IN THE MATTER OF 2010 SPECIAL 301 REVIEW: IDENTIFICATION OF COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1974

Docket No. USTR-2010-0003

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 2010 Special 301 Review: Identification of Countries under section 182 of the Trade Act of 1974 published in the *Federal Register* on January 12, 2010.

Summary

U.S. copyright law contains a careful balance between public and private rights, providing incentives for a diverse set of stakeholders in the knowledge economy, including creators, students, and educators and other users of information, and developers of innovative new technologies. In conducting its annual review for the Special 301 Report, the USTR should seek to ensure that U.S. trading partners' laws embody a similar balance, in order to facilitate the free flow of information for social and economic development, and to support U.S. technology exporters seeking to expand into new markets. In short, U.S. foreign policy on intellectual property (IP) and Trade should serve the interests of all stakeholders in the knowledge economy.

Public Knowledge and the Electronic Frontier Foundation recognize the efforts made by the USTR this year to expand the range of inputs into the Special 301 process. We appreciate the opportunity to provide comments and testify in the public hearing on the Special 301 process. We would also appreciate the opportunity to comment on the 2010 submissions of the industry groups that appear to play a significant role in the USTR's decision to identify countries under section 182 of the Trade Act of 1974, but note that there is no opportunity for public interest organizations to file reply comments. Accordingly, our comments are limited to the 2009 Special 301 Report and previous years' reports.

We wish to comment on several concerns with the 2009 Special 301 Report and the process by which it was compiled:

(1) The standards for evaluation applied in the 2009 Special 301 Report raise significant public policy concerns and are not mandated by section 182 of the Trade Act.
(2) The evaluation criteria for listing countries in the Special 301 Report are vague and non-transparent.
(3) The lack of independent verification or evaluation of the empirical data provided by copyright industry lobbyists upon which the USTR has relied in making the factual determinations that underpin the identification and placement of countries on the watch list or priority watch list, and subject to out of cycle review.
(4) Procedural deficiencies in the process of compiling the Special 301 report which undermine its credibility, in particular, the absence of an opportunity for public interest advocates to respond to the complaints identified by the non-governmental copyright industry lobbyist group that provides input to the Special 301 process, the International Intellectual Property Alliance.

We conclude by offering several recommendations to address these concerns.

1. About Public Knowledge and the Electronic Frontier Foundation

Public Knowledge is a Washington, D.C.-based public interest advocate that works to promote a balanced copyright regime. Public Knowledge believes that current U.S. copyright law embodies this balance to a significant extent and seeks to protect and promote these values. To achieve this goal, Public Knowledge works on informing policy makers and citizens about the importance of this balance through several modes of engagement including its weblogs and videos hosted on its website and also through various whitepapers that it releases from time to time.

The Electronic Frontier Foundation (EFF) 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

SUBMISSION

1. A balanced copyright system is the hallmark of U.S. law and the USTR should promote the same balance abroad

The purpose of U.S. copyright law is to promote the progress of science and arts by rewarding artists for their creativity.[1] This purpose is achieved by providing a bundle of exclusive rights to owners[2] and also limiting these rights.[3] Limitations and exceptions to

[1] U.S. CONST. art I, § 8, cl. 8.
[2] 17 U.S.C. § 106 (2009)
[3] *See* 17 U.S.C. §§ 107-122 (2009)

copyright foster education, innovation, and advancement of culture. For instance, the first sale doctrine[4] of copyright law permits activities such as library lending, thereby promoting education. Similarly, copyright law also permits uses of copyrighted works by students and teachers in the course of face-to-face teaching in a classroom[5] or in the course of distance education under certain conditions[6]. The fair use provision and case law interpreting it have permitted innovations in the consumer devices and services market[7], facilitating introduction of devices such as the VCR, the TiVo, and the Slingbox. In addition to fostering education and innovation, the system of limitations and exceptions also facilitates follow on creation. For instance, fair use allows documentarians to extensively use content created before in their own works. Similarly, limitations permit cover artists to perform pre-existing musical works and create sound recordings of their own.[8] Thus, the strength of the U.S. copyright system derives not only from the protections it affords to copyright owners but also from its robust limitations and exceptions that permit productive uses of copyrighted works.

Because this balanced system of rights and limitations has been so successful in the U.S., the USTR should strive to promote similarly balanced copyright laws in other countries. If on the contrary, the USTR encourages countries to adopt more expansive copyright protections without limitations and exceptions, U.S. creators and innovators who rely on limitations and exceptions in the U.S. will find less flexibility in their potential export markets. For instance, producers of consumer electronic devices that facilitate fair use time shifting or space shifting might be considered as facilitating copyright infringement in another country with less flexible copyright law. Similarly, search engines and other Internet-based services that have relied on limitations and exceptions in U.S. copyright law to build robust services within the U.S. could find themselves unable to operate in foreign countries.[9] Such a result would be directly opposed to the purpose of the Trade Act: to promote market access for all U.S. products and services[10], not just U.S. IP products.

The USTR should not press countries to adopt laws and policies that ignore the balance present in the U.S. copyright system. Instead it should seek to preserve and promote this balance as it pursues its Special 301 Review process and negotiates various Free Trade Agreements in an attempt to cure perceived flaws in foreign IP laws.

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[4] 17 U.S.C. § 109(a) (2009)
[5] 17 U.S.C. § 110(1) (2009)
[6] 17 U.S.C. § 110(2) (2009)
[7] *See* Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens,* 74 Fordham L. Rev. 1831 (2006).
[8] 17 U.S.C. § 115 (2009).
[9] *See for example,* Jonathan Band, *Google and Fair Use,* (December 2007), *at* http://www.policybandwidth.com/doc/20080211-MLB104.pdf, (explaining Google and other search engines' reliance on fair use and how in the absence of fair use or a similar exception, their operations in Europe are jeopardized.)
[10] *See* 19 U.S.C.A §2101 (West 2010).

2. The standards for evaluation applied in the 2009 Special 301 Report raise significant public policy concerns and are not mandated by section 182 of the Trade Act.

(a) 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

The Trade Act directs the USTR to place countries on the annual watch lists for failure to provide "adequate and effective" protection of intellectual property rights[11] or denial of "fair and equitable market access to U.S. persons who rely upon intellectual property protection."[12] This mandate does not require the USTR to place on these watch lists countries that choose not to accede to and implement certain intellectual property agreements such as the 1996 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively "the WIPO Internet treaties").

The Trade Act defines "adequate and effective protection" as the refusal of a country to provide means *under its laws* for foreign nationals to exercise and enforce their IP rights.[13] It considers a country to have denied market access if its laws or regulations *violate provisions of international agreements to which both the U.S. and that foreign country are parties* or if the law or regulation constitutes a discriminatory non-tariff barrier[14]. Thus, a country should be considered to provide adequate and effective IP protection and fair and equitable market access for these purposes if it complies with its existing international obligations and provides foreign rights-holders with a means under its domestic law to enforce their rights or seek access to its markets. Failure to sign international agreements does not *per se* mean the country has failed to provide adequate and effective protection for U.S. rights-holders' intellectual property. This is also consistent with the principle of national sovereignty, a foundational principle of the modern world order[15],which recognizes a country's freedom to choose international instruments to which it will be bound.[16]

Many countries have legitimate and lawful reasons for not signing or ratifying treaties. The United States itself is a prime example. It declined to ratify the Berne Convention

[11] 19 U.S.C. §2242(a)(1)(A) (2009).
[12] 19 U.S.C. §2242(a)(1)(B) (2009).
[13] 19 U.S.C. §2242(d)(2) (2009).
[14] 19 U.S.C. §2242(d)(3) (2009).
[15] U.N. CHARTER art. 2, para 1.
[16] Vienna Convention on Law of Treaties, May 23, 1969, Article 34, 1155 U.N.T.S. 331.

until 1988 – far later than most other developed countries.[17] Similarly, other countries' governments have cast doubt on the usefulness of the WIPO Internet treaties as a means to secure copyright protection while also maintaining a vibrant system of limitations and exceptions. For instance, the government of Israel has noted that its decision not to sign these treaties was based on the determination that the usefulness of legally-entrenched technological protection measures (TPMs) in preventing copyright infringement, a primary focus of the WIPO Internet treaties, was questionable.[18]

Despite this, the USTR placed India, Canada, Israel, China, and Russia on the priority watch list in 2009, citing as one reason the failure of these countries to accede to the WIPO Internet treaties.[19] Canada was also placed on the watch list in the 2008[20] and 2007[21] Special 301 reports out of concern for its "failure to accede to and implement the WIPO Internet Treaties." The USTR should not use the Special 301 process to circumvent a country's decision not to be bound by certain instruments.

Nor should it be used to pressure countries to adopt a particular model of treaty implementation sought by U.S. rights-holders. Countries that have sought to implement the WIPO Internet Treaties' requirements based on their determination of how best to do so in their national law have been subjected to extra scrutiny because they have not implemented the treaty obligations in the particular format preferred by U.S. rights-holders. We note that Canada was subject to Out-of-Cycle review in 2006 after it released draft copyright amendment legislation implementing the WIPO Internet Treaties' TPM obligations in a manner that differed in approach from the U.S. Digital Millennium Copyright Act.[22] The IIPA recommended that Canada stay on the Priority Watch List in its 2007 submission to the USTR for its failure to implement the WCT and WPPT with the particular legal regime used in the DMCA.[23] Similarly, New Zealand was

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[17] The Final act of the Berne convention was finalized in 1967 and the United States held off on signing on till 1988.

[18] GOVERNMENT OF ISRAEL, COMMENT ON PROPOSED RULE: 2009 SPECIAL 301 REVIEW: IDENTIFICATION OF COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1974, 10-11, USTR-2009-0001, *at* http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064808e9bc5

[19] UNITED STATES TRADE REPRESENTATIVE, 2009 SPECIAL 301 REPORT, 16,17,18, 19 (April 30, 2009) *at* http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf [Hereinafter "2009 Special 301 Report"].

[20] UNITED STATES TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT, 39 *at* http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf.

[21] UNITED STATES TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT, 30 *at* http://www.ustr.gov/sites/default/files/asset_upload_file230_11122.pdf.

22 UNITED STATES TRADE REPRESENTATIVE, 2006 SPECIAL 301 REPORT, discussing Canadian Copyright Bill, C-60, § 34.02(1) (proposed June 2005) prohibiting circumvention "for the purpose of an act that is an infringement of copyright." at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf.

[23] IIPA 2007 Special 301 submission to USTR, Canada country report, at http://www.iipa.com/rbc/2007/2007SPEC301CANADA.pdf

the subject of a Special Mention in the 2007 IIPA submission to the USTR because the TPM provisions in its draft Copyright (New Technologies and Performers' Rights) Amendment Bill of 2006 differed from the DMCA approach.[24]

(b) The USTR should not sanction countries in the future for failure to accede to the Anti-Counterfeiting Trade Agreement or to implement its standards

The 2008[25] and 2009[26] Special 301 reports refer to the proposed Anti-counterfeiting Trade Agreement (ACTA) being negotiated by the USTR on behalf of the U.S. and 36 other countries, which is intended to create new IP enforcement standards that go beyond those in the TRIPs Agreement. ACTA negotiating countries intend that developing countries will be required to accede to and implement ACTA.[27] As noted above, one of the controversial criteria used by the USTR to evaluate countries' identification in the Special 301 Report is their accession to, and particular implementation of, the WIPO Internet Treaties. The references to ACTA in the two previous Special 301 Reports appear to indicate that accession to ACTA, and implementation of its substantial standards, will be required of countries to avoid adverse consideration in the Special 301 annual review.

Given that ACTA is being negotiated as a plurilateral agreement by a small set of countries, outside of traditional multilateral IP fora and without the participation or input of more than 150 nation states, we strongly believe that it would be inappropriate for countries that are not signatories to ACTA to be evaluated according to the standards agreed by the ACTA negotiating countries, or to be required to accede to ACTA in order to avoid additional scrutiny as part of an out of cycle review or adverse ranking as part of the Special 301 annual review. This is particularly true since leaked information about the content of ACTA indicates that it will include specific measures on several areas where no internationally agreed standard exists, such as requirements for signatory countries to adopt particular secondary copyright liability standards based on inducement principles enunciated by the U.S. Supreme Court, and for Internet Service Providers to adopt so-called Three Strikes automatic Internet disconnection policies, as well as measures that were previously considered but not accepted by the majority of WIPO member states at the diplomatic conference leading up to the adoption of the WIPO Internet Treaties, such as a broad prohibition on the manufacture and distribution of tools that can be used to circumvent rights-holders' TPMs for non copyright-infringing purposes, modeled on that in the U.S. Digital Millennium Copyright Act.

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[24] IIPA 2007 Special 301 submission at http://www.iipa.com/2007_SPEC301_TOC.htm.

[25] UNITED STATES TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT, 4-5, at: http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf.

[26] 2009 Special 301 Report, *supra* note 21, at 3.

[27] The leaked ACTA Discussion Paper available at http://wikileaks.org/wiki/G-8_plurilateral_intellectual_property_trade_agreement_discussion_paper states that there will be "Special measures for developing countries in the initial phase."

Evaluating countries on the basis of their implementation of ACTA standards under the Special 301 process is also unnecessary, as leaked ACTA negotiation texts that have surfaced on the Internet indicate that ACTA may have its own Oversight Council to review and evaluate signatory countries' compliance with ACTA's enforcement standards.[28]

(c) Introduction of exceptions and limitations to national copyright law that comply with the international copyright framework should not be a basis for identification in the Special 301 Report.

The Trade Act does not direct the USTR to identify countries in the Special 301 report for enacting or proposing limitations and exceptions to domestic copyright that promote socially beneficial activities and comply with the Three Step Test and the international copyright framework. The Trade Act defines denial of "adequate and effective protection of intellectual property" as a refusal to afford means *under its laws* to enforce their rights.[29] This does not support interpretations that foreign laws embodying anything but the most narrow exceptions deny adequate and effective IP protection.

In conducting its annual evaluation for the Special 301 Report, the USTR should not be swayed by claims that socially beneficial limitations and exceptions to copyright would threaten U.S. rights-holders' market access or deny adequate protection to their intellectual property. For instance, the International Intellectual Property Alliance (IIPA), in its 2009 comments, claimed that Israel's fair use exception, which was modeled after U.S. law and gave discretion to the Minister of Justice to make regulations prescribing conditions under which a particular use would be deemed a fair use, was too broad.[30] It also objected to proposed provisions for a back-up copy exception on the ground that the exception was not limited to a single copy.[31] Similarly it objected to the existence of an exception for security testing of computer programs within the interoperability exception.[32]

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[28] Leaked ACTA negotiation text and Non Paper at: http://wikileaks.org/wiki/Talk:Classified_US,_Japan_and_EU_ACTA_trade_agreement_drafts,_2009#ACTA_Oversight_Council

[29] 19 U.S.C. §2242(d)(2) (2009).

[30] ERIC SMITH, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, USTR-2009-0001-0011.5, COMMENT ON PROPOSED RULE: 2009 SPECIAL 301 REVIEW, 208, *at* http://www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648085ba53 [Hereinafter IIPA Middle East and Africa comments]

[31] *Id.* at 208.

[32] *Id.* at 209.

In its 2006 submission to the USTR, the IIPA recommended that Chile should be placed on the Priority Watch List, for, amongst other things, efforts to introduce a fair-use-like exception in its national law. It noted that:

> "During 2005, several Chilean government agencies reportedly were trying to amend the bill to incorporate very broad "fair use"-like exceptions which would allow copyrighted materials to be used without the rights-holders' authorizations. It is likely that these provisions, if included, would also meet with the objections of the copyright industries."[33]

The IIPA also objected to provisions in a proposed law in India in its 2009 submission to the USTR, which provided exceptions for "noncommercial personal uses", and circumvention of technological protection measures for lawful uses.[34] It must be noted here that U.S. law also provides a mechanism to permit circumvention of technological protection measures for lawful purposes. Under this mechanism,[35] the Register of Copyrights conducts a triennial review to examine whether any particular users of copyrighted works are likely to be affected by the ban on circumvention for the next three years and exempts those that it finds would be so affected. Under this process, the Register of Copyrights has recommended and the Librarian of Congress has permitted exemptions including: an exemption for the blind to circumvent TPMs in order to gain access to works they own; and an exemption for media studies professors to circumvent TPMs to create compilations of DVD clips for classroom use.[36] While the Indian exception, or any other country's exception may not follow exactly the same approach used in the U.S. Digital Millennium Copyright Act, it is intended to achieve the same goal. An exception or limitation to U.S. copyright law that is not considered a denial of protection to U.S. rights-holders should not be considered a denial of protection if practiced in another country.

Similarly, in its 2009 submission, the IIPA claimed that a provision in Israeli law that would set up a tribunal to set royalty rates for broadcasts and performances of music and likely require rights holders to share these royalties was a "problematic" change to their law. It further claimed that such a tribunal would be "unprecedented anywhere in the

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[33] INTERNATIONAL INTELLECTUAL PROPERTY ORGANIZATION, 2006 SPECIAL 301 REPORT: CHILE, 28, at http://www.iipa.com/rbc/2006/2006SPEC301CHILE.pdf.

[34] ERIC SMITH, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, USTR-2009-0001-0011.2, COMMENT ON PROPOSED RULE: 2009 SPECIAL 301 REVIEW, 208, *at* 48, http://www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648085ba55 [Hereinafter IIPA Asia Pacific comments]

[35] 17 U.S.C. §1201(a)(1)(C) (2009)

[36] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472, 68473-68474, 68475-68476, (November 27, 2006) (37 CFR Part 201) *available at* http://www.copyright.gov/fedreg/2006/71fr68472.pdf

world" and would harm the interests of owners of sound recordings.[37] These claims overlooked the fact that a copyright royalty tribunal charged with setting royalty rates is also present in the United States.[38] While U.S. law allows rights holders to negotiate voluntarily, failing these negotiations, the Copyright Royalty Board (CRB) sets rates that are mandatory for all rights holders.[39] The CRB and its predecessor, the Copyright Arbitration Royalty Panel, have set such mandatory rates several times since 1998.

Even where foreign law does not parallel U.S. law, different countries may adopt different mechanisms to deal with situations that demand efficient licensing of rights to large collections of works. The USTR should give due deference to national legislatures' judgment about how best to deal with these situations.

Most rights holder objections to foreign countries' proposed copyright exceptions were framed in terms of fears that the defined exceptions could lead to broader exceptions. This claim suggests, erroneously and without providing any justification for doing so, that countries are incapable of designing their system of limitations and exceptions appropriately.

More fundamentally, many of the claims made by the IIPA in its submissions about foreign countries' proposed copyright exceptions imply that *any* limitation or exception is harmful to copyright owners. This is inconsistent with both the international copyright framework and its underlying principles. Exceptions and limitations to copyright have been part of the international copyright system since its earliest days. The Berne Convention contains a mandatory exception (Article 10(1)) and a mandatory limitation (Article 2(8)). Countries are permitted to create new exceptions and limitations to their national copyright law that meet the Three Step Test, embodied in Article 9(2) of the Berne Convention in relation to the reproduction right, Article 10 of the WCT and Article 16 of the WCT, and Article 13 of TRIPs for a larger set of exclusive rights. As the Agreed Statement to Article 10 of the WCT confirmed, this extends specifically to the creation of exceptions and limitations that are "appropriate in the digital networked environment."[40]

In considering whether a country should be on a priority watch list or watch list the USTR should take full account of the flexibilities available to countries under the international copyright framework. In particular, countries' decisions to enact or propose exceptions or limitations to their national copyright law that are consistent with the Three

[37] IIPA Middle East and Africa comments, *supra* note 30,at 210.
[38] *See* 17 U.S.C. §§ 801-085 (2009)
[39] 17 U.S.C. § 114(e) and (f) (2009).
[40] World Intellectual Property Organization, WIPO Copyright Treaty, Final Text and Agreed Statements, at http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf

Step Test and the rest of the international copyright framework should not be a basis for identification in the Special 301 Report.

(d) The USTR must recognize the principle of proportionality in enforcement and allocation of resources for intellectual property infringements

The USTR must take account of the principle of proportionality when evaluating countries for inclusion in the Special 301 Report on the basis of national intellectual property enforcement standards. Proportionality applies both to the penalty prescribed for intellectual property infringements and to the allocation of public resources employed in IP enforcement actions.

In keeping with the principle of proportionality, the USTR should recognize that different types of IP violations warrant different levels of penalties. Higher levels of fines or imprisonment may not be appropriate or just. Thus, the USTR should be wary of recommendations for listing of countries on the basis of rights-holders' claims that a country's IP regime is deficient because it lacks a statutory damages regime, or fails to impose criminal sanctions for intellectual property infringements that are not committed for profit. While present in U.S. law, some of these penalties are highly controversial. This is particularly true of the statutory damage regime for copyright infringement.[41] In fact, there is currently a vigorous debate as to the constitutionality of the system.[42] It potentially imposes automatic penalties hundreds of thousands of times greater than any foreseeable economic harm to rights-holders caused by the infringement.[43]

The USTR should not view the reluctance of a country to impose a draconian statutory damages regime as evidence of a lack of concern for IP rights. Attempts to normalize such massive statutory penalties by encouraging other countries to adopt such regimes may create barriers to U.S. domestic legislative reform and inhibit Congress from reexamining the issue in the future.

The USTR should also view calls for automatic forfeiture provisions with skepticism. It is certainly reasonable for large-scale counterfeiters to be forced to forfeit the machinery used to produce items such as handbags or commercial quantities of optical disks. There is little potential for collateral damage when such machines are impounded. However, even in the U.S. seizure provisions are extremely controversial[44] and the USTR must

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41 *See, e.g.* J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 Tex. L. Rev. 525, 528 n.19 (2004).

42 *See, e.g.* Pamela Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. Pa. L. Rev. PENNumbra 53 (2009), http://wwwpennumbra.com/debates/pdfs/CopyrightDamages.pdf.

43 A single musical work legally downloaded from a service such as iTunes or Amazon.com costs approximately $1. United States law allows for statutory damages of up to $150,000 for each illegal download of that same work.

44 *See* Eric Moores, *Reframing the Civil Asset Forfeiture Reform Act,* 51 Ariz. L. Rev. 777 (2009); Chloe Cockburn, *Easy Money: Civil Asset Forfeiture by Police,* (February 23, 2010), *at* http://www.aclu.org/blog/racial-justice/easy-money-civil-asset-forfeiture-abuse-police.

avoid extending these provisions to all instances of infringement, particularly instances of non-commercial infringement by individuals. Individuals' computers may be implicated in digital copyright infringement. However, seizure of a household's personal computer that may be involved in one individual's IP-related violations would punish everyone in the household. Computers are a critical communication link between the family and the outside world. An accusation of copyright infringement against a single-family member should not deprive the entire household of access to a computer. The collateral damage caused by such seizure provisions may be aggravated if adopted in developing countries where, a single computer may serve a larger group of people beyond a single household.

Rights-holder groups such as the IIPA, have in the past advocated for an increase both in punishments and in resources devoted to IP-related issues. For example, IIPA criticized Israel for not adequately "criminalizing end-user piracy," failing to set a satisfactory floor on statutory damages, and granting courts discretion in imposing statutory damages, among other complaints.[45] Similarly, IIPA expressed concerns about India's failure to adopt an "optical disk law," the pending proposal to grant investigating officers discretion in handling some crimes, and the lack of an "anti-camcorder law" to complement existing copyright protections.[46]

While it is clear from their previous submissions that IIPA members would, given the choice, prefer more IP-related civil and criminal penalties over fewer such penalties, the mere fact that a country's system of penalties could be more severe should not be grounds for a country to be included in the Special 301 Report. As noted above, the Trade Act only directs the USTR to identify countries in the Special 301 report for failure to provide non-discriminatory access to foreign legal systems and the opportunity to enforce IP rights. Greater penalties do not necessarily translate to more effective enforcement. Furthermore, the Trade Act's direction to secure IP protection should not be viewed as a mandate to interfere with the design of domestic laws. Efforts by the USTR to secure protection for U.S. copyright holders via tougher penalties may disturb delicate balances that foreign domestic laws engender.[47]

The USTR should also look skeptically upon the complaints of rights-holder groups such as IIPA regarding the allocation of resources to combat IP infringements. While it is likely true that enforcement in India is hampered by "corruption, inefficient court procedures, lack of training, massively long delays, and few convictions,"[48] and that "[c]ourt procedures are overly burdensome; courts are severely backlogged and there are

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[45] IIPA Middle East and Africa Comments, *supra* note 30, at 206-207.

[46] IIPA Asia Pacific comments, *supra* note 34, at 48-49.

[47] For example in 2009, the USTR cited China for its failure to provide criminal sanctions against counterfeiters, the high value and volume thresholds placed before criminal prosecutions could be instituted , and the high volume of cases sent to administrative rather than criminal authorities. However, as one scholar points out, the Chinese criminal justice system is far from modern, and denies basic protections to those accused of crimes. The administrative process that the USTR referred to is said to impose "penalties that are tantamount to incarceration without trial." Ira Belkin, *China's criminal Justice System: A Work in Progress*, Wash. Journal of Modern China, at www.law.yale.edu/documents/pdf/China_Criminal_justice_System.pdf

[48] IIPA Asia Pacific comments, *supra* note 34, at 45.

major delays in bringing criminal (and civil) cases to final judgment,"[49] this is hardly an IP-specific problem.[50]

Countries must balance the need for IP enforcement obligations with other, often more pressing, needs and their obligations under the UN Millennium Development goals.[51] The disproportionate allocation of national resources has impacts far beyond protection for foreign right-holders' IP rights. It is inappropriate for the Special 301 Review process to be used to pressure countries to implement the particular enforcement measures and specific models of international treaty implementations sought by US intellectual property rights-holders, limiting these countries' policy options for achieving conflicting domestic policy priorities.

To suggest that a country like India should be punished for not electing to "set[] up special IP prosecutors in each state and establish[] specialized IP courts or appoint[] special IP judges" is simply nonsensical in this contest.[52] The USTR should not suggest that a country with an inefficient judicial system set aside scarce resources in order to streamline one class of cases. Failure to establish a dedicated system of courts or enforcement for intellectual property does not amount to a "denial of adequate and effective protection for IP" that warrants placing a country on a watch list.

In drafting its Special 301 Report, the USTR must focus on proportionality. The existence of a harsher punishment, a more resource intensive option, or merely an alternative approach to that preferred by some rights-holders should not be grounds for adding a country to the Report. If the USTR does elect to add a country to the Special 301 Report, it must go beyond merely indicating the differences between the listed country's approach to IP and that of the United States. It must provide an objective explanation of why the country's approach is inadequate as a matter of that country's international treaty obligations.

3. Failure to engage in evidence-based decision making

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[49] *Id.* at 46.

50 Transparency International ranks India 84, between Guatemala and Panama, on its 2009 Corruption Perceptions Index. Transparency International, *2009 Corruption Perceptions Index*, *available at* http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table. A 2005 study by the same organization found the police, immediately followed by the judiciary, to be the most corrupt public services in India. Transparency International, *India Corruptions Study – 2005*, *available at* http://www.transparency.org/regional_pages/asia_pacific/newsroom/news_archive2/india_corruption_study_2005.

51 *See* The South Centre, *Who Should Bear the TRIPS Enforcement Costs?*, Jan. 2008, *available at* http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=713&Itemid=68.

[52] *See* IIPA Asia Pacific Comments, *supra* note 34, at 46.

The USTR should place greater emphasis on evidence-based decision-making in its Special 301 process. Currently, evidence-based decision-making is deficient in several respects.

(a) The evaluation criteria for listing countries in the 2009 Special 301 Report are vague and non-transparent.

The USTR's Special 301 Reports do not state clearly all the factors that go into the decision to place a country on a watch list or a priority watch list and provide foreign countries with little guidance on the issues that are of concern to U.S. policymakers. In many cases, it is only possible to understand the basis for concern and the possible reason why the USTR has decided to list a country in a particular category by consulting the more detailed complaints about that country's national legal regime submitted by IIPA or Pharma to the USTR.

For instance, in its 2009 comments the IIPA raised several concerns with India's national copyright law: lack of statutory damages; lack of compensation in criminal cases; failure to comply with the WIPO Internet Treaties; failure to enact anti-camcording legislation; lack of sufficient resources dedicated to IP enforcement; and a proposed exception for "private and personal uses." With respect to the WIPO Internet treaties, the IIPA specifically complained that proposed WIPO treaty implementation legislation would permit circumvention of copyright holders' TPMs for lawful non-infringing purposes.

In placing India on the priority watch list, the USTR merely mentioned that India needed to improve its enforcement and move towards implementing the WIPO Internet treaties.[53] This brief explanation gives no indication as to whether the USTR thinks India should only improve its existing enforcement mechanisms or increase various penalties for infringement. It also fails to taken into account the Indian government's response that it is in the process of implementing the WIPO treaties.[54] Furthermore, it does not indicate if the USTR thinks that India's proposed law, with a provision that allows circumvention of TPM for lawful purposes, is consistent with the WIPO Internet treaties. Similarly, the USTR gave a fairly cryptic explanation for why Canada had been placed on the priority watch list in its 2009 report. However, the IIPA's 2009 submission to the USTR described its concerns with Canada in considerable detail.

The USTR should be required to provide countries with a clear indication of its views as to what constitutes "adequate protection of IP". For instance does a country's decision to

[53] 2009 Special 301 Report, *supra* note 21, at 18-19.

[54] SIBI GEORGE, INDIAN EMBASSY, COMMENT ON PROPOSED RULE: 2009 SPECIAL 301 REVIEW: IDENTIFICATION OF COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1974, 10-11, USTR-2009-0001-0069, *at* http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064808edd9b.

provide an exception for "private and personal uses" constitute inadequate enforcement in the USTR's view? Similarly, does allowing circumvention of TPMs for lawful purposes cause the country to be placed on the priority watch list?

A failure to provide these explanations and to identify criteria used to make these evaluations has eroded the credibility of the USTR's special 301 Reports both within and outside the United States and has created the impression that the USTR is blindly endorsing copyright and pharmaceutical industry demands.

(b) 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.

Many rights-holder submissions to the annual review process often fail to cite sources from which they derive their information. For instance, in its 2009 comments on Israel, the IIPA claimed, without citing a single authoritative source, that pirated products were being sold in main markets and flea markets and that these sales affected products such as audio visual works, clothing, and pharmaceuticals.[55] Similarly, with respect to India, the IIPA claimed that publishers report that many "best-selling text books were being loaded onto CD-ROMs and being sold for US$5 or less."[56] Again this claim was not supported by evidence. These are just two instances of a more general practice that has developed since 1989.

This is of concern because the USTR appeared to rely on these assertions in making tis factual determinations and identifying countries that were listed in its 2009 Special 301 Report. While particular rights-holders'may be true, relying on unsupported assertions as a basis for identifying countries to be included in the Special 301 Report carries the risk that these unverified claims that may turnout to be false or exaggerated. Because countries face additional scrutiny, bilateral pressure, and could ultimately face trade sanctions [57] as a result of a Special 301 process after being identified in the Special 301 Report, the USTR should be required to demand the highest standards of proof before subjecting its trading partners to such treatment.

Similarly, the frequently unverified trade loss numbers cited by some rights-holders raise significant policy concerns and should not be relied upon by the USTR as the sole indication of the state of IP infringement and its effects in a particular country. As

[55] IIPA Middle East and Africa comments, *supra* note 30, at 204.
[56] IIPA Asia Pacific comments, *supra* note 34, at 42.
[57] *See* 19 U.S.C. § 2411(c) (2009); Memorandum from Alan Dunn & Bill Fennell, Stewart & Stewart, to Film Television & Action Comm. 1 (Apr. 23, 2004), *available at* http:// www.ftac.net/7-Special_301.pd

scholars have noted,[58] and even the IIPA concedes,[59] many of these studies cite losses based on the questionable assumption that the user of the illegal copy would have paid full price for a legal one. However, scholars point out that many consumers, especially those in developing countries, would not be able to pay full price[60] and thus these loss numbers are actually overestimates of the impact on the market. While we do not dispute that copyright infringement exists, in conducting its Special 301 Review, the USTR must be mindful that the validity of the rights-holder industries' methodology for calculating losses remains untested.

6. Recommendations

To address the substantial procedural deficiencies that currently exist in the Special 301 process, we make the following recommendations:

(1) The USTR should not press countries to adopt laws and policies that ignore the balance present in the U.S. copyright system. Instead it should seek to preserve and promote this balance as it pursues its Special 301 review process and negotiates various Free Trade Agreements in an attempt to cure perceived flaws in foreign IP laws

(2) The USTR should make transparent the set of factors and standards it uses for evaluating countries in each year's Special 301 Report.

(3) The USTR should provide a clear written explanation stating the basis for identification of a country in the Special 301 report and placement on the watch list or priority watch list, or for an out-of-cycle review.

(4) The USTR should arrange for independent external verification of country data and statistics submitted by the IIPA before making factual determinations based upon it.

(5) The USTR should provide a meaningful opportunity for public interest advocates to file comments subsequent to, and in response to, submissions provided by copyright industry rights-holders,

(6) The USTR should apply objective standards for evaluating whether a country has denied adequate and effective protection of intellectual property rights or fair and

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[58] Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective*, 13, Intellectual Property Rights and Sustainable Development, ISSUE NO. 22, (2009), *available at:* http://ictsd.org/downloads/2009/03/fink-correa-web.pdf; SUSAN K. SELL, THE GLOBAL IP UPWARD RATCHET, ANTI-COUNTERFEITING AND PIRACY ENFORCEMENT EFFORTS: THE STATE OF PLAY, (June 9, 2008), *at* http://www.twnside.org.sg/title2/intellectual_property/development.research/SusanSellfinalversion.pdf.

[59] INTERNATIONAL INTELLECTUAL PROPERTY ASSOCIATION, 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT : APPENDIX B, METHODOLOGY, 2, *at* http://www.iipa.com/rbc/2009/2009SPEC301METHODOLOGY.pdf

[60] Fink, *supra* note 36, at 13; Sell, *supra* note 36.

equitable market access to U.S. persons that rely on intellectual property protection. In particular:

(a) countries' decision not to accede to, or implement, provisions of particular international treaties should not be the basis for identification in the Special 301 Report;

(b) countries' decisions to enact or propose exceptions or limitations to their national copyright law that are consistent with the Three Step Test and the rest of the international copyright framework should not be a basis for identification in the Special 301 Report;

(c) the USTR should support the principle of proportionality in its evaluation criteria; and

(d) the USTR should not sanction countries in the future for failure to accede to the Anti-Counterfeiting Trade Agreement or to implement its standards.

We would be pleased to answer any questions on the above matters.

Respectfully submitted,

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