

IN THE MATTER OF 2011 SPECIAL 301 REVIEW: IDENTIFICATION OF COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1974

Docket No. USTR-2010-0037

COMMENTS OF PUBLIC KNOWLEDGE AND THE ELECTRONIC FRONTIER FOUNDATION

Public Knowledge and the Electronic Frontier Foundation appreciate the opportunity to submit the following comments to the Office of the United States Trade Representative (USTR) in connection with the Request for Public Comment and Announcement of Public Hearing in the Matter of 2011 Special 301 Review: Identification of Countries under section 182 of the Trade Act of 1974, published in the Federal Register on December 30, 2010.¹

I. Summary

Public Knowledge (PK) and the Electronic Frontier Foundation (EFF) submit these comments to caution against the use of the Special 301 process to impose intellectual property laws upon other countries that would be detrimental both to the interests of U.S. constituencies and to the interests of other countries. Particularly now, when the U.S.'s trading partners offer access to increasingly large emerging markets, the U.S. should not risk damaging trade relations merely to grant the requests of one particular segment of U.S. stakeholders. The Special 301 process is a tool designed to address outright violations of international obligations, not to handle interpretive disagreements between countries. The U.S. should handle such disagreement through traditional diplomacy; this would comport with the principle that a sovereign nation retains the right to implement its own domestic laws and it would build healthy relationships with current and future trade partners, which is critical to the continuing vitality of the U.S. economy. Additionally, PK and EFF reiterate the points made in their submission in the 2010 Special 301 proceeding, which remain pertinent to this year's determinations.

Public Knowledge is a Washington, D.C.-based public interest advocate that works to promote a balanced copyright regime for the benefit of creators and consumers alike. Public Knowledge believes that current U.S. copyright law embodies this balance to a significant extent and seeks to protect and promote these values.

The Electronic Frontier Foundation is a non-profit organization with over 14,000 members worldwide, dedicated to the protection of online freedom of expression, civil liberties, digital consumer rights, privacy, and innovation, through advocacy for balanced intellectual property laws and information policy.

¹ 2011 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing, 75 Fed. Reg. 82,424 (Dec. 30, 2010).

II. The Comments Submitted by PK and EFF in the 2010 Special 301 Proceeding Remain True and Relevant to this Year's Determinations.

In 2010, PK and EFF filed comments in the USTR's Special 301 proceeding, presenting several points that remain as valid today as they were one year ago.² First, a balanced system is the hallmark of U.S. copyright law, and the USTR should promote the same balance abroad.³ Additionally, the evaluation standards applied in previous Special 301 Reports raise significant public policy concerns and are not mandated by section 182 of the Trade Act.⁴ The Trade Act does not require countries to be placed on the priority watch list or watch list for failure to accede to and implement particular international treaties.⁵ The USTR should not base identification in the Special 301 Report on countries' introduction of exceptions and limitations to national copyright law that comply with the international copyright framework.⁶ Also, the USTR must recognize the principle of proportionality in enforcement and allocation of resources for intellectual property infringements.⁷

Our 2010 Comments also emphasized the need for the USTR to engage in evidence-based decision making.⁸ This approach would require that evaluation criteria for listing countries in the Special 301 Report be clear and transparent.⁹ Yet the 2011 Request for Public Comment only sought comment on "countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection," with no additional guidance as to what details the USTR would consider in making its determination.¹⁰ Additionally, the empirical data upon which the USTR relies in making factual determinations that underpin the identification of countries in the Special 301 Report should be subject to independent review and evaluation.¹¹ Independent review and evaluation is vital to the Special 301 process because it would protect against the risk of false or exaggerated claims by commenters, particularly those claims made without any citation to their sources.¹²

² See Comments of Public Knowledge & Electronic Frontier Foundation, *2010 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, United States Trade Representative, Docket No. USTR-2010-0003 (filed Feb. 18, 2010).

³ *Id.* at 2-3.

⁴ *Id.* at 4-12.

⁵ *Id.* at 4-6.

⁶ *Id.* at 7-10.

⁷ *Id.* at 10-12.

⁸ *Id.* at 12-15.

⁹ *Id.* at 13-14.

¹⁰ 2011 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment and Announcement of Public Hearing, 75 Fed. Reg. 82,424, 82,425 (Dec. 30, 2010).

¹¹ Comments of Public Knowledge & Electronic Frontier Foundation, *2010 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, United States Trade Representative, Docket No. USTR-2010-0003 (filed Feb. 18, 2010), at 14-15.

¹² *Id.* at 14.

III. To Serve the Purposes of the Trade Act of 1974, the USTR Must Consider All Relevant U.S. Constituencies When Evaluating the Economic Impact of Foreign Countries' Intellectual Property Policies and Practices.

Section 301 of the Trade Act was enacted to promote trade, and to achieve that end the USTR must look at U.S. economic interests holistically.¹³ To that end, the USTR should consider the economic effects of its determination on all constituencies, not only large copyright holders. As PK and EFF noted in last year's Special 301 proceeding, constituents as varied as libraries, teachers, students, individual innovators, documentarians, and cover artists are all able to contribute to society by utilizing the limitations and exceptions in U.S. copyright law.¹⁴ By pressuring other countries to omit limitations and exceptions in their domestic copyright law, the USTR prevents U.S. constituencies from marketing their works internationally and from making lawful uses of foreign works domestically.

In the 2010 Special 301 proceeding, the USTR issued negative determinations for 91% of the countries requested by the International Intellectual Property Alliance (IIPA),¹⁵ following an increasingly strong correlation between the IIPA's requests and the USTR's determinations in the past few years (88% in 2009,¹⁶ 86% in 2008,¹⁷ and 83% in 2007¹⁸). However, while invoking Special 301 against many of these countries may serve the best interests of the IIPA, it does not necessarily serve the best interests of the U.S. as it looks for new trading opportunities. Negotiations about particular—and often controversial—provisions of domestic copyright law can distract from more important negotiation objectives and unnecessarily damage our trade relations. The Special 301 determinations should consider the best interests of all U.S. stakeholders, and the arguments and data submitted by content holders should be considered along with the interests of other U.S. constituencies who would be adversely affected if the U.S.

¹³ Trade Act of 1974, Pub. L. No. 93-618, §301, 88 Stat. 1978, 2041-42 (1975) (codified as amended at 19 U.S.C. §2411 (2006)).

¹⁴ Comments of Public Knowledge & Electronic Frontier Foundation, *2010 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, United States Trade Representative, Docket No. USTR-2010-0003 (filed Feb. 18, 2010), at 2-3.

¹⁵ Compare Comments of the IIPA, *2010 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, United States Trade Representative (filed Feb. 18, 2010), with UNITED STATES TRADE REPRESENTATIVE, 2010 SPECIAL 301 REPORT (2010) (putting thirty-one of the IIPA's requested thirty-four countries on the Priority Watch List, Watch List, or Section 306 Monitoring List).

¹⁶ Compare Comments of the IIPA, *2009 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, United States Trade Representative (filed Feb. 17, 2009), with UNITED STATES TRADE REPRESENTATIVE, 2009 SPECIAL 301 REPORT (2009) (putting thirty-five of the IIPA's requested forty countries on the Priority Watch List, Watch List, or Section 306 Monitoring List).

¹⁷ Compare Comments of the IIPA, *2008 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, United States Trade Representative (filed Feb. 11, 2008), with UNITED STATES TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT (2008) (putting thirty-seven of the IIPA's requested forty-three countries on the Priority Watch List, Watch List, or Section 306 Monitoring List).

¹⁸ Compare Comments of the IIPA, *2007 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974*, United States Trade Representative (filed Feb. 12, 2007), with UNITED STATES TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT (2007) (putting thirty-eight of the IIPA's requested forty-six countries on the Priority Watch List, Watch List, or Section 306 Monitoring List).

pressured a country to perfectly mimic only the intellectual property protections and the enforcement mechanisms of domestic U.S. law.

The system established by U.S. copyright law is not one-dimensional. The law's limitations and exceptions to copyright owners' exclusive rights directly foster industry growth and innovation, in addition to reflecting Congress's policy choices regarding the social benefits of promoting the creation of new works.¹⁹ These limitations and exceptions grow increasingly important as the penalties for intellectual property infringement rise. The USTR should consider all U.S. constituencies when making determinations in Special 301 proceedings, including the creators and consumers who benefit from the limitations and exceptions in U.S. copyright law. In fact, the Trade Act requires the USTR to "take into account information from such sources as may be available to the [USTR]," in addition to submissions in response to its Request for Comments.²⁰ However, the law grants the USTR discretion to decline to initiate an investigation if "the investigation would be detrimental to United States economic interests."²¹ Even after the USTR has determined that a country's practice qualifies for sanctions under section 2411(a) or 2411(b), the USTR has discretion in either case to decline to take action.²²

IV. The U.S. Should Engage Respectfully with Trading Partners Through Diplomatic Negotiations, Not Unilateral Trade Pressures.

The USTR would best serve the foreign and economic policies embodied in the Trade Act by primarily relying upon reasoned diplomatic relations, not unilateral, bilateral, or multilateral trade pressure, to develop international agreements on intellectual property. The stated purposes of the Trade Act are:

- (1) to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade;
 - (2) to harmonize, reduce, and eliminate barriers to trade on a basis which assures substantially equivalent competitive opportunities for the commerce of the United States;
 - (3) to establish fairness and equity in international trading relations, including reform of the General Agreement on Tariffs and Trade;
 - (4) to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm[s], workers, and communities to adjust to changes in international trade flows;
 - (5) to open up market opportunities for United States commerce in nonmarket economies;
- and

¹⁹ Indeed, reducing barriers to creativity and innovation encourages economic and cultural development, while aggressive enforcement efforts can have serious unintended consequences. See Comments of Public Knowledge et al., *Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy*, Dep't of Commerce Internet Task Force (filed Nov. 19, 2010), available at http://www.publicknowledge.org/files/docs/PK-EFF-OTI_Commerce_Copyright_Comments.pdf.

²⁰ 19 U.S.C. § 2242(b)(2)(B).

²¹ 19 U.S.C. § 2412(b)(2).

²² 19 U.S.C. § 2411(a)(2), (b)(2).

(6) to provide fair and reasonable access to products of less developed countries in the United States market.²³

To achieve these ends, the Trade Act aims to strengthen economic relations with other countries.²⁴ Unduly pressuring another country to enact provisions like “three strikes” laws, anticircumvention prohibitions, or strict enforcement measures against that country’s interests will only weaken the relationship between the U.S. and that country. Furthermore, such provisions may inappropriately burden users of copyrighted works or creators that build upon past cultural achievements. This contradicts the Trade Act’s goal of fair and equitable trading relations by preventing the creation and marketing of cultural products.²⁵

Additionally, countries with more limited resources may legitimately decide that they cannot implement certain enforcement measures or user compliance strategies, or that such actions would not be in the best overall interest of their constituencies. For some countries, “[t]he transaction costs of building and staffing intellectual property systems, including patent offices and other administrative agencies, constitute a palpable drain on very scarce resources.”²⁶ It is important to remember that in many of today’s developed countries copyright law was allowed to evolve over centuries of debate and adjustment to changing market conditions,²⁷ and in fact the balance struck in U.S. law continues to be refined to this day. Therefore, the U.S. should not unduly interfere with developing countries’ right to interpret and implement TRIPS flexibilities in domestic law by imposing our own specific interpretation of international intellectual property standards.²⁸

If the U.S. does decide that it needs to challenge developing countries’ interpretations of their international obligations, it should do so through diplomatic discussion, not through tactics that may be perceived as an entrée to potential trade sanctions. The U.S. should work with its trading partners, particularly less-developed countries, to help them establish intellectual property systems that maximize benefits while minimizing the social costs of diminished access to information, higher priced products, and job losses.²⁹

The U.S. practice of tying Generalized System of Preference (GSP) benefits and Special 301 also poses special concerns regarding the U.S.’s use of trade pressure against countries as

²³ 19 U.S.C. § 2102.

²⁴ *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498, 500 (1st Cir. 1977).

²⁵ 19 U.S.C. § 2102 (3).

²⁶ Jerome H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT’L L. 441, 450 (2000). Indeed, even as regards the cost of sending delegations to regional or international meetings to deal with intellectual property enforcement, “[i]t is an open secret that many countries could simply not afford to attend these meetings if WIPO or other organizations did not foot all or part of the bills.” *Id.* at 443.

²⁷ CRAIG JOYCE ET AL., COPYRIGHT LAW 14-18 (7th ed. 2006).

²⁸ See Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 7, 8, 41(5), Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

²⁹ Daniel Gervais, *TRIPS and Development*, in INTELLECTUAL PROPERTY, TRADE & DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 3, 21 (2007); see also SOUTH CENTRE, INTERNET GOVERNANCE FOR DEVELOPMENT (2006), http://www.intgovforum.org/Substantive_1st_IGF/SouthCentreGGDPAnalyticalNoteIGF.pdf.

punishment when the U.S. disapproves of a trading partner's domestic interpretation of international intellectual property agreements.³⁰ The GSP program was designed to “promote economic growth in the developing world,”³¹ and it would be utterly contrary to the goals of GSP to use this program to impose domestic law detrimental to the economic health of the U.S.'s trading partners. The U.S. should not withdraw GSP benefits to unilaterally punish a country whose intellectual property laws do not comport perfectly with the wish list of particular U.S. content holders. Instead, the U.S. should seek to resolve issues concerning intellectual property protection and enforcement through diplomatic engagement, particularly before it effectively punishes other countries for their particular interpretations of their own international obligations.

More pragmatically, the U.S. negotiates in an increasingly competitive trade environment, and should acknowledge the benefits it can derive from respecting the domestic policy choices of other countries. Traditionally, less-developed countries lacked significant bargaining power and expertise in international trade negotiations, but as market power has shifted, countries with previously weak negotiating positions may now be able to choose between offering the U.S. access to large markets and shutting the U.S. out of such opportunities.³² Countries may achieve this through either individual or collective action. Recent reports indicate that developing countries are emerging from the global economic crisis far better than developed countries, and that the economies of Brazil, Russia, India, and China may collectively be as large as the G7 by 2027.³³ In the next decade, Brazil, Russia, India, and China are expected to contribute twice as much to global growth as the G3, overtaking the U.S. by 2018.³⁴ In light of these projections, the U.S. should not expect threats of punishment for failing to comply with unwelcome demands—when the U.S. was in a relatively powerful position—to suddenly become effective as the U.S.'s relative bargaining power diminishes on the increasingly competitive international plane.

If anything, analysis shows that, since the beginning of the 20th century, “an assertive, bullying, strategy is both less effective and more risky than much of the folklore of power policies would have it.”³⁵ Such tactics pose a number of risks: provoking retaliation by the targeted state; causing damage to some U.S. industries in the name of protecting others; isolating the U.S. from its other trading partners, who may naturally wonder when such tactics will be used against them; mobilizing resistance and stoking hostility against the U.S.; and devastating the economies of developing economies. At the same time, it is unclear that the adverse listing of a country under Special 301 has helped to address the underlying factors that fuel intellectual

³⁰ 19 U.S.C. § 2462(c)(5).

³¹ *General System of Preference*, UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp> (last visited Feb. 11, 2011); see 19 U.S.C. §§ 2461-66.

³² JOHN H. BARTON ET AL., *THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO* 171 (2006).

³³ Jim O'Neill & Anna Stupnytska, *The Long-Term Outlook for the BRICs and N-11 Post-Crisis* (Goldman Sachs, Global Economics Paper No. 192, 2009), <http://www2.goldmansachs.com/ideas/brics/long-term-outlook-doc.pdf>.

³⁴ Dominic Wilson et al., *Is This the 'BRICs Decade'?*, BRICS MONTHLY (May 20, 2010), <http://www2.goldmansachs.com/ideas/brics/brics-decade-doc.pdf>.

³⁵ Russell J. Leng & Hugh G. Wheeler, *Influence Strategies, Success, and War*, 23 J. CONFLICT RESOL. 655, 681 (1979) (surveying international crises between 1905 and 1971).

property infringement in other economies.³⁶ In fact, the Congressional Research Service has already cited tension over intellectual property protection as hampering the U.S.'s economic relations with other nations, such as Russia³⁷ and India.³⁸ When foreign relations experts are already warning that intellectual property law has caused tension with increasingly important trade partners, it would be a serious mistake to jeopardize those relationships by pressuring countries to implement controversial intellectual property provisions. To avoid suffering these consequences and to maximize healthy trade relationships with other countries, the U.S. should engage with its trading partners through diplomatic negotiations, not trade pressures that will only hurt U.S. interests.

V. The U.S. Should Not Use Special 301 to Pressure Partners into Joining the Anti-Counterfeiting Trade Agreement.

Finally, the USTR should not use the Special 301 process to pressure countries to accede to the Anti-Counterfeiting Trade Agreement (ACTA) or to implement its standards. Throughout the negotiation process, the ACTA negotiations were decidedly non-transparent and excluded several countries who objected to the process. Countries not party to that agreement should not be pressured to join an intellectual property agreement when they were not part of the negotiating process. The ACTA negotiations also demonstrated that attempts to impose stricter copyright law provisions, such as “three strikes” rules or Internet service provider liability, only cause needless controversy and delay the conclusion of negotiations. In the context of agreements such as the Trans-Pacific Partnership (TPP), such controversies would impede the U.S.'s ability to establish valuable trade relationships. The U.S.'s willingness to respect other parties' specific implementation and interpretation of international agreements will be critical to the success of the TPP. In this proceeding, it would be inappropriate to attempt to use the Special 301 process to impose such controversial provisions on countries that have decided to structure their own domestic laws differently.

VI. Conclusion

In making its determination under Special 301, the USTR should ensure that it considers the economic impact of its choices on all U.S. constituencies. Additionally, PK and EFF urge the USTR to use adverse comment and the watch lists in the Special 301 process judiciously, and to favor the use of diplomatic relations over unilateral trade pressures. Evidencing respect for

³⁶ See Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317, 335-38 (2006); Joe Karaganis, Program Director, Social Science Research Council, *Media Piracy in Emerging Economies: Price, Market Structure and Consumer Behavior*, Sept. 2010, report prepared for 6th session of WIPO Committee on Enforcement, http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_6/wipo_ace_6_5.pdf

³⁷ Jim Nichol, *Russian Political, Economic, and Security Issues and U.S. Interests*, CONG. RESEARCH SERV., at 19 (Nov. 4, 2010), http://digital.library.unt.edu/ark:/67531/metadc29670/m1/1/high_res_d/RL33407_2010Nov04.pdf.

³⁸ K. Alan Kronstadt et al., *India-U.S. Relations*, CONG. RESEARCH SERV., at 47 (Oct. 27, 2010) http://digital.library.unt.edu/ark:/67531/metadc29672/m1/1/high_res_d/RL33529_2010Oct27.pdf (“India remains critical of U.S. efforts to pressure developing nations, including India, to adopt laws and regulations governing pharmaceuticals that are overly supportive of the major pharmaceutical companies and could potentially deny poorer nations of access to important medicines.”).

other nations' decisions regarding their own domestic law will strengthen the U.S.'s trade relationships, which will in turn benefit the entire U.S. economy. Finally, the USTR should consider the importance of allowing countries flexibility in implementing international intellectual property law, both to respect the sovereignty of its negotiation partners and to preserve the socially beneficial balance between the rights of creators and users in intellectual property law.

Respectfully submitted,

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