ELECTRONIC FRONTIER FOUNDATION SUBMISSION TO OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE ON PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT

The Electronic Frontier Foundation (EFF) is pleased to submit the following comments to the Office of the United States Trade Representative (USTR) in response to the Request for Public Comments on a Proposed Anti-Counterfeiting Trade Agreement, published in the Federal Register of February 15, 2008 (Volume 73, Number 32, pages 8910-8911).

Executive Summary

Part III of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), together with the 1996 WIPO Copyright Treaty and Performances and Phonograms Treaty, Model Provisions of the World Customs Union, and bilateral cooperation agreements, provide WTO Member States with a sophisticated array of remedies to enforce intellectual property rights both within, and across, WTO members' national borders. In addition, U.S. bilateral free trade agreements since 2002 have routinely required foreign trading partners to comply with a set of specific enforcement obligations beyond the internationally agreed standards embodied in the TRIPs Agreement.

EFF believes that no empirical evidence has been provided justifying the creation of a new TRIPs-plus plurilateral intellectual property enforcement treaty backed by the sanctions of international trade law. However, if the USTR decides to negotiate such a treaty, at a minimum it should (1) protect the fundamental privacy rights and freedom of expression of citizens of the U.S.A. and its trading partners, and (2) facilitate a global environment that fosters interoperability and is conducive to technology innovation.

Most importantly, any treaty on enforcement of intellectual property must balance the needs of all stakeholders. As treaty proponents have stated, a key part of effective enforcement is citizens' respect for copyright and other intellectual property laws. That is not just a matter of education in the narrow sense of telling consumers about the content of statutes. It is instead a matter of social value and fairness. In short, citizens will only respect a copyright system that is balanced, and serves the interests of all stakeholders. In the effort to curtail genuine commercial-level copyright infringement, the USTR must avoid harming other important public policy priorities, including in particular, citizens' privacy and expression rights, and technology innovation. If enforcement mechanisms are perceived to undermine the traditional balance embodied in the copyright system, it is inevitable that there will be less respect for, and correspondingly lower compliance with, copyright law.

Lack of Transparency

Unfortunately, the Request for Public Comments published in the Federal Register on February 15, 2008 contained very little information about the substance of the proposed trade agreement. EFF is aware of the existence of a "Discussion Paper" on the proposed

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substance of such an agreement, which is apparently circulating among content industry representatives, but is not aware of any substantive information about the agreement emanating from the Office of the USTR. In the absence of a specific text to comment upon, these comments focus on the appropriate scope of any proposed agreement, and three aspects of recent copyright enforcement activity that have raised significant public policy concerns, and which we anticipate could form part of the content of any proposed treaty.

1. Scope of Treaty

Part III of the TRIPs Agreement reflects the current level of international agreement about standards and methods for enforcement of intellectual property rights. We understand that the proposed agreement would cover the same scope – namely "counterfeit trademarked goods" and "pirated copyright goods" as those terms are used in Part III of TRIPs and defined in footnote 14 to the TRIPs Agreement:

> *(a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;*
>
> *(b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.*

Accordingly, we understand that the agreement would not apply to *all* copies of copyrighted works, but instead only to those copies (a) that would be an infringement of one of the exclusive rights granted to copyright holders by section 106 of the U.S. copyright statute, (b) that are made willfully, with the intent to commit copyright infringement, and (c) are made for the purpose of commercial gain. Thus, "counterfeit" goods do not include unauthorized but permitted uses of copyrighted works, such as uses that would be considered "fair use" under U.S. copyright law.

For the sake of clarity, we note that the internationally agreed definition of "counterfeit" works set out in the TRIPs agreement differs markedly from the broader definition used by particular entertainment industry groups calling for a new enforcement treaty, which would appear to encompass all unauthorized uses of works, including uses that are lawful

but not specifically authorized by rightsholders, such as non-infringing fair use under U.S. copyright law[1].

2. Internet Intermediary Liability

The U.S. Copyright statute contains four "safe harbors", limiting Internet intermediaries' liability for secondary copyright infringement for routine activities: acting as a conduit of Internet communications, caching of material, hosting of user created content, and provision of information location and search tools (17 U.S.C. §512). This regime has created a relatively stable environment for innovation and facilitated the development of robust hosting platforms, which have made possible a comprehensive and free worldwide encyclopedia (Wikipedia), a rich world of user created content (YouTube, MySpace), global economic enterprises (eBay, Amazon.com) and powerful search tools (Google, Yahoo!). There is no international harmonization of secondary copyright liability concepts and standards across countries. However, in recognition of the economic importance of the safe harbor regime to the U.S. telecommunications industry, this regime has been exported to the legal regimes of U.S. trading partners through the enforcement chapter of all bilateral and regional free trade agreements signed since 2002, as a specific implementation of Article 41 of the TRIPs Agreement.

The stable innovation environment resulting from harmonized limitation of liability regimes in the U.S., EU and elsewhere, is now under threat from various sources. Copyright owner industry groups have attempted to overturn the balance struck in the U.S. copyright safe harbor regime, in efforts to clamp down on perceived widespread online copyright infringement by Internet users. These efforts endanger fundamental privacy rights of Internet users and threaten the end-to-end principle that is central to the Internet's open architecture. Reflecting the decision in *Religious Technology Centre v. Netcom On-line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal, 1995), the U.S. safe harbor regime specifically states that Internet Service Providers (ISPs) and Online Service Providers are not required to monitor, nor affirmatively search for evidence of potential infringement on their networks (17 USC §512(m)).

Major film and music copyright industry groups in Europe have recently advocated for a suite of proposals that seem to jeopardize this foundational principle. A memorandum produced by the International Federation of Phonographic Industries circulated to European Parliament staffers in November 2007 calls on the European Parliament to mandate that ISPs block communications using particular Internet protocols, install network-level filtering, and block access to websites that facilitate copyright infringement.[2] In December 2007, a proposed amendment to a European Parliamentary committee report would have required ISPs to filter their networks and monitor customer communications in order to find evidence of potential copyright infringement.

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[1] See International Federation of Phonographic Industries webpage entitled *"What is Piracy?"*, visited 19 March 2008:
<http://www.ifpi.org/content/section_views/what_is_piracy.html>

[2] <http://www.eff.org/files/filenode/effeurope/ifpi_filtering_memo.pdf>

If adopted, these proposals are likely to dramatically alter the current nature of the Internet. ISPs and Internet intermediaries will be obliged to monitor their networks in an unprecedented manner. This directly threatens' citizens' privacy rights and makes it more likely that ISPs will be deemed to have constructive knowledge of online copyright infringement taking place on their networks, thus disqualifying them from the safe harbors that have previously safeguarded their businesses. At the same time, adopting such filtering measures is not likely to be technologically effective because they can be defeated by encrypting communications. Thus, mandatory network filtering is not likely to reduce online copyright infringement, but is likely to lead to file-sharing going "underground".

At the request of a major music industry rightsholder group[3], France and the United Kingdom have proposed draft legislation for a "graduated response" requiring ISPs to send a warning notice to alleged infringing subscribers, to suspend those customers' access on a second warning, and to terminate the Internet access of customers on the basis of a third rightsholder allegation of copyright infringement, independent of any judicial review. The French proposal also requires ISPs to create and exchange lists of "blacklisted" Internet users to whom Internet service cannot be provided.

In the digital age, as more of citizens' civic and cultural life takes place in online fora, excluding citizens from the ability to connect to, and communicate on the Internet, amounts to social exclusion from the knowledge economy. This is a disproportionate response to the harm in issue. As highlighted by the recent rejection of a similar termination proposal by Members of the Swedish Parliament, the penalty of exclusion from the Internet is far more severe than traditional copyright monetary sanctions, both for the individual involved, and also for society at large. It is likely to divide society into two communities – one, highly networked and able to take advantage of the educational, social and economic benefits that flow from access to the Internet, and a second, unable to access the Internet's rich informational resources nor utilize it for communications.

Imposing such an Internet access termination obligation via the proposed enforcement agreement, in order to meet the perceived needs of one group of rightsholder, is likely to create social division, and will certainly slow the momentum of technology innovation and impede the development of the Internet's global infrastructure.

Recommendation:

Any proposed agreement should respect countries' distinctive national legal regimes and not seek to impose secondary liability on ISPs and Internet intermediaries where none might otherwise exist under national law. The proposed agreement should incorporate remedies for rightsholders that are proportionate to the harm suffered from an incident of copyright infringement, and should not require Internet intermediaries to engage in

[3] See 2008 IFPI DIGITAL MUSIC REPORT, *Introduction: Making ISP responsibility a reality in 2008*, and Section 5: *Time for Governments and ISPs to Take Responsibility*, available at: <http://www.ifpi.org/content/library/DMR2008.pdf>

mandatory termination of Internet access for their subscribers unless ordered to do so by a competent court, following a comprehensive judicial review.

3. Preserving Due Process and Copyright Enforcement

Article 47 of TRIPs allows, but does not require, WTO members to provide *judicial authorities* with the ability to order *infringers* to disclose the identity of third parties involved in an act of infringement, but only if this would not "be out of proportion to the seriousness of the infringement." EFF is disturbed by reports that major film and music copyright owner industry groups are seeking to include a *mandatory* obligation on ISPs to disclose to *rightsholders* information about the identity of alleged copyright-infringing file-sharers in the proposed agreement. An extra-judicial mandatory disclosure obligation raises very substantial privacy and due process concerns.

U.S. law does not currently provide an extra-judicial mechanism forcing disclosure of the identity of individuals allegedly engaged in file-sharing activity.[4] However the absence of such a mechanism has not provided any obstacle to U.S. copyright holders' ability to enforce their rights against alleged file-sharers, as evidenced by the more than 20,000 lawsuits brought against individuals since 2003[5].

By comparison, the European Union introduced a mandatory disclosure obligation in the "right of information" enshrined in Article 8 of the 2004 Intellectual Property Enforcement Directive (2004/48/EC). National courts in the European Community have for some time been making determinations about requests for customer data made by European rightsholder organizations, taking into consideration EU Directive 2004/48/EC and the EU Information Society directive 2001/29/EC, the EU Electronic Commerce directive (2000/31/EC) and European personal data protection and privacy law (2002/58/EC).

However, following the European Court of Justice's decision in the *Productores de Música de España (Promusicae) v. Telefónica de España*[6] case where an ISP was not required to disclose customers' identity data, reports have surfaced that entertainment industry groups are seeking to incorporate a mandatory identity disclosure obligation in the proposed anti-counterfeiting trade agreement. From the public policy perspective, mandating divulgence of customer data from intermediaries without providing appropriate due process and judicial review threatens citizens' privacy and personal data protection rights and is ripe for misuse by unscrupulous parties.

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[4] USC §512(h) provides an expedited subpoena process, but this does not extend to obtaining the identity of alleged file-sharers extra-judicially. See *Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc., 3*51 F.3d 1229 (D.C. Cir. 2003).

[5] EFF Report, *RIAA v. The People: Four Years Later*, available at: <http://w2.eff.org/IP/P2P/riaa_at_four.pdf>

[6] European Court of Justice 2008/C 64/12, 29 January 2008, Case C-275/06 referred from Juzgado de lo Mercantil No 5 de Madrid, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:064:0009:0010:EN:PDF>

Recommendation

The proposed treaty needs to provide balanced solutions that recognize and respect the fundamental rights of all stakeholders in the information society. At a minimum, any disclosure obligation must incorporate adequate due process and be conditioned on a process of judicial review.

4. Criminal sanctions for IP infringement

There is widespread agreement that actual commercial enterprise-scale counterfeiting and piracy are unlawful and harmful to investment in research and development, technology innovation and consumer protection. This is embodied in Article 61 of TRIPs, which requires WTO Members to provide criminal sanctions for *willful* copyright piracy and trademark counterfeiting done on *a commercial scale*.

It was well understood at the time of negotiation of TRIPs that criminal sanctions would be reserved for only the most serious, and commercially motivated, cases of IP infringement. While there is agreement for measures addressing genuine enterprise level infringement done willfully and with commercial motivation, there is no public policy justification for changing the contours of current copyright law and penalizing *non commercial* activities of individuals and legitimate business practices.

The last 10 free trade agreements entered into by the United States have required trading partners to introduce criminal sanctions for a broader set of purposes than required by the TRIPs Agreement, including for acts that are not done with commercial motive or intent of financial gain, mirroring the language introduced into 17 USC §605 by the No Electronic Theft Act.

Criminal sanctions are intended to be a deterrent. While they are appropriate in the case of commercial-scale wilful infringement, applying criminal sanctions to non commercially motivated and unintentional infringement serves no public policy purpose. At the same time, it will harm consumers and the environment for technology innovation.

Recommendation:

Criminal sanctions should be reserved for actual commercial-level profit-motivated infringement. The terms “commercial-scale” and “wilful” should be defined narrowly, as originally intended, and should not be expanded to encompass non-commercially motivated infringement. If the real intent behind introducing expanded criminal sanctions is to address infringement on the Internet, this provision is not likely to accomplish that, but is likely to cause significant collateral harm to consumers.

Given the very significant numbers of individuals who regularly engage in file-sharing, it would be more effective to promote new business models focused on licensing of content exchanged on the Internet, rather than creating new legal rules that would criminalize millions of individuals. U.S. copyright law already contains criminal sanctions for certain

behavior. As the experience of the last five years, and over 20,000 lawsuits against individual filesharers in the United States has shown, legal sanctions have had little or no appreciable impact on the volume of file-sharing taking place on public and private networks across the globe. There is no reasonable basis for believing that adding criminal sanctions in the proposed trade agreement will change this situation. On the contrary, all indications are that filesharers will migrate to encrypted communication channels, evading detection and prosecution by current procedures.

At the same time, adopting legal rules that criminalize the behavior of such a significant proportion of the population, for what is widely perceived to be a market failure, is likely to lead to a lessening of respect for copyright law. The proposed trade agreement should avoid undermining the normative force of intellectual property law.

We would be pleased to provide further information on any of the above issues.

Thank you for your consideration.

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