

As ACTA Tanks in Europe, USTR Announces Potentially Important Shift for TPP Talks

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The EU Parliament vote by an overwhelming margin (478 to 39) to reject Europe's participation in the Anti-Counterfeiting Trade Agreement (ACTA) should be a wake-up call for trade negotiators. Intellectual property trade agreements are going nowhere unless they provide better balance between the various interests at stake in copyright policy. And lo and behold, the U.S. Trade Representative may be taking note: at the upcoming negotiating round for the the Trans-Pacific Partnership (TPP) agreement, the United States for the first time will propose that a trade agreement include language affirmatively embracing copyright limitations and exceptions. That would be a welcome and potentially significant shift -- though just how significant will depend on the actual language, which of course isn't public.

Let's start with ACTA. As CDT [noted](#) [2] when public protests flared up in Europe in February, the final text of ACTA had deleted or softened many of its more troubling provisions. But CDT, like a growing segment of the public, remains concerned about the growing trend of using trade negotiations to promote a selective vision of copyright law -- one in which enforcement provisions are strong and mandatory while the counterbalancing limitations and exceptions are weak or purely optional. The [non-transparent nature of the negotiations](#) [3] and the [problematic provisions](#) [4] in leaked drafts helped create a widespread perception that ACTA was focused narrowly on serving the interests of a few powerful industries, with Internet user and innovator interests addressed as an afterthought if at all. ACTA's demise in the EU Parliament demonstrates -- as did the [defeat of SOPA/PIPA](#) [5] in the U.S. Congress earlier this year -- that such a perception is a huge political land mine that can derail the entire effort.

To be clear, the defeat in the EU Parliament doesn't completely kill ACTA. ACTA could still take effect if six of the participating countries ratify it. But the main purpose of ACTA was to demonstrate consensus regarding what a strong and modern intellectual property legal framework should look like -- and then to use that consensus to push for changes in non-ACTA countries. It's hard to see how ACTA can do that effectively with a major party like the EU so emphatically rejecting it.

Meanwhile, negotiations toward the intellectual property chapter of the TPP have raised similar public [concerns](#) [6] regarding the lack of transparency and the risk of embracing one-sided, selective approaches to IP law. Until this week, there was little indication that those concerns would prompt any change in approach by USTR, which seemed content largely to track language from IP provisions in previous free trade agreements negotiated before these issues became a subject of broad public debate. Then, on Tuesday, USTR publicly [announced](#) [7] that it would propose a new provision at the upcoming TPP negotiating round -- a provision that "will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research." USTR's statement notes that "exceptions and limitations achieved in U.S. law provides diverse benefits for large and small businesses, consumers, authors, artists, and workers in the information, entertainment, and technology sectors" and cites U.S. laws regarding fair use and the [DMCA safe harbor](#) [8] as examples.

This is welcome language, and USTR deserves credit for taking this step. It marks an express recognition that copyright isn't just about rewarding content creators; the system also needs to work for all the consumers and businesses who use and disseminate information. Expanding the focus of copyright trade policy to affirmatively promote the interests of the copyright-using public -- rather than just seeking new ways to ratchet up enforcement to assist rights holders -- would be a considerable step forward.

USTR's announcement, however, is just a first step. For USTR's characterization of the copyright

system being "an engine of free expression" to be more than mere lip service, it needs to be reflected in the details of actual agreement language. That means the new provision USTR proposes needs to be strong enough to be meaningful. (Some observers are already [warning](#) [9] that the new provision, by incorporating the "3-step test" from the WIPO TRIPS agreement, could end up having the practical effect of *constraining* limitations and exceptions rather than promoting them.) It also means the other provisions in TPP's IP chapter need to be analyzed for their impact on a broad range of stakeholders. Whatever progress is reflected in a new provision on limitations and exceptions could easily be eclipsed by harmful provisions elsewhere in the chapter -- in effect, giving with one hand but taking away with the other.

In short, the details matter. A USTR press release could be long forgotten five years from now, but the text of a widely adopted TPP agreement would live on. And because the TPP negotiations lack transparency, there may not be any opportunity for stakeholders to evaluate or weigh in on actual text. In that sense, USTR still hasn't grasped one of the major lessons from ACTA's failure in Europe: With the public watching and increasingly skeptical about whose interests are being served, it simply won't do to use behind-closed-door negotiations to determine the appropriate parameters of copyright law internationally. More input from a broader range of perspectives is essential, both for getting the substance right and for getting the public to accept the result as legitimate and balanced. Let's hope USTR, and all the other TPP negotiators, are able to figure that out.

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