

# Essay

## **The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements**

**Eddan Katz<sup>†</sup> & Gwen Hinze<sup>††</sup>**

### I. INTRODUCTION

U.S. trade policy on Intellectual Property (IP) enforcement is at a crossroads in the governance of the global knowledge economy. Calls for a war on counterfeiting and piracy have intensified, led by a coalition of multinational corporations in the entertainment, pharmaceutical, and luxury goods industries, that rely on expanding IP protection for their business models. This coalition has pursued the growth of IP rights in multilateral institutions over the past two decades to secure its incumbent position in the knowledge economy. These efforts now threaten to undermine the balance of IP at the foundation of sustainable innovation and creativity.<sup>1</sup> IP enforcement isolated from innovation policy ignores the legal flexibility that enables

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<sup>†</sup> International Affairs Director, Electronic Frontier Foundation.

<sup>††</sup> International Policy Director, Electronic Frontier Foundation.

1. See generally Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts* (June 9, 2008) (unpublished manuscript, available at [http://www.twinside.org.sg/title2/intellectual\\_property/development.research/SusanSellfinalversion.pdf](http://www.twinside.org.sg/title2/intellectual_property/development.research/SusanSellfinalversion.pdf)).

information technology to emerge, obstructs access to knowledge, and threatens citizens' civil liberties.<sup>2</sup>

This Essay questions the agenda behind the plurilateral Anti-Counterfeiting Trade Agreement (ACTA or the Agreement), now under negotiation, that is the vanguard of the global IP enforcement regime. Announced as a modest coordination of customs practices among friendly nations, ACTA regulates far more than that. We discuss the loopholes of accountability under which ACTA is being negotiated. We analyze the impact of this secrecy on public policy and citizens' rights in the information society, and dispute the appropriateness of negotiating ACTA as a sole executive agreement.<sup>3</sup>

We argue that increased transparency, accountability mechanisms, and input from civil society in the ACTA negotiations are essential because: (1) accountability mechanisms are core to the constitutional design of foreign trade agreements; (2) balanced policymaking requires a diverse representation of interests; and (3) global Internet regulations could result in changes to the Internet's fundamental architecture.

We conclude by outlining several proposals that would help achieve this:

- Reform trade advisory committees for more diverse representation;
- Strengthen congressional oversight and negotiating objectives;
- Institutionalize transparency guidelines for trade negotiations; and
- Implement the State Department's solicitation of public comments under the Circular 175 procedure.<sup>4</sup>

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2. Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective*, in THE GLOBAL DEBATE ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES, at xiii, xv (2009).

3. Sole executive agreements are agreements concluded on the basis of the President's constitutional authority that do not require a congressional vote. *See* Part III *infra*.

4. "The 'Circular 175 procedure' refers to regulations developed by the State Department to ensure the proper exercise of the treaty-making power." U.S. Dep't of State, Circular 175 Procedure, <http://www.state.gov/s/l/treaty/c175> (last visited Nov. 8, 2009). The procedure "seeks to confirm that the making of treaties and other international agreements by the United States is carried out within constitutional and other legal limitations, with due consideration of the agreement's foreign policy implications, and with appropriate involvement by the State Department." *Id.*

## II. ACTA – A PLURILATERAL AGREEMENT WITH GLOBAL IMPACT

ACTA is intended to set new global IP enforcement norms above the current international standards in the Agreement on Trade Related Aspects of Intellectual Property (TRIPs).<sup>5</sup> ACTA was conceived as a plurilateral agreement that would be created outside of multilateral institutions such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), where international IP norm-setting takes place. These international bodies account for a range of interests, while ACTA will lack such checks and balances.

On October 23, 2007, the United States, the European Community, Switzerland, and Japan simultaneously announced the launch of ACTA.<sup>6</sup> Negotiations began in June 2008 with additional partners,<sup>7</sup> and are to be completed by the end of 2010.

The decision to use a plurilateral coalition to create new global standards reflects increasing disillusion with WIPO as a norm-setting venue because of its lack of enforcement power. Since TRIPs, the United States and the European Community have created IP enforcement obligations in bilateral and regional free trade agreements with their trading partners.<sup>8</sup> ACTA follows this model.

Although not participating in negotiations, developing country governments will nevertheless find their domestic policy space reduced by ACTA. If recently leaked texts reflect the positions of the treaty negotiators,

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5. See U.S. TRADE REPRESENTATIVE, THE ANTI-COUNTERFEITING TRADE AGREEMENT—SUMMARY OF KEY ELEMENTS UNDER DISCUSSION (Apr. 6, 2009), [http://www.ustr.gov/sites/default/files/uploads/factsheets/2009/asset\\_upload\\_file917\\_15546.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2009/asset_upload_file917_15546.pdf) [hereinafter USTR ACTA SUMMARY]; U.S. TRADE REPRESENTATIVE, SPECIAL 301 REPORT 3 (Apr. 30, 2009), <http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf>.

6. USTR Press Release, *Ambassador Schwab Announces U.S. Will Seek New Trade Agreement To Fight Fakes*, Oct. 23, 2007, <http://www.ustr.gov/ambassador-schwab-announces-us-will-see-new-trade-agreement-fight-fakes>; European Commission Press Release, *European Commission Seeks Mandate To Negotiate Major New International Anti-Counterfeiting Trade Pact*, Oct. 23, 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1573>.

7. Additional partners included Australia, Republic of Korea, New Zealand, Mexico, Jordan, Morocco, Singapore, and Canada. USTR ACTA SUMMARY, *supra* note 5, at 1.

8. Ruth Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125 (2003); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323 (2004).

negotiating states intend that developing countries will accede to and implement ACTA.<sup>9</sup> ACTA standards likely will be a requirement of future bilateral agreements and evaluation criteria in the annual Special 301 report.<sup>10</sup> In addition to the international trade framework, ACTA may have its own enforcement mechanism overseen by an ACTA Oversight Council.<sup>11</sup>

### III. EXECUTIVE POWER IN FOREIGN TRADE NEGOTIATIONS

The Office of the U.S. Trade Representative (USTR) has stated that ACTA will build upon the substance of prior bilateral trade agreements negotiated under “Fast Track” authority.<sup>12</sup> However, ACTA will be negotiated as a sole executive agreement with minimal congressional oversight. The Agreement will operate like a treaty, shaping international standards, but will not be subject to the requirements of the U.S. Constitution’s Treaty Clause, which gives the President the power to enter into foreign agreements “by and with the Advice and Consent of the Senate” with a supermajority vote.<sup>13</sup> The framers intended to give the Executive the power to negotiate international

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9. See Proposed U.S. ACTA Multi-Lateral Intellectual Property Trade Agreement, [http://wikileaks.org/wiki/G-8\\_plurilateral\\_intellectual\\_property\\_trade\\_agreement\\_discussion\\_paper](http://wikileaks.org/wiki/G-8_plurilateral_intellectual_property_trade_agreement_discussion_paper) (last visited Oct. 28, 2009) (stating that there will be “[s]pecial measures for developing countries in the initial phase”) [hereinafter ACTA Leaked Text]; see also U.S. TRADE REPRESENTATIVE, SPECIAL 301 REPORT 4 (2008), [http://www.ustr.gov/sites/default/files/asset\\_upload\\_file553\\_14869.pdf](http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf) (noting that “ACTA is envisioned as a leadership effort among countries that will raise the international standard for IPR enforcement”) [hereinafter SPECIAL 301 REPORT].

10. See SPECIAL 301 REPORT, *supra* note 9, at 4. The Special 301 Report “is an annual review of the global state of intellectual property rights (IPR) and enforcement, conducted by the Office of the United States Trade Representative (USTR) pursuant to Special 301 provisions of the Trade Act of 1974.” *Id.* at 2.

11. ACTA Non-Paper on Institutional Issues Under the Agreement, [http://wikileaks.org/wiki/Talk:Classified\\_US,\\_Japan\\_and\\_EU\\_ACTA\\_trade\\_agreement\\_drafts,\\_2009#ACTA\\_Oversight\\_Council](http://wikileaks.org/wiki/Talk:Classified_US,_Japan_and_EU_ACTA_trade_agreement_drafts,_2009#ACTA_Oversight_Council) (last visited Oct. 28, 2009).

12. “Fast Track” authority refers to “[a]n expedited legislative procedure found throughout United States foreign affairs statutes [which] authorizes the President to initiate a foreign affairs action (for example, negotiation of an international trade agreement), but requires him to notify, consult, and subsequently submit the product of that action back to Congress for final, accelerated approval.” Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT’L L. 143, 143 (1992).

13. U.S. CONST. art. II, § 2, cl. 2.

agreements on the nation's behalf, so long as this power was checked by the diversity of economic interests representing the states in the Senate.<sup>14</sup>

Executive power over foreign trade agreements has expanded greatly since George Washington's visit to Congress to seek "advice" on treaty negotiations.<sup>15</sup> Subsequent presidents struggled with long delays in obtaining Senate approval of agreements—most notably the Treaty of Versailles, establishing the League of Nations—giving rise to complaints that the Treaty Clause was an impediment to efficiency and legitimacy in foreign relations and an emergent international order.<sup>16</sup> The formation of global governance institutions within the United Nations at the end of World War II resulted in the increased use of congressional-executive agreements as the primary instrument of trade negotiations.<sup>17</sup> These agreements require only a majority vote, but of both houses. The adaptive use of congressional-executive agreements has been hailed as a triumph of the democratic nature of the Constitution in the new international order. Frequent use of sole executive agreements to negotiate plurilateral agreements such as ACTA undermines that international order and requires neither congressional nor public approval.<sup>18</sup> The balance between diplomatic efficiency and public accountability has fluctuated throughout history, but both have been recognized to be necessary.

From 1974 to 1994 and 2002 to 2007, Congress delegated power to the Executive Branch to negotiate free trade agreements (FTAs) under two expedited processes called Fast Track and Trade Promotion Authority.<sup>19</sup> Under these regimes, Congress was required to consider legislation implementing FTAs negotiated by the USTR with mandatory deadlines, limited debate, and no power to amend. Both the Senate and the House of

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14. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1306 (2008).

15. SENATE COMM. ON FOREIGN RELATIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 33 (2001).

16. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 848-51 (1995).

17. *Id.* at 907-09.

18. Bradford R. Clark, *Domesticating Sole Executive Agreements*, 97 VA. L. REV. 1573, 1576-77 (2007).

19. Koh, *supra* note 12, at 145-59.

Representatives had to approve or reject an FTA's implementing legislation in its entirety on a simple majority vote.<sup>20</sup> The USTR in exchange followed negotiation objectives specified by Congress, covering a broad range of public policy goals.<sup>21</sup>

These negotiation objectives required FTA IP provisions to have a standard of protection reflecting U.S. law, and to provide "strong enforcement of intellectual property rights, including through accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms."<sup>22</sup> The USTR was required to consult with particular congressional committees (including the House of Representatives' Ways and Means Committee and the Senate Finance Committee) during negotiations, and to notify Congress before entering into a foreign trade agreement on behalf of the United States.<sup>23</sup>

Fast Track was intended to serve two policy goals. First, it would promote the U.S. trade agenda by assuring trading partners that agreements reached would be subject to a prompt congressional approval process. Second, it would preserve constitutionally mandated congressional oversight over non-tariff issues that impact domestic legislation and policy.<sup>24</sup> Fast Track authority was instrumental in negotiating and implementing many multilateral and bilateral trade agreements.<sup>25</sup> However, the use of FTAs and Fast Track authority to meet non-tariff policy goals such as labor and environmental standards have become increasingly controversial.<sup>26</sup>

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20. HAL S. SHAPIRO, *FAST TRACK: A LEGAL, HISTORICAL AND POLITICAL ANALYSIS* 9 n.2 (2006) (discussing 19 U.S.C. § 2191 (2006)).

21. Koh, *supra* note 12, at 156.

22. 19 U.S.C. § 3802(4)(i), (v).

23. LENORE SEK, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF FOR CONGRESS IB 10084: FAST-TRACK AUTHORITY FOR TRADE AGREEMENTS (TRADE PROMOTION AUTHORITY): BACKGROUND AND DEVELOPMENTS IN THE 107TH CONGRESS (2003), <http://fpc.state.gov/documents/organization/16806.pdf>.

24. Shapiro, *supra* note 20, at 15; *see* U.S. CONST. art. I, § 8, cl. 3.

25. *See, e.g.*, SEK, *supra* note 23; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-59, INTERNATIONAL TRADE: AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATIONS UNDER TRADE PROMOTION AUTHORITY (2007), *available at* <http://www.gao.gov/new.items/d0859.pdf>.

26. SHAPIRO, *supra* note 20, 29-42; Doug Palmer, *Democrats, Bush Strike Deal on Trade*, REUTERS, May 10, 2007, <http://www.reuters.com/article/topNews/idUSWBT00695620070511>; International Centre for Trade and Sustainable Development, *White House, Democrats Reach Deal on Bilateral FTAs, Sparking Hopes For TPA*, BRIDGES WEEKLY, May 16, 2007, at 2, *available at* <http://ictsd.net/i/news/bridgesweekly/7751>.

With the expiration of Trade Promotion Authority in 2007, the USTR elected to negotiate ACTA as a sole executive agreement. The U.S. State Department is tasked with authorizing this type of agreement and reviewing international commitments, under the regulations known as the Circular 175 Procedure.<sup>27</sup> This public policy impact assessment and constitutional screening requires a State Department evaluation prior to negotiation, and a periodic review of the potential impact of the negotiations on domestic law and international procedural norms. The State Department is also empowered to solicit comments from other government agencies and the general public.

Sole executive agreements are concluded on the basis of the President's independent constitutional authority alone. Unlike in agreements negotiated under Fast Track, the USTR is not guided by negotiating objectives; nor is the agreement subject to a congressional vote. This transparency loophole removes the inter-branch accountability mechanisms essential to balanced policymaking. It also risks eroding the legitimacy of U.S. trade policy with the American public if agreements are seen as backroom deals subject to capture by corporate lobbyists. General public input as part of a meaningful participatory democracy is now possible with new online tools and databases.<sup>28</sup> Given its likely impact on the knowledge economy and the Internet, the use of a sole executive agreement to negotiate ACTA should be questioned.

#### IV. ACCOUNTABILITY DEFICIT IN ACTA NEGOTIATIONS

States are negotiating ACTA with unprecedented secrecy, and in a manner seemingly designed to evade public review. Efforts to obtain information about ACTA through freedom of information laws have proven unsuccessful. A lawsuit brought by the Electronic Frontier Foundation and Public Knowledge resulted in the release of 159 pages of information, but 1362 pages were withheld under a national security classification.<sup>29</sup> In

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27. U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL 722, 723 (2006).

28. See, e.g., White House Open Government Initiative, <http://www.whitehouse.gov/open> (last visited Oct. 28, 2009).

29. See 5 U.S.C. § 552(b)(1) (2006); Defendant's Motion for Summary Judgment, Elec. Frontier Found. v. Office of the U.S. Trade Representative, No. 081599 (D.C. Cir. Sept. 17, 2008),

December 2007, before formal negotiations commenced, the USTR asked other negotiating countries to agree to a confidentiality agreement it had prepared.<sup>30</sup> The USTR has used this to classify all correspondence between ACTA negotiating countries as “national security” information on the grounds that it is confidential “foreign government information.”<sup>31</sup>

Little information has been made available by the USTR about the objectives of ACTA, the topics of forthcoming negotiations, or the content of previous negotiations. No draft provisions have been officially released, although several leaked negotiation texts have surfaced on the Internet.<sup>32</sup> The USTR sought public comments on ACTA in February 2008, with only a one and half page fact sheet on which to comment.<sup>33</sup> The USTR subsequently held one informal public hearing in 2008.<sup>34</sup> The hearing was held in the absence of negotiating texts or discussion topics for forthcoming negotiations, making the consultation process far less meaningful than stakeholders had hoped.

The USTR has said that it is customary for negotiations between sovereign states to be conducted in private and that ACTA documents must be kept confidential to facilitate the frank exchange of views between negotiating governments to resolve differing national positions, and to obtain an agreement that is most favorable to U.S. economic interests and national security.<sup>35</sup> However, the USTR has previously negotiated trade agreements with greater transparency. Similarly, drafts of the proposed Free Trade Area

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available at [http://www.eff.org/files/filenode/EFF\\_PK\\_v\\_USTR/USTR-SJM.pdf](http://www.eff.org/files/filenode/EFF_PK_v_USTR/USTR-SJM.pdf).

30. Declaration of Assistant USTR Stanford McCoy, *Elec. Frontier Found.*, No. 081599, available at [http://www.eff.org/files/filenode/EFF\\_PK\\_v\\_USTR/McCoy.pdf](http://www.eff.org/files/filenode/EFF_PK_v_USTR/McCoy.pdf) [hereinafter McCoy Declaration]; Declaration of Warren H. Maruyama paras. 4-5 & attach. A, *Elec. Frontier Found.*, No. 81599, available at [http://www.eff.org/files/filenode/EFF\\_PK\\_v\\_USTR/maruyama\\_decl.pdf](http://www.eff.org/files/filenode/EFF_PK_v_USTR/maruyama_decl.pdf) [hereinafter Maruyama Declaration].

31. Exec. Order No. 12,958, 60 Fed. Reg. 76 (Apr. 17, 1995), amended by Exec. Order No. 13,292, 68 Fed. Reg. 60 (Mar. 25, 2008).

32. Nate Anderson, *ACTA Draft Leaks: Nonprofit P2P Faces Criminal Penalties*, ARS TECHNICA, Feb. 4, 2009, <http://arstechnica.com/tech-policy/news/2009/02/actual-acta-draft-leaks-noncommercial-p2p-could-get-criminal-penalties.ars>; Talk: Classified U.S. Japan EU ACTA Trade Agreement Drafts, [http://wikileaks.org/wiki/Talk:Classified\\_US,\\_Japan\\_and\\_EU\\_ACTA\\_trade\\_agreement\\_drafts,\\_2009#ACTA\\_Oversight\\_Council](http://wikileaks.org/wiki/Talk:Classified_US,_Japan_and_EU_ACTA_trade_agreement_drafts,_2009#ACTA_Oversight_Council) (last visited Oct. 28, 2009).

33. 73 Fed. Reg. 8910 (Feb. 15, 2008).

34. See 73 Fed. Reg. 51,860 (Sept. 5, 2008) (announcing hearing on Sept. 22, 2008).

35. McCoy Declaration, *supra* note 30, para. 11; Maruyama Declaration, *supra* note 30, para. 6; Ask the Ambassador, <http://www.ustr.gov/about-us/press-office/blog/ask-ambassador-acta-text> (Sept. 23, 2009, 11:55 EST).

of the Americas regional agreement between the thirty-three countries of the Western Hemisphere were released to the public for comment, and negotiators sought and published the views of civil society stakeholders.<sup>36</sup> Drafts of international instruments negotiated between states at WIPO and the WTO are routinely made available for public comment.<sup>37</sup>

The confidentiality rationale fails most significantly from a public policy perspective. Transparency is necessary for balanced policymaking that serves the needs of all stakeholders in the knowledge economy. U.S. IP laws provide incentives for a diverse set of stakeholders including the entertainment and pharmaceutical industries, but also the technology sector, educators, libraries, and private citizens. The USTR has provided draft ACTA texts to representatives of the entertainment and pharmaceutical industries who are members of the Industry Trade Advisory Committee on Intellectual Property, but has not requested informed input from other stakeholders.<sup>38</sup>

## V. INTELLECTUAL PROPERTY RIGHTS (IPR) ENFORCEMENT AND NORM-SETTING

The lack of transparency, accountability mechanisms, and opportunity for informed citizen input provokes special concern because ACTA may have a significant impact on U.S. public policy and citizens' civil liberties.

First, though it was originally portrayed as an agreement to coordinate best practices on border enforcement of physical goods, ACTA will extend to regulation of global Internet traffic. Section 4 of Chapter 2 of the Agreement will address "IPR Enforcement in the Digital Environment" including "the possible role and responsibilities of Internet service providers in deterring copyright and related rights piracy over the Internet."<sup>39</sup> ACTA will constrain national legislation governing domestic networks and physical infrastructure. It will also restrict the global flow of information by regulating, and

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36. See Free Trade Area of the Americas: Participation of Civil Society, [http://www.ftaa-alca.org/SPCOMM/COMMCS\\_E.ASP](http://www.ftaa-alca.org/SPCOMM/COMMCS_E.ASP) (last visited Oct. 30, 2009).

37. Memorandum from Electronic Frontier Foundation to the United States Trade Representative (July 22, 2009), available at [http://www.keionline.org/misc-docs/4/ustr\\_transparency\\_asks\\_22jul2009\\_final.pdf](http://www.keionline.org/misc-docs/4/ustr_transparency_asks_22jul2009_final.pdf) [hereinafter Transparency Memo].

38. See McCoy Declaration, *supra* note 300, paras. 16-17.

39. USTR ACTA SUMMARY, *supra* note 5, at 3.

potentially criminalizing, the next generation of innovative network technologies.

Second, implementation of ACTA may require amending U.S. law and upsetting developments in controversial areas of public policy. As a sole executive agreement, ACTA provisions should not change U.S. law. However, leaked negotiation texts and industry submissions include proposals that extend beyond current U.S. copyright and trademark law. Leaked texts indicate that the EU has sought power for judges to issue pre-litigation seizure orders and injunctions against Internet intermediaries whose services are being used by a third party to infringe IP rights.<sup>40</sup> U.S. rightsholders' submissions to USTR have sought obligations for ISPs to terminate a customer's Internet account upon repeated allegations of copyright infringement, to filter users' Internet communications for potential copyright infringement, and to disclose customer data.<sup>41</sup>

As a group of twenty-one public interest and technology groups note:

Any discussion of 'best practices' regarding the use or testing of filtering technologies would also require changes to both the 1998 Digital Millennium Copyright Act (DMCA) and existing trademark law. . . . Section 512(m) of the DMCA expressly exempts intermediaries from obligations to monitor and filter its services. Filtering [would have] significant privacy, technical, due process, and cost concerns that would implicate many other U.S. laws.<sup>42</sup>

Internet termination obligations would remove the discretion that Congress gave Internet service providers in the DMCA. If ACTA were to include such provisions, its implementation by Congress would require changes to U.S. law. While resulting legislative amendments might be subject to challenge in federal court to the extent that they impinge on constitutionally protected speech and due process protections, the deference courts have shown to international treaties superseding U.S. law renders ACTA a target vehicle for policy laundering.

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40. ACTA Leaked Text, *supra* note 9 (“Art. 2.6 Civil Enforcement provisions”).

41. Public Knowledge, Anti-Counterfeiting Trade Agreement, <http://www.publicknowledge.org/issues/acta#comments> (follow hyperlinks to individual comments) (last visited Oct. 28, 2009).

42. See Public Knowledge Use, Group Comments on the Anti-Counterfeiting Trade Agreement, <http://www.publicknowledge.org/node/1752>.

Third, using trade agreements to set global norms for intellectual property enforcement risks distorting national information regulation. As noted above, U.S. copyright law strikes a careful balance between public and private rights, providing incentives for a diverse set of stakeholders. By exporting one half of the complex U.S. legal regime, FTAs have required other countries to adopt lopsided laws with strengthened exclusive rights without accompanying exceptions and limitations. U.S. technology exporters looking to expand into new markets will confront foreign laws lacking the flexibility that was key to their innovation. Because ACTA is focused solely on harmonizing signatories' IP enforcement obligations with no consideration of balancing flexibilities, it is likely to have a greater distorting impact. Finally, using an international agreement to lock in a particular interpretation of issues that are in dispute in U.S. courts precludes future policy options by creating foreign obligation barriers to domestic legislative reform.

## VI. CONCLUSION—TOWARD SOLUTIONS

The ACTA negotiations need to be made more transparent to ensure that U.S. foreign policy promotes innovative business and protects citizens' interests. Transparency is also necessary for a meaningful public debate about issues of fundamental significance for the future of the Internet.

To achieve this, first, input to U.S. trade negotiators on IP needs to reflect the views of all stakeholders in the U.S. knowledge economy to counterbalance the disproportionate influence of lobbyists for incumbent industries. This requires reform of the current trade advisory committee system to include civil society and technology industry participation in the tier 3 industry trade advisory committee on intellectual property, ITAC-15, or the creation of new equivalent level advisory committees.<sup>43</sup>

Second, congressional oversight of foreign trade negotiations, especially agreements affecting areas of non-trade domestic policy, requires strengthening. The USTR should be required to comply with additional negotiating objectives. These objectives would reflect the interests of all

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43. *Hearing on Trade Advisory System Before the Subcomm. on Trade of the H. Comm. of Ways and Means*, 111th Cong. (2009) (statement of Gigi B. Sohn, President, Public Knowledge).

stakeholders in the U.S. economy, and specify what content must and must not be included in agreements. In addition to labor and environmental standards, IP enforcement provisions in agreements must not undermine internationally agreed upon commitments on public health,<sup>44</sup> and flexibilities that protect citizens' access to knowledge, nor obstruct IP exceptions and limitations appropriate for the digital age. In addition, the Congressional Oversight Group, a statutory supervisory group designed to liaise with the Trade Representative,<sup>45</sup> could conduct a thorough review and certify that the new negotiating objectives have been met before a trade agreement could be brought to a vote in either House.<sup>46</sup>

Third, transparency guidelines for trade negotiations should be institutionalized. Beyond congressional oversight of USTR, this process should enable citizens to discuss the public policy impacts of proposed agreements. The policy assessments described in the Department of State's Circular 175 procedure should be made public at the outset of USTR negotiations.<sup>47</sup> Finally, the State Department should exercise its option to solicit comment to enable meaningful public debate.<sup>48</sup>

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44. See Trade, Accountability, Development and Employment Act of 2009, H.R. 3012, 111th Cong. § 8(4) (2009).

45. 19 U.S.C. § 3807 (2006).

46. *Id.* §§ 6, 7.

47. See Transparency Memo, *supra* note 37.

48. See U.S. STATE DEP'T, *supra* note 277.