



October 29, 2010

MEMORANDUM

To: The Honorable Ron Wyden
Attention: Jayme White

From: Brian T. Yeh
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7-5182

Subject: **Potential Implications for Federal Law Raised by the October 2010 Draft of the Anti-Counterfeiting Trade Agreement (ACTA)**

Reluctant

This memorandum is in response to your request that the American Law Division (ALD) of the CRS analyze whether the commitments put forward in the October 2, 2010 draft version of the Anti-Counterfeiting Trade Agreement (ACTA)¹ diverge from existing federal law or would impede current and future legislative efforts in the area of reform to damages for patents or access to orphaned copyrighted works. As you indicated in your letter to the ALD, it is your understanding that ACTA is being negotiated as an “executive agreement” that does not currently appear to require congressional approval because it “is not intended to impact U.S. law.” The U.S. Trade Representative Ron Kirk, in a letter addressed to your office dated January 28, 2010, stated, “We do not view the ACTA as a vehicle for changing U.S. law.”²

As you know, over the past two and a half years, the United States and nearly 40 other countries have been conducting negotiations on ACTA, a proposed plurilateral agreement whose primary objective is to enhance protection and enforcement of intellectual property rights (IPR) internationally. The ACTA would build on the minimum standards for IPR protection and enforcement set forth by the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The ACTA currently is being negotiated as an independent agreement outside of the WTO or any other international body.³ After the eleventh and final round of negotiations (held in Tokyo, Japan) concluded on October 2, 2010, the Parties released to the public a draft text of the agreement.⁴ According to the U.S. Trade Representative, the purpose of the ACTA is to “establish[] a state-of-the-art international

¹ Consolidated Text, Anti-Counterfeiting Trade Agreement, Oct. 2, 2010 Draft, available at http://www.ustr.gov/webfm_send/2338.

² Office of the U.S. Trade Representative letter to Senator Wyden, January 28, 2010, at 1, available at http://www.ustr.gov/webfm_send/1700.

³ For more general background information on ACTA, see CRS Report R41107, *The Proposed Anti-Counterfeiting Trade Agreement: Background and Key Issues*, by Shayerah Ilias.

⁴ Office of the U.S. Trade Representative, *ACTA Fact Sheet and Guide to Public Draft Text*, available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text>.

framework that provides a model for effectively combating global proliferation of commercial-scale counterfeiting and piracy in the 21st century.”⁵

Whether the October 2, 2010 Draft of ACTA May Diverge from Existing Federal Law.

Depending on how broadly or narrowly several passages from the ACTA draft text are interpreted, it appears that certain provisions of federal intellectual property law could be regarded as inconsistent with ACTA, as identified below. However, the ACTA draft text also includes several caveats and language that appear to provide Parties with a certain degree of discretion and flexibility in meeting the obligations set forth in the agreement—therefore, it is debatable whether these apparent inconsistencies are significant or whether they would require changes to federal law in order for the U.S. to be considered in compliance with ACTA’s general obligations. For example, ACTA contains the following clause in the “initial provisions” section (Chapter One, Section A): “Each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice.”⁶

Disagreements may arise over whether this particular provision could be successfully used as a defense to complaints that a Party is in violation of ACTA because its domestic laws feature exceptions to the agreement’s general obligations regarding IPR enforcement.⁷ It would appear to be up to the Parties to evaluate the legitimacy of this interpretive claim.⁸ For example, while the above clause refers to a party’s “appropriate *method* of implementing the provisions of” ACTA, it may not necessarily permit a party to adopt or enforce domestic laws that contravene a specific ACTA provision. Yet the United States could nevertheless attempt to advance the argument that this clause does, in fact, allow the existence of federal laws “within its own legal system and practice” that may contain limited exceptions or limitations to the enforcement of IPR that is called for by ACTA.⁹ U.S. federal courts have traditionally shown considerable deference to the Executive Branch’s interpretation of international agreements.¹⁰

Another initial provision in the draft text declares: “This Agreement shall be without prejudice to provisions governing the availability, acquisition, scope, and maintenance of intellectual property rights

⁵ *Id.*

⁶ Consolidated Text, Anti-Counterfeiting Trade Agreement, Oct. 2, 2010 Draft, Chapter One, Section A, Article 1.2(1).

⁷ See, e.g., James Love’s blog, *USTR’s Implausible Claim That ACTA Article 1.2 is an All Purpose Loophole, and the Ramifications if True*, Oct. 22, 2010, at <http://keionline.org/node/990>.

⁸ See Consolidated Text, Anti-Counterfeiting Trade Agreement, Oct. 2, 2010 Draft, Chapter Five, Article 5.1 (establishing the ACTA Committee that is charged with the power to review implementation and operation of ACTA and may “make recommendations regarding implementation and operation of the Agreement.”). Of course, because all the decisions of the ACTA Committee must be made “by consensus,” this may well affect the outcome of this determination assuming that the United States objected.

⁹ Officials in the U.S. Trade Representative Office have reportedly made this claim in response to questions regarding the consistency of federal law with the provisions of the ACTA draft text. See James Love’s blog, *Françoise Castex, French Socialist MEP, Asks About USTR Assertions that ACTA Does Not Require Changes in US Law*, Oct. 25, 2010, at <http://keionline.org/node/993> (“At recent meetings in Washington the US Trade representative has told other US agencies, NGOs and US legislators that ACTA is not binding and that its Article 1.2 allows for a general flexibility for any element that might contradict ACTA in US law.”).

¹⁰ See *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010) (“It is well settled that the Executive Branch’s interpretation of [an international agreement] is entitled to great weight.”)(internal quotations omitted); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“While courts interpret [international agreements] for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”).

contained in a Party's law."¹¹ Note that this language refers to intellectual property *rights* (as opposed to remedies for violation of those rights). Thus, this provision allows a Party to have domestic laws that contain exceptions, limitations, and conditions concerning the "availability, acquisition, scope, and maintenance" of IPR. It does not, however, appear to apply to a Party's domestic laws that provide exceptions to the *remedies* that are available to intellectual property holders that seek to enforce their IPR. Yet it may be difficult in certain circumstances to draw a distinction between a Party's domestic laws that establish rights and those that provide remedies for violation of those rights; if the domestic law clearly concerns the latter, then this provision does not appear to be relevant. For example, a law that specifies that "injunctive relief is not available..." for certain acts of infringement, appears more clearly to be a limitation on available remedies. However, a law that specifies that "it is not an act of infringement to" perform a specific action¹² could be considered a limitation on remedies, or it could also be regarded as an exception, limitation, or condition regarding the availability and scope of IPR.

General Obligations With Respect to Enforcement

Chapter Two, Section 1 of the draft text sets forth the general obligations of the Parties with respect to IPR enforcement; the first one reads as follows: "Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."¹³ In addition, a limitation is provided: "No provision of this Chapter shall be construed to require a Party to provide for liability of officials for acts undertaken in the performance of their official duties."¹⁴ This limitation appears designed to accommodate state sovereign immunity privileges that often are asserted by state officials who are sued for IPR infringement by rights holders.¹⁵ It also may support the following federal statute concerning the National Archives and Records Administration's power to preserve certain copyrighted documents: "When letters and other intellectual productions (exclusive of patented material, published works under copyright protection, and unpublished works for which copyright registration has been made) come into the custody or possession of the Archivist, the United States or its agents are not liable for infringement of copyright or analogous rights arising out of use of the materials for display, inspection, research, reproduction, or other purposes."¹⁶

In Chapter Two, Section 2, titled "Civil Enforcement," the draft text directs that: "Each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right as specified in this section."¹⁷ The mandatory term "shall" indicates that a Party is obliged to "make available" the following civil judicial procedures that relate to remedies for enforcement of IPR. Note that this section is currently subject to a reservation offered by the United States: "For the purpose of this

¹¹ Consolidated Text, Anti-Counterfeiting Trade Agreement, Oct. 2, 2010 Draft, Chapter One, Section A, Article 1.3(1).

¹² See, e.g., 17 U.S.C. § 119(a)(6)(E) ("The secondary transmission by a satellite carrier of a performance or display of a work embodied in a primary transmission made by a network station to subscribers who do not reside in unserved households shall not be an act of infringement...").

¹³ Consolidated Text, Anti-Counterfeiting Trade Agreement, Oct. 2, 2010 Draft, Chapter Two, Section 1, Article 2.X(1).

¹⁴ Consolidated Text, Anti-Counterfeiting Trade Agreement, Oct. 2, 2010 Draft, Chapter Two, Section 1, Article 2.X(4).

¹⁵ As a result of two landmark U.S. Supreme Court decisions in 1999, *Florida Prepaid v. College Savings Bank* and *College Savings Bank v. Florida Prepaid*, the Eleventh Amendment to the U.S. Constitution bars an individual from successfully seeking damages from a state for violations of federal intellectual property laws. For more information on this topic, see CRS Report RL34593, *Infringement of Intellectual Property Rights and State Sovereign Immunity*, by Brian T. Yeh.

¹⁶ 44 U.S.C. § 2117.

¹⁷ Consolidated Text, Anti-Counterfeiting Trade Agreement, Oct. 2, 2010 Draft, Chapter Two, Section 2, Article 2.1(1).

Agreement, Parties agree that patents do not fall within the scope of this Section.”¹⁸ This reservation appears to be quite significant.

if the footnote proposed by the United States that would exclude patents from this section is *accepted* by the Parties, then this provision of federal patent law, as well as other sections of the Patent Act that place conditions on the availability of remedies in patent infringement cases,²¹ would appear to be consistent with ACTA. The remainder of this memorandum assumes that the footnote will be adopted, although that prospect is far from certain.²²

Injunctions and Intermediary Liability

General Injunctive Relief

Article 2.X(1) of Chapter Two, Section 2 of the ACTA draft text specifies the general obligation of Parties to provide injunctive relief in IPR infringement cases:²³

Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities shall have the authority to issue an order against a party to desist from an infringement, and *inter alia*, an order to that party or, where appropriate, to a third party over whom the relevant judicial authority exercises jurisdiction, to prevent infringing goods from entering into the channels of commerce.

Two phrases from the above article may possibly provide the United States with some degree of flexibility in meeting the general obligation to require injunctive relief in copyright and trademark

¹⁸ Footnote 2 of the Consolidated Text, Anti-Counterfeiting Trade Agreement, Oct. 2, 2010 Draft.

See, e.g., 35 U.S.C. § 271(e)(4)(C) (“[D]amages or other monetary relief may be awarded against an infringer only if there has been commercial manufacture, use, offer to sell, or sale within the United States or importation into the United States of an approved drug, veterinary biological product, or biological product.”); 35 U.S.C. § 287(a) (“In the event of failure [of a patent holder to mark a patented article with the word “patent” or the abbreviation “pat.”, along with the number of the patent], no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice.”).

²² *De Gucht Stands Firm On ACTA Scope, No Compromise Yet Seen With U.S.*, INSIDE U.S. TRADE, Oct. 22, 2010.

²³ Preliminary injunctions are specified in Article 2.5, Chapter Two, Section 2; the language is similar to that above.

infringement cases: “shall have the authority” and “where appropriate.” With respect to the direct infringer (the party that is adjudged directly liable for infringement), the above article appears to require Parties to provide their courts with the power to order injunctive relief in copyright and trademark infringement cases. Nevertheless, the U.S. Trade Representative has expressed his interpretation of the phrase “shall have the authority”:

We seek coverage of civil injunctive relief that is similar to the enforcement provisions of the intellectual property chapters of U.S. FTAs previously negotiated with ACTA partners Australia, Korea, Morocco, and Singapore. Those agreements require that judges have the *authority* to award civil injunctive [relief] in connection with specified infringements, but they do not prevent judges from determining, in line with the relevant legal standards, that injunctive relief is inappropriate in a particular case.²⁴

Such an interpretation focuses on the judges’ discretionary power to withhold injunctive relief in certain cases, rather than answers whether the United States may maintain or establish laws that deny judges the authority to grant injunctive relief. Yet the Trademark Act of 1946 (conventionally known as the Lanham Act) contains a provision that prohibits injunctive relief in a particular instance:

Injunctive relief shall not be available to the owner of the right infringed or person bringing the action under section 43(a) [15 U.S.C. § 1125(a)] with respect to an issue of a newspaper, magazine, or other similar periodical or an electronic communication containing infringing matter or violating matter where restraining the dissemination of such infringing matter or violating matter in any particular issue of such periodical or in an electronic communication would delay the delivery of such issue or transmission of such electronic communication after the regular time for such delivery or transmission, and such delay would be due to the method by which publication and distribution of such periodical or transmission of such electronic communication is customarily conducted in accordance with sound business practice, and not due to any method or device adopted to evade this section or to prevent or delay the issuance of an injunction or restraining order with respect to such infringing matter or violating matter.²⁵

In addition, the limitations on injunctive relief under the Digital Millennium Copyright Act (DMCA) (17 U.S.C. § 512) that are available to qualifying Internet Service Providers (ISPs) could potentially be viewed as inconsistent with this article of ACTA. This statute provides that an ISP “shall not be liable for monetary relief, or ... for injunctive or other equitable relief, for infringement of copyright...” if the ISP satisfies specific statutory criteria with respect to infringing material that is available online.²⁶ However, the draft text includes footnote number 13, corresponding to a different section regarding IPR enforcement in the digital environment, that expressly states that a Party may “adopt[] or maintain[] a regime providing for limitations on the liability of, or on the remedies available against, online service providers...”²⁷

The “where appropriate” phrase in the above article of ACTA refers to third parties that may have some involvement in the infringement—thus, Parties are given some amount of discretion to determine the extent to which a “third party” could be subject to injunctions to prevent infringing goods from entering into commercial channels. One important interpretive question is the scope of the term “third party.” In the United States, the direct infringer is not the only party potentially liable for infringement; federal

²⁴ Office of the U.S. Trade Representative letter to Senator Wyden, January 28, 2010, at 2 (emphasis in original).

²⁵ 15 U.S.C. § 1114(2)(C).

²⁶ For more information on the DMCA’s limitations on copyright infringement liability for ISPs, see CRS Report RL32037, *Safe Harbor for Service Providers Under the Digital Millennium Copyright Act*, by Brian T. Yeh and Robin Jeweler.

²⁷ Consolidated Text, Anti-Counterfeiting Trade Agreement, Oct. 2, 2010 Draft, Chapter Two, Section 5, Article 2.18(2), n.13.

courts have recognized two forms of secondary copyright infringement liability: contributory and vicarious. For contributory infringement liability to exist, a court must find that the secondary infringer “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”²⁸ Vicarious infringement liability is possible where a defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”²⁹

It is unclear whether an ISP could be considered a “third party” under this article of ACTA;³⁰ although the term could apply to websites offering infringing material that the ISP provides access or links to, would it also refer to the ISP as well?³¹ If ISPs are considered to be a “third party” within the meaning of the ACTA article, then the DMCA’s § 512 limitations on liability could be consistent with the ACTA draft text.

However, this ACTA article requires that Parties’ “judicial authorities shall have the authority to issue an order against a party to desist from an infringement”—the words “a party” and “an infringement” may suggest that this article applies not only to parties that are liable for direct infringement, but also to parties that may be contributory and vicarious infringers as well. ISPs could be held liable for secondary infringement liability if they do not qualify for § 512’s “safe harbor” provisions. Therefore, an interpretation that ISPs fall within the scope of the mandatory part of this ACTA article, rather than the discretionary “where appropriate” segment regarding third parties, would strengthen support for the view that § 512’s limitations on injunctive relief conflict with the ACTA draft text.

Limitations on Injunctive Relief

Article 2.X(2) of Chapter Two, Section 2 of the ACTA draft text, provides that:

Notwithstanding the other provisions of this Section, a Party may limit the remedies available against use by government, or by third parties authorized by a government, without the authorization of the right holders to the payment of remuneration provided that the Party complies with the provisions of Part II of the TRIPS Agreement specifically addressing such use. In other cases, the remedies under this Section shall apply or, where these remedies are inconsistent with a Party’s law, declaratory judgments and adequate compensation shall be available.

The first clause of the first sentence of this article (“use by government”) preserves a government’s eminent domain power over intellectual property. In the United States, 28 U.S.C. § 1498(b) withholds injunctive relief in the event that the federal government infringes the copyright of a private entity; in such a case, the copyright holder’s only legal remedy is to seek damages:

²⁸ *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001).

²⁹ *Gershwin Publ’g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d. 1159, 1162 (2d. Cir. 1971).

³⁰ See *De Gucht Stands Firm On ACTA Scope, No Compromise Yet Seen With U.S.*, INSIDE U.S. TRADE, Oct. 22, 2010 (“Stakeholders questioned if reference to third parties in the ACTA provisions on injunctions could apply automatically to Internet service providers (ISPs). ... A source familiar with the Oct. 18 briefing said USTR officials explained that the phrase ‘where appropriate’ in this provision gives a court the flexibility to grant an injunction based on its own legal guidelines and does not require a court to apply this measure in cases of ISP liability.”).

³¹ For example, an individual subscribes to an ISP in order to gain access to the Internet. This individual uses the ISP to connect to the Internet and download infringing material (copyrighted movies and music) from a website not affiliated in any way with the ISP. The individual is the “direct infringer” in this scenario, whereas the website that offers the infringing material could be the “third party.”

[W]henever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States ... the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement...

The second clause of the first sentence of this ACTA article (“by third parties authorized by a government”) allows Parties to maintain compulsory licenses with respect to intellectual property. Under U.S. copyright law, “statutory” or “compulsory” licenses compel copyright owners to allow third parties to use creative works under certain conditions and according to specific requirements, in exchange for payment of royalty fees at a rate determined by a federal government body known as the Copyright Royalty Board. Therefore, a user of a statutory license need not obtain or negotiate authorization for using a copyrighted work from the copyright owner; that permission is “compulsory.”³²

The second sentence of the above ACTA article requires that a Party make available “declaratory judgments and adequate compensation” in instances where injunctive relief is “inconsistent with a Party’s law.” This sentence apparently concedes that a Party may maintain laws that deny injunctive relief; however, in such a situation, the Party would be obligated to make available damages to the rights holder for IPR infringement.

Damages

Article 2.2(1) of Chapter Two, Section 2 of the ACTA draft text, presents the following obligation of Parties with respect to the power of their courts in awarding damages in IPR infringement cases:

Each Party shall provide that in civil judicial proceedings, its judicial authorities shall have the authority to order the infringer who knowingly or with reasonable grounds to know, engaged in infringing activity of intellectual property rights, to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement. In determining the amount of damages for infringement of intellectual property rights, its judicial authorities shall have the authority to consider, *inter alia*, any legitimate measure of value submitted by the right holder, which may include the lost profits, the value of the infringed good or service, measured by the market price, the suggested retail price.

The following provision of the Copyright Act provides a limited exception to the availability of damages for willful infringement of a copyrighted work (in the phrase “no damages shall be awarded for such act of infringement...”), which could be considered to be in conflict with the first sentence of the above ACTA article:

The willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission embodying a performance or display of a work made by a television broadcast station to a subscriber who does not reside in that station’s local market, and is not subject to statutory licensing under section 119 ... or subject to a private licensing agreement, is actionable as an act of infringement ... and is fully subject to the remedies provided by sections 502 through 506 [17 U.S.C. §§ 502-506], except that— (A) no damages shall be awarded for such act of infringement if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscriber...³³

³² For more information about compulsory licenses in the Copyright Act, see CRS Report RL34020, *Statutory Royalty Rates for Digital Performance of Sound Recordings: Decision of the Copyright Royalty Board*, by Brian T. Yeh.

³³ 17 U.S.C. § 122(f)(1). See also a similar provision in 17 U.S.C. § 119(a)(6)(A).

IPR Enforcement in the Digital Environment

Chapter Two, Section 5 of the ACTA draft text sets forth the obligations of the Parties regarding their enforcement procedures relating to infringement of IPR that takes place in the digital environment. Article 2.18(2) provides:

Each Party's enforcement procedures shall apply to infringement of *at least trademark and* copyright or related rights over digital networks, *including the unlawful use of means of widespread distribution for infringing purposes.*

It is unclear what the phrase "at least" refers to in the above article; it appears to envision IP rights beyond traditional trademark and copyright rights (or related rights), but nowhere in ACTA provides an explanation of this potential expansion. The draft text also reflects a disagreement (as indicated by the underlined and italicized text above) among the Parties regarding whether such IPR is limited to only copyrights or if it includes trademarks as well. It has been reported that the United States desires that this section only covers copyrights, whereas the European Union is seeking to include trademarks too.³⁴ If the trademark language is included in the final ACTA text, and the United States signs it, federal law governing trademarks (the Lanham Act) may need to be revised in order to include provisions that expressly address trademark infringement online in order to be more closely aligned with ACTA obligations. Unlike the Digital Millennium Copyright Act that pertains to online copyright infringement, the Lanham Act does not currently include specific language relating to trademark infringement facilitated by the use of digital networks that allow "widespread distribution" of such infringing material.

In addition, Article 2.18(4) provides:

Each Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of infringement of *at least trademark and* copyrights or related rights and where such information is being sought for the purpose of protecting or enforcing *at least the right holder's trademark and* copyright or related rights.

However, this article uses the term "may," rather than "shall;" thus, it is *not* an obligation imposed on the Parties. The Digital Millennium Copyright Act allows, upon request by a copyright owner, the clerk of any U.S. district court to "expeditiously issue" a subpoena to a service provider for disclosure of "information sufficient to identify the alleged infringer of the [copyrighted] material."³⁵ There is no comparable provision in the Lanham Act with respect to online service providers' disclosure of subscribers who allegedly infringe trademarks.

Whether the October 2, 2010 Draft of ACTA Would Impede Current and Future Legislative Efforts in the Area of Reform to Damages for Patents or Access to Orphaned Copyrighted Works.

Congress could continue to consider legislation in the area of reform to damages in patent litigation or access to orphaned copyrighted works that resemble approaches from the 110th and 111th Congresses.

³⁴ *ACTA Parties Take Unresolved Issues Back to Capitals For Consultation*, INSIDE U.S. TRADE, Oct. 18, 2010.

³⁵ 17 U.S.C. § 512(h)(1).

Such approaches specify methods of calculating monetary damages in patent cases³⁶ and call for limitations on damages and injunctive relief in copyright infringement cases involving orphan works.³⁷ ACTA, as an executive agreement that reportedly will not be submitted to Congress for approval,³⁸ does not reduce, constrain, or otherwise impact the authority and prerogative of Congress to enact such measures that change federal law.³⁹ Further, Congress may not feel compelled to take into account the requirements of an agreement that it had no formal role in approving. On the other hand, it may well be that Members of Congress might be reluctant to consider legislative approaches that would alter federal law in a manner that might make the United States in default of its ACTA obligations. The seriousness of such a concern may turn on the extent to which the United States may be held accountable for ignoring its ACTA obligations, or how successful the United States is in convincing other ACTA Parties of its compliance with the ACTA commitments even with such legislation.

³⁶ For more information on this topic, see CRS Report R40481, *Patent Reform in the 111th Congress: Innovation Issues*, by Wendy H. Schacht and John R. Thomas.

³⁷ For more information on this topic, see CRS Report RL33392, *"Orphan Works" in Copyright Law*, by Brian T. Yeh.

³⁸ Nathan Pollard, *Law Professors' Letter to Obama Asks For Meaningful ACTA Participation Process*, BNA'S PATENT, TRADEMARK & COPYRIGHT JOURNAL, Oct. 29, 2010.

³⁹ For more information on this topic, see CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael John Garcia. See also Jack Goldsmith and Lawrence Lessig, *Obama's Go-It-Alone Mistake; A Trade Agreement Raises Constitutional Concerns*, WASH. POST., Mar. 26, 2010, at A23 ("The administration has suggested that a sole executive agreement in this instance would not trample Congress's prerogatives [regarding making laws that regulate foreign commerce and intellectual property] because the pact would not affect U.S. domestic law. Binding the United States to international obligations of this sort without congressional approval would raise serious constitutional questions even if domestic law were not affected.").
