, particularly if these proposals require the use of Deep Packet Inspection.

Termination of Internet Access

We note that submissions from several intellectual property rightsholder industry groups have called for the ACTA enforcement provisions to clarify the application of national laws to permit use of the so-called "Graduated Response" or "Three Strikes" policy, which would require ISPs to automatically terminate their customers' Internet access upon a repeat allegation of copyright infringement by a copyright owner. The Graduated Response proposal that is currently under discussion in draft French legislation would require ISPs to automatically disconnect Internet users for up to one year. The names of disconnected Internet users would be put on a blacklist and disconnected Internet users would then be precluded from obtaining Internet access from any service provider, for any purpose, for one year.

The adoption of such a policy, whether as part of a direct obligation in a "Legal Framework" or a "Best Practices" private party agreement approach, raises serious due process concerns for citizens, and is vulnerable to misuse and mistake. It is also a disproportionate response to the alleged harm involved. Such automatic disconnection also appears inconsistent with current U.S. law. Section 512(i) of the Copyright statute requires ISPs to adopt and implement a policy of terminating subscribers and account holders who are "repeat infringers", but only "in appropriate circumstances." Adopting the "Graduated Response" would remove the discretion currently available to Internet service providers and redraw the balance currently embodied in section 512 of the Copyright statute.

Mandatory disclosure of customer data

We note that submissions to the USTR from several copyright owner industry groups have requested that ACTA include an obligation on ISPs to disclose to rightsholders information about the identity of ISP subscribers who are allegedly engaged in copyright infringement. An extra-judicial mandatory disclosure obligation raises very substantial privacy and due process concerns for citizens.

It would also require changes to U.S. Copyright law and potentially, various Federal and State privacy laws. U.S. copyright law does not provide an extra-judicial mechanism forcing disclosure of the identity of individuals allegedly engaged in infringing activities. As two Appellate Court decisions have made clear, Section 512(h) allows rightsholders to use subpoenas to ISPs to obtain the identity of alleged infringers who post material on an ISPs' network in certain circumstances. It does not require ISPs to divulge customer information about alleged infringers where the allegedly infringing material does not reside on the ISPs' computer network.¹ However the absence of such a mechanism has not provided any obstacle to U.S. copyright holders' ability to enforce their rights against alleged file-sharers, as evidenced by the more than 30,000 lawsuits brought against individuals since 2003².

Unlike current U.S. law, the European Community introduced a mandatory disclosure obligation in the "right of information" enshrined in Article 8 of the 2004 Intellectual Property Enforcement Directive (2004/48/EC). If ACTA were to provide rightsholders with a right of information similar to that in EU law, it would directly or indirectly lead to significant changes to current U.S. law. To protect citizens, at a minimum, any disclosure obligation must incorporate adequate due process safeguards and be conditioned on a process of judicial review.

Finally, we wish to reiterate that ACTA needs to provide balanced solutions that recognize and respect the fundamental rights of *all* stakeholders in the information economy.

We would be pleased to provide further information on any of the above issues once the draft ACTA text is made available.

Thank you for your consideration.

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¹ USC §512(h) provides an expedited subpoena process, but this does not extend to obtaining the identity of alleged file-sharers extra-judicially. See *Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); *Recording Industry Association of America, Inc. v. Charter Communications, Inc.*, 393 F.3d 771 (8th Cir. 2005).

² EFF Report, *RIAA v. The People: Four Years Later*, available at: <http://w2.eff.org/IP/P2P/riaa_at_four.pdf>