February 11, 2011

Stanford K. McCoy
Assistant U.S. Trade Representative for Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th St NW
Washington, DC 20006

Re: FSF Position on ACTA
(Docket no. USTR-2010-0014)

Dear Mr. McCoy:

I am writing on behalf of the Free Software Foundation (FSF), a registered 501(c)3 nonprofit organization based in Boston, Massachusetts. The FSF's mission is to encourage the development and distribution of free software: software that everyone is allowed to use, modify, and distribute as they see fit. We provide technical and informational resources to developers working on free software, and hold the copyright to over 200 such programs. Our work is primarily supported by individual donors: more than 3,500 gave to the FSF last year.

Now that the final text of the agreement has been made public, we believe that ACTA should be rejected in its entirety, and not signed by the United States or any other country. Parties who enter into the agreement are required to implement a number of laws and enforcement mechanisms that benefit the interests of a few large copyright and trademark holders over individuals' freedom to share software and other informational and cultural works with each other. This is exactly backwards: if anything, governments should encourage people to copy these works, to enrich ourselves by sharing knowledge and culture.

ACTA's Favors To Copyright and Trademark Holders Are Unwarranted

In June 2010, FSF founder and president Richard Stallman published "A Firm, Simple Declaration Against ACTA" (http://www.fsf.org/campaigns/acta/acta-declaration) along with an accompanying article to explain his reasons for doing so. The declaration outlines eleven points that ACTA would need to observe in order to minimally respect the freedom that everyone should have to share works noncommercially, and avoid unduly favoring copyright and trademark holders in each party's governance. To date,

more than 4,700 individuals signed in support of this declaration. Its first and most important point states:

> ACTA must respect sharing and cooperation: it must do nothing that would hinder the unremunerated noncommercial making, copying, giving, lending, owning, using, transporting, importing or exporting of any objects or works.

There may not be widespread agreement on this point, but it's a natural consequence of the digital era. Hundreds of millions of people worldwide have access to personal computers and similar devices like smartphones, making it relatively easy for them to share digital works with each other—whether software, written word, music, audiovisual works, or anything else—at minimal marginal cost. That last observation is key. Copyright law was born of a time when the means of disseminating a work, the printing press, was rare and expensive to possess. In that context, it may have been reasonable to give authors some legal leverage against the near-monopoly powers that press owners possessed. Today, however, the machines to copy these works outnumber the authors, and modern copyright law acts primarily to prevent people from sharing with each other.

The end result is that people feel compelled to treat each other badly. If your neighbor could benefit by getting a copy of some software or another digital work from you, there's no practical reason why you shouldn't offer it to them: unlike physical objects, neither you nor anybody else who already has a copy of the work is going to lose it when another one is made. Unfortunately, today's law steps in and compels you not to share with your neighbor this way—and collectively, we are all deprived of art and tools that could make our lives better.

We should seek to adjust copyright law to account for these technological changes, and permit this sort of noncommercial sharing. Rather than observe this fundamental point, ACTA consistently does the opposite. Given these consistent attacks against individual liberty, the agreement is completely unacceptable.

New Obstacles: Legal Support for Digital Handcuffs

Article 27 of the ACTA text requires parties to provide "legal protection and effective legal remedies against the circumvention of effective technological measures." These "technological measures" are software tools that act as digital handcuffs: they attempt to restrict the recipient from making full use of the work as they see fit. Today, they often serve as copyright holders' first line of assault against users' liberties. Not only do they enforce the restrictions against copying imposed by copyright law; they even prohibit activities that are permitted by law, including fair use distribution and derivation, format shifting, creation of archival or backup copies, and more.

ACTA would not only make it illegal to break these handcuffs, but also prohibit

"the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure." The negative consequences of laws like this have been plain to see in the United States since 1998, when the Digital Millennium Copyright Act (DMCA) passed and brought these same restrictions into domestic law. Since then, suits brought under the DMCA have sought to stop people from playing movies they've purchased on free software operating systems (*Universal City Studios, Inc. v. Reimerdes*), or saving copies of those movies to their computers (*RealNetworks, Inc. v. DVD Copy Control Association, Inc.*); from running software they choose on special-purpose computers they own (*Sony Computer Entertainment America v. Hotz*); or from purchasing third-party printer ink cartridges (*Lexmark Int'l v. Static Control Components*) or garage door openers (*Chamberlain Group, Inc. v. Skylink Technologies, Inc.*).

These prohibitions all constitute unjust efforts to reduce individuals' ability to control the devices that we increasingly rely upon in our day-to-day life. Providing legal force for "electronic rights management," as ACTA requires, hands that control over to copyright and trademark holders. In doing so, our freedoms of action and expression become subject to the whims of those few privileged parties. Nobody should be required by law to relinquish their rights this way.

Stacking the Deck: New Enforcement Mechanisms

ACTA mandates a number of enforcement mechanisms aimed at preventing the distribution of works that allegedly infringe copyrights or trademarks. These mechanisms are uniformly biased in favor of the copyright and trademark holders, designed to take action before the alleged infringers, or even third parties related to but unliable for the alleged infringement, have any opportunity to defend themselves.

Article 12 grants judicial authorities the power to conduct *inaudita altera parte* hearings to order provisional measures to prevent infringement from occurring, and even seize the materials in question. Article 16 asks customs authorities to detain goods that might infringe, even absent any request to do so; and Article 22 encourages them to provide information about those shipments to copyright and trademark holders. Article 27 recommends that online services should be compelled to disclose personal information about subscribers who are allegedly infringing, and encourages the development of unspecified joint programs between those businesses to combat infringement, all without any judicial oversight.

This list might give a reader the impression that copyrights and trademarks are underenforced today. Nothing could be further from the truth. Over the past several years copyright holders in the United States have been able to extract settlements from a large number of alleged infringers—most of whom were engaged in noncommercial sharing. Of the cases that have gone to trial, many have had damages reduced, or been rejected wholesale for fundamental procedural or evidentiary weaknesses. We need less

enforcement of copyrights and trademarks; instead ACTA requires more.

Conclusion

The entirety of ACTA is based on one faulty premise: that most everyone in the world will ultimately benefit from increased enforcement of copyright and trademark rights. This premise echoes throughout the entirety of the text. It's stated in the preface to the agreement, demonstrated through the adoption of lopsided measures that favor enforcement above most any other interest, and reflected through the use of terms like "intellectual property" and "electronic rights management" that support this bias through their connotations.

That premise remains unproven. It's impossible to deny that the industry groups who were privileged to participate in ACTA drafting meetings, and who now lobby for its passage, are large and make plenty of profit for themselves. They may earn even more with ACTA's help. But for everyone else, ACTA represents a large cost. Financially, the citizens of countries that sign ACTA will pay for all this increased enforcement activity, at a time when many governments struggle to provide popular services. Even more importantly, we will all pay the costs when ACTA pushes us to share less with each other. We will be poorer for our lack of shared knowledge and culture.

Here in the United States, we already have several laws on the books that meet or exceed the obligations we face under ACTA. That should not be mistaken for an argument to sign the agreement, however. These laws do not serve the public interest. We should be seeking ways to overturn them, rather than entrenching them through international obligations.

The Free Software Foundation urges all countries, including the United States, to reject ACTA.

Sincerely,

Brett Smith

License Compliance Engineer

Free Software Foundation

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