

Searching iPods at the Border? EFF Sues for Access to Secret Anti-Counterfeiting Treaty

By David Zwick, Associate

In a bid to inject transparency where secrecy has so far prevailed, the Electronic Frontier Foundation has filed a Freedom of Information Act complaint in the District of Columbia district court to force the Office of the U.S. Trade Representative to disclose all records related to the negotiation of the Anti-Counterfeiting Trade Agreement.

Last October, the USTR announced that the U.S. and some of its key trading partners, including the European Union, Japan, and Switzerland, would negotiate an Anti-Counterfeiting Trade Agreement (ACTA) to combat the problem of global counterfeiting and piracy.

Observing that counterfeiting impairs business revenues, discourages innovation, and threatens consumer health and safety, ACTA envisions progress on three fronts: strengthening international cooperation, improving enforcement practices, and providing a strong legal framework for intellectual property rights enforcement. Since the announcement, though, all of the negotiations have taken place in near-total secrecy.

In May, an ACTA discussion paper from the USTR was leaked and placed on the Internet. The paper alarmed many consumer protection groups and civil rights organizations, as well as Internet service providers and electronics manufacturing firms. The paper advocates for several controversial provisions for the Agreement, particularly in the area of the legal framework for IP rights enforcement.

Both criminal and civil law enforcement is envisaged, including the criminalization of non-commercial infringement. Border measures would include giving customs authorities the power to act without complaint by rights holders to block suspicious goods from entering a country.

The discussion paper said that ISPs should be required to cooperate with rights holders by handing over information about the identity of alleged infringers after an

“effective notification” of a “claimed infringement.” The list of provisions has been dubbed “a potential Christmas wish-list by Hollywood companies.”

The secrecy of the negotiations and the virtual lack of involvement by other than rights holders has led critics to suggest that ACTA will result in laptops and iPods being searched at airports to look for evidence of illegally downloaded music. ISPs are leery about any requirements to monitor their customers’ Internet communications and the extent of any secondary liability for alleged or real infringing activities of their customers.

Electronics companies, in turn, are worried about liability for equipment they manufacture that might be used for infringement activities. And public and private library associations are concerned that ACTA will interfere with fair use of copyrighted materials.

Even the chairman and ranking member of the U.S. Senate Judiciary Committee have sent a letter to the USTR asking it not to rush into a sweeping new agreement that may curtail domestic IP rights and protection without seeking formal Congressional involvement.

Against this backdrop of rising alarm, in mid-September more than 100 public interest organizations from around the world signed on to a letter to the USTR calling on officials from the countries negotiating ACTA to immediately publish the draft text of the agreement.

Later that week, EFF was joined by Public Knowledge, a public interest group that promotes balance in IP law and technology policy, in their FOIA action. EFF asked for expedited treatment of their request in view of the USTR’s stated goal of completing the agreement by the end of 2008.

In late September, a representative of the USTR answered questions from concerned groups, assuring them that ACTA will not rewrite U.S. law, will not result in searching iPods at the border, and is not a sop

to content providers at the expense of everyone else. He said that the USTR wants to involve major Internet players, such as Google and ISPs, before making any final decisions on the language of the Agreement.

However, the representative also said that he could not distribute any draft text because none exists, and could not provide any specifics because he is bound by the confidentiality of the negotiating process.

The original goal of hammering out the Agreement by the end of 2008 now looks unlikely in light of promises to allow public input to the process. We look forward to seeing a draft of the agreement, however it is brought to light. ✧