

# ACTA, TPPA Opponents Cite Broken Promises On Medicines, One-Sided Copyright Provisions

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The Trans-Pacific Partnership Agreement currently being negotiated by the U.S. Trade Representative is even more restrictive and less attentive to human rights than the Anti-Counterfeiting Trade Agreement that so riled the social justice community in the last two years, according to attendees beginning a three-day conference Aug. 25.

Organizers of the "Global Congress on Public Interest Intellectual Property" at the American University Washington College of Law held a two-hour press briefing with sessions covering both ACTA and the TPPA. Each session was equally divided between those criticizing the agreements for detrimental policies hampering access to medicines in developing countries and those decrying the U.S. exportation of the enforcement side of copyright law without user-focused exceptions and limitations such as fair use.

Presenters harshly criticized the Obama administration for reneging on campaign promises and extending Bush era preferential treatment for the IP concerns of major corporations.

## Obama Reneges on Promise on Access to Medicines

Formal discussions on ACTA began in 2008 under the Bush administration, with the goal of establishing a comprehensive international framework for combatting IP rights infringement. The agreement among the 11 participants was finalized in November (219 PTD, 11/16/10) and includes provisions on civil, criminal, border, and digital environment enforcement. The United States and the European Union were key participants.

At the Aug. 25 press briefing, the ACTA session began with a discussion of a new report intended to influence a European Union Parliament vote on the agreement in the coming months. EU Green Party representative Erik Josefsson said that the unresolved question is whether ACTA is actually a trade agreement or legislation. The

Green Party, which has about seven percent of the seats in the EU Parliament, concluded it is legislation, and when parliament failed to initiate a required impact assessment, the party proceeded on its own.

American University law professor Sean Flynn responded to the party's request and co-wrote the report, "ACTA and Access to Medicines." Coordinator of the conference and moderator of the ACTA session at the press briefing, Flynn identified "18 specific provisions that raise IP concerns" related to access to medicines.

Flynn was most concerned that the agreement inhibits the development of generic drugs and "dramatically expands the scope of border measures" allowing countries to seize medicines in transit. For example, he noted that trademark violations based on "substantial similarity" can result in a seizure, thus "shifting complex legal determinations from the courts to border control, eliminating evidentiary standards, lowering due process safeguards, and increasing the risk of more unwarranted seizures."

During the TPPA session, moderators Matt Kavanagh of Health GAP and Peter Maybarduk of Public Citizen were particularly critical of the Obama administration for reneging on promises made when he was a candidate for the presidency in 2008.

The Obama/Biden platform included a pledge to "break the stranglehold that a few big drug and insurance companies have" on HIV/AIDS drugs, Kavanagh noted. "But the opposite is happening" with the administration's push for the TPPA, he said.

Maybarduk specifically chastised the U.S. Trade Representative, which is negotiating the agreement, for "introducing provisions to shore up drug monopolies." He reasoned that the administration's main goal in promoting the TPPA is to "isolate India" and its weak patent standards within Asia. For example, he pointed to particular provisions in leaked documents available at the Public Citizen website that show the United States pushing for standards barring pre-grant opposition and patentability for new uses of old drugs.

Agreements Export Copyright Enforcement Side Only

Though the moderators were focused on the issues related to access to medicines, each session also featured a panel of international representatives, and those panel members for the most part were more concerned about the agreements' provisions for enforcing against copyright piracy.

Jérémie Zimmermann, cofounder of La Quadrature du Net, a French advocacy group for users' digital rights, urged the audience to lobby EU Parliament members to defeat ACTA. "This is a battle we cannot afford to lose," he said.

Zimmerman faulted the agreement's inclusion of criminal sanctions for copyright piracy. Though the sanctions are to be assessed only against piracy on a "commercial scale," he asserted that the definition of that term was broad enough to capture "anything done by anyone on the internet." He also questioned whether imposing such sanctions is even within the sovereignty of the parliament, as he rhetorically asked the EU members: "Are you willing to let the EU steal the power to legislate criminal sanctions?"

Jonathan Band of [policybandwidth.com](http://policybandwidth.com) cited the "imbalance in the exportation of U.S. copyright law." Indeed, he praised U.S. law for being "extremely balanced" with protections for copyright owners and a well-developed list of exceptions and limitations, such as fair use. However, he said, "The TPPA exports the enforcement provisions without the fair use exceptions."

As with the medicines discussion, the piracy-oriented panelists were quick to assign responsibility to the administration's kowtowing to large corporate interests. According to Band, for example, the goal of the TPPA is "making the world safe for Disney ., doing what's good for the movie industry."

BNA asked why TPPA members in developing economies could not just replicate U.S. law by passing fair use provisions similar to 17 U.S.C. §107. Band accused the USTR's office of pressuring other TPPA members to forgo U.S.-like exceptions and limitations to copyright protection, and Kimberlee Weatheral, associate director of the Intellectual Property Research Institute of Australia contended that that is exactly what happened in her country.

Summing up the views of the panel, Kavanagh said, "The world envisioned in the TPPA is neither the world we have now or the world we're hoping to evolve to."

#### Will Agreements Force U.S. Law Changes?

After the press briefing, participants advised BNA that ACTA and the TPPA would also necessarily impose changes to U.S. law, a charge that has repeatedly been denied by the USTR during the ACTA negotiations, at least (41 PTD, 3/4/10).

Margot Kaminski, executive director of the Information Society Project at Yale Law School, told BNA that the U.S. Congress would, if ACTA is ratified, have to add a statutory provision for aiding and abetting copyright and trademark infringement acts calling for criminal sanctions, in ACTA Article 2.14(4).

The Congressional Research Service, in an Oct. 29, 2010, letter to ACTA critic, Sen. Ron Wyden (D-Ore.) titled, "Potential Implications for Federal Law Raised by the October 2010 Draft of the Anti-Counterfeiting Trade Agreement (ACTA)," identified other ACTA provisions that might require changes in U.S. statutes, but the USTR reportedly redacted the document.

Krista Cox, a staff attorney for Knowledge Ecology International, which published a copy of the CRS letter to Wyden, told BNA that the TPPA would require even more changes to U.S. law, because patent infringement enforcement was excluded from ACTA but is included in the TPPA.

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