

August 10th, 2010

Mr. Felipe Calderón Hinojosa
Presidente Constitucional de los Estados Unidos Mexicanos
Residencia Oficial de los Pinos Casa Miguel Alemán
Col. San Miguel Chapultepec, C.P. 11850, D.F., México

Dear Mr. President Calderon:

Knowledge Ecology International (KEI) is a not for profit nongovernmental organization that searches for better outcomes to the management of knowledge resources, often focused on social justice, particularly for the most vulnerable populations, including low-income persons and marginalized groups.

In the context of negotiation for Anti-Counterfeiting Trade Agreement (ACTA), and after reviewing the July 1, 2010 version of the consolidated negotiating text, it seems opportune to draw the attention of the Government of Mexico to those provisions in the mentioned Agreement that could imply a significant modification of the intellectual property regime in the country, including in particular those that affect directly the fundamental rights of citizens and consumers, the proper functioning of markets, and the development of the local industries.

Without being exhaustive, KEI notes that there are certain provisions in the proposed ACTA text that, if adopted, would require the adoption of new legal provisions for copyright and patent laws, Internet functioning, personal data protection, compensation of damages, and the enforcement of intellectual property in general. ACTA would also introduce international norms that would limit the ability of Mexico to search for better legislative solutions and business models in the future, and hinder Mexico's ability to compete in the digital economy and to design incentive mechanisms to promote innovation and access for knowledge goods, including biomedical technologies.

In relation to copyright, the ACTA Agreement will force Mexico to adopt criminal sanctions for conducts that are not globally criminalized, such as the circumvention of effective technological measures, the distribution of devices that enable such circumvention, the removal of rights management information, and, in general, non-profit copyright infringements (See, Articles 2.14, 2.18.4, and 2.18.6 of the ACTA¹). Those conducts are not now criminally sanctioned in Mexico (See, Article 424 *et seq* of the Federal Criminal Code) and some of the activities are not subject to criminal sanctions even in developed countries. In important cases, criminalizing such conduct will threaten market competitiveness and damage the rights of consumers.

In connection with information disseminated over the Internet, the ACTA Agreement imposes on the Internet service providers the obligation to adopt new policy measures against users (See, Articles 2.18.1, 2.18.2 and 2.18.3 of the ACTA). These measures do not now exist in the Mexican law, and there is no international agreement that requires the specific implementation that is called for in the ACTA proposed text. These measures will increase the cost of operation for Internet service providers; undermine the market competitiveness of local companies; and in some important cases jeopardize fundamental rights of people, such as free speech, privacy, and the access to the progress of technology.

Related to the protection of the right to privacy and personal data, the ACTA text requires the adoption of measures to identify Internet users in cases involving possible infringements of intellectual property by means of the Internet [or possibly more broadly in the digital environment] (See, Article 2.18 of the ACTA). As now proposed, the ACTA text would appear to force Mexico to modify its recently adopted Federal Law on Personal Data Protection in Possession of the Private Sector. As a guarantee for the exercise of fundamental rights and given the fact that most countries limit the provision of information about individual Internet users to serious crimes, it is recommended that the ACTA limit the provision of information identifying users to only serious crimes.

In relation to the enforcement of intellectual property rights, the current ACTA text would limit key flexibilities necessary to promote the public interest, including flexibilities on the award of injunctions as remedies now found in Article 44.2 of

¹ All references to the ACTA text here and elsewhere are for the July 1, 2010 consolidated text.

the TRIPS Agreement. Mexico should support the proposal offered by Canada and Australia that would allow each Party to preserve or introduce statutory exceptions to injunctive relief in their national laws (See, Article 2.X of the ACTA).

In relation to the measurement of damages, the ACTA Agreement requires judicial authorities to always consider any valuation methodologies presented by right owners in determining the compensation of injuries, including specifically in the ACTA the suggested retail price of goods (See, Article 2.2.1 of the ACTA). Some proposals in ACTA would also expand the role of legally pre-established amounts, allowing the right owner the discretion of choosing between statutory damages and the damages based upon an analysis of harm (See, Article 2.2.3 of the ACTA). These initiatives, which are controversial internationally, are unknown in Mexico's legal system, where compensation is designed to repair damages caused by infringement but does not facilitate an unfair enrichment. In addition, the lack of flexibilities in the current text of the ACTA Agreement is contrary to some limitations already set forth in the domestic law of Mexico (See, e.g., Article 216 bis of the Federal Copyright Act).

With regard to injunctions and damages for infringements, KEI draws the attention of Mexico to the importance of this issue to the topic of orphaned copyrighted works. Some countries, including the United States, have proposed that the mechanism to expand access to orphan works be fashioned as limitations on injunctions and royalties; that policy would be impossible under some proposals now found in the ACTA negotiating text, such as those concerning the mandates to provide for the availability of injunctions, and/or the determination of damages based on value submitted by the right holder.

Related to the government responsibility in the enforcement of intellectual property, the ACTA Agreement requires the availability of *ex-officio* actions by customs, judicial and criminal prosecutor authorities (See, Articles 2.7 and 2.17 of the ACTA). In Mexico, *ex-officio* criminal prosecution is unknown in industrial property (See, Article 223 Industrial Property Act) although is available in a limited fashion for some acts concerning copyright infringements (See, Article 429 Federal Criminal Code). In Mexican custom procedures, custom authorities do not act *ex-officio*, but in compliance of a decision adopted by a court and/or an administrative authority (See, Articles 144 and 148 Customs Act). However, the custom authority shall collaborate with foreign authorities in

accordance with the Mexican law and the international treaties in which Mexico is party. Since the domestic law includes references to treaties in which the country is party (See, Articles 1 and 3 Customs Act), certain provisions in ACTA will become self-executing. In this regard, we are surprised that Mexico supports *ex-officio* action by custom authorities not only in case of importation, but also in exportation and in-transit goods (See, Article 2.7 Opción 1 of the ACTA). This will be particularly far reaching and problematic if the ACTA border measures are applied to a wide set of intellectual property rights, including patents, semi-conductor designs, geographic indicators, industrial designs, routine copyright disputes and trademark cases involving infringements confusingly similar marks. On the other hand, if the ACTA text on *ex-officio* border measures is limited to only cases involving serious counterfeiting and copyright piracy, the provisions may be seen as more appropriate. Here we congratulate the effort of the Mexican Government to reduce the scope of custom *ex-officio* actions to trademark counterfeiting and copyright piracy, excluding routine infringement disputes.

Therefore, if the ACTA Agreement includes *ex-officio* actions by custom authorities and Mexico become part of the Agreement, those actions will apply to Mexican authorities even without an implementing law. In brief, the Agreement will create new and expanded *ex-officio* actions by custom, judicial and criminal prosecutor authorities; predictably increasing the public spending on the protection of private interests.

Finally, the ACTA agreement lacks several of the important safeguards incorporated in the Mexican law and the TRIPS Agreement that ensure a proper balance in the enforcement of intellectual property rules. In this regard, we are surprised and disappointed that Mexico has joined the United States, Japan and Korea in opposing three important safeguards, including those concerning the control of abuse of rights, anti-competitive practices, or those concerning the protection of public health, or the transfer of technology (Article 1.X of the ACTA). A lack of safeguards will harm competition, and the ability of governments to adopt innovation policies that de-link and dissociate the cost of innovation from the price of products. In this regard, we ask if the government officials responsible for public health or competition policy were consulted on this issue.

In sum, the adoption of the current text of the ACTA Agreement will imply the modification not only of the Federal Copyright Act and the Industrial Property Act, but also the Federal Criminal Code, the Federal Law on Personal

Data Protection in Possession of the Private Sector, and possible the Customs Law, the Federal Code of Civil Procedures, and the Federal Code of Criminal Procedures, among other laws.

Luckily, unlike other countries, Mexico has the important advantage of taking part directly in the negotiation of the ACTA. Therefore, Mexico has the power to further influence the drafting of the Agreement, rejecting those provisions that seriously compromise the public interest of the country and, at the same time, proposing the inclusion of flexibilities to address public policies that protect the fundamental rights of its citizens, guarantee an adequate functioning of the market, provide proper protection to the rights of consumers, and promote the development of the local industries, particularly in the fields of culture and technology.

In case you require any additional information, we will be glad to provide this to you. Please contact at alberto.cerda@keionline.org

Thank you for your time and consideration.

Sincerely,



Alberto Cerda Silva
Research Associate
Knowledge Ecology International