



RE: 2010 Special 301 Review
Docket Number USTR-2010-0003

February 18th, 2010

Jennifer Choe Groves
Senior Director for Intellectual Property and
Innovation and Chair of the Special 301 Committee
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508
Filed electronically via Regulations.gov

Dear Ms. Groves,

The Social Science Research Council is concluding a 3-year study of software, film, and music piracy in developing countries, with detailed reports on Russia, India, Brazil, Mexico, Bolivia and South Africa. A portion of this work focuses on the policymaking and evidentiary processes that inform the Special 301 process and the wider integration of trade and IP policy. In advance of the publication of this report, this comment summarizes some of the research, findings, and recommendations related to Special 301. We request an opportunity to present and discuss these findings in the upcoming 2010 Special 301 hearing.

Overall, we welcome recent USTR efforts to move the Special 301 process toward a level of transparency and accountability commensurate with its importance in domestic and international policymaking. The implementation of more reasonable comment window for foreign countries is a significant step in this direction, as is the announcement of a public hearing in 2010. The dramatic jump in country comments submitted in 2009 is a sign, in our view, that Special 301 has many more stakeholders than have traditionally been encouraged to participate in the process. This opening of the process, we would argue, is important to maintaining the credibility of the US as an honest broker in the IP and trade arena—all the more so because IP policy has become subject to much greater public scrutiny than in the past.

In our view, however, more needs to be done at the levels of participation, procedures, and evidentiary practices. Our work suggests three steps that would go some way toward addressing these issues:

- The implementation of a proper comment window with adequate time for notification and response from a wider range of stakeholders, including consumer and health organizations.
- The expansion of USTR IP advisory panels to include a wider array of interests and expertise, beyond the traditional roster of industry representatives.
- Serious implementation of Special 301’s evidentiary requirements for policy research submissions: notably that such submissions (1) “provide all necessary information for assessing the effect of the acts, policies, and practices”; and that (2) “any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses.”¹ Research submitted by IIPA and other major industry organizations do not meet a reasonable interpretation of these standards. Nor do they meet the newer, stricter OMB standards of “transparency” and “reproducibility” required for research used in the policymaking process.

These proposed steps are, of course, connected. Evidentiary standards haven’t greatly mattered in a one-sided process that admitted little real scrutiny or challenge. It is not our purpose here to bring those challenges, but rather to observe that they are already widely and recurrently made in public and policy contexts, and that the failure to engage them has a delegitimizing effect on the policy process itself. Both the USTR and industry, in our view, have a compelling interest to ensure that this does not happen. Further openness, in our view, is the only way forward.

Participation

Until recently, there was little pressure for greater participation or procedural transparency in the Special 301 process. The industry-centered institutional culture of the USTR discouraged it; the most obviously affected parties—other countries—had no meaningful standing; and the traditional obscurity of trade policy sheltered it from the public attention directed at other powerful policymaking bodies. The legal status of Special 301 reinforced these tendencies. The Special 301 process is an “informal adjudication” as opposed to a rulemaking process. As described by the Administrative Procedures Act, a rulemaking is forward looking, whereas adjudication traditionally describes a more technical determination of rights and responsibilities based on existing rules and past conduct. In our view, this distinction misses the primary function of Special 301 as instrument for changing other countries’ policies, and in shaping negotiations that ultimately bind the US.

¹ 19 USC 2242(b)(2)(B)

The informality of the process also plays an important part in shaping participation and accountability. As the term suggests, ‘informal’ processes leave considerable leeway with respect to procedures. Notably, they do not have to be “on the record after the opportunity for an agency hearing.” Because there have been no hearings, there is virtually no record of how decisions are made.

The term has nonetheless been subject to a variety of legal interpretations and clarifications regarding what constitutes due process in such contexts, with strong consensus in the courts that “a minimum procedure must include at least some form of notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”² In our view, the Special 301 process has been out of compliance with a reasonable understanding of this standard. Minimal and, in our view, still inadequate notice was made possible only in 2008. A meaningful opportunity to be heard will take place for the first time in 2010.

Despite this obscurity, the USTR has to meet certain basic requirements to justify its findings, including acting on the basis of evidence collected during the Special 301 process. With some 50-60 countries placed annually on the Watch Lists, the research requirements of the Special 301 process are considerable. The USTR’s role in this process was never clearly defined by statute and quickly defaulted to industry, which ramped up its research capacities throughout the 1990s to meet the new demand. This division of labor quickly became embedded in the USTR’s internal organization: in 2009, only eight USTR staff worked on IP issues. Most of the findings, legal recommendations, and country detail discussed in the Special 301 report simply recapitulate the submissions of the major industry groups. In our work on copyright, by far the most important group is the IIPA. Among the 54 countries listed by IIPA for inclusion on the Watch and Priority Watch lists in 2008, the USTR accepted 46 (or 84%). This close relationship goes back more than 20 years: the IIPA was instrumental in the creation of Special 301, and the two can be fairly described, in our view, as the research and policy sides of a larger collective enterprise.³

² 32 Fed. Prac. & Proc. Judicial Review § 8136 (1st ed.), (stating “[g]enerally, all informal adjudications have some form of three elements—notice, some opportunity to participate and reasons”). *See also*, 32 Fed. Prac. & Proc. Judicial Review § 8201 (1st ed.) (stating “[s]everal courts have said that a minimum procedure must include at least some form of notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”)

³ The handful of cases in which USTR departed from IIPA recommendations (in 2009, Sweden, Nigeria, Kazakhstan, Lithuania, and Brunei) are suggestive of the somewhat wider field of political inputs that affect USTR decisions, including geopolitical goals, conflicting industry requests, or other factors shaping bilateral relationships. In South Africa, for example, the controversial dispute over patent protection for AIDS medicines in the late 1990s cast a shadow over subsequent IIPA requests for South African inclusion on the Watch and Priority Watch Lists. The USTR ignored these requests between 2000 and 2006, and South Africa has since fallen off the list of countries targeted by the IIPA.

The Special 301 comment period is part of the annual effort to gather “any information as may be available to the Trade Representative and ... as may be submitted by interested persons” (19 USC 2242(b)(2)(B)). Interested persons can include other countries, non-US industry groups, non-governmental organizations, and—in theory—individuals. In practice, it has overwhelmingly meant US industry. The USTR’s interest in hearing from other parties has generally been viewed as negligible, and this perception has been reinforced by the unusual restrictions on the comment process itself. Until 2008, all comments were due *on the same day*—a requirement that made the notification of countries and same-year replies to complaints impossible. Under these circumstances, only a handful of countries (and typically no NGOs) bothered to submit comments at all, and the few that did generally responded to the previous year’s comments.

Under new rules that went into effect in 2008, countries (but not NGOs or other parties) were permitted two additional weeks to submit comments after industry submissions were received. This small opening had a dramatic effect on participation: the number of countries submitting comments jumped from 3 to 24.

Special 301 Comments

	2007	2008	2009
Companies and industry groups	21	19	30
Countries on previous 301 lists	4	3	24
Individuals	0	2	1
Nonprofits	1	0	0

Source: Flynn et.al, 2009

The spike in comments was also marked by a perceptible change in tone. Traditionally, foreign countries have been deferential in their dialogues with the USTR—often highly so. Country comments typically catalog the actions taken in the past year to meet American wishes, and on that basis request removal from the watch lists. Local policy and enforcement activities in targeted countries also often follow the seasonal rhythm of the Special 301 process, as governments seek to head off placement on the watch lists.

Occasionally, countries have filed more-pointed objections to USTR claims and the industry research underlying them. In 1992, Italy challenged the \$224 million estimate of losses by the Motion Picture Association to pirated movie cassettes—focusing in particular on the assumption that pirated videocassette sales

represented a one-to-one loss with respect to ticket sales (Drahos 2007:97). But such comments, and especially research-related comments, have been rare. Countries have routinely ignored, acquiesced to, or tried to finesse the Special 301 process. They have rarely contested it.

There are signs that this politics of avoidance is beginning to change. Country comments from 2009 include a number of unusually blunt rebuttals, including criticism of the Special 301 process, of IIPA research, and of USTR complaints about policies that comply with the TRIPS agreement. Most of these comments make claims about the lack of consistency of the presented evidence and the standards that underwrite the various warnings. Israel—a Priority Watch List member in 2008 and 2009—responded sharply to IIPA and USTR criticism of its recently revised copyright law. In considerable detail, it objected to the unilateralism of US demands that it go beyond existing international obligations on issues such as the copyright term for sound recordings, the scope of fair use provisions, the protection of technical protection measures (anti-circumvention), takedown procedures for ISPs, the liability of end-users of pirated software, compensation for accidental seizure of licit goods, and much of the rest of the USTR TRIPS+ playbook (Israel 2009). Turkey, which appeared on the Priority Watch list from 2004-2007 and on the Watch list in 2008 and 2009, offered similar criticism of US unilateralism in reference to ongoing disputes over pharmaceutical patents.

Spain, which the IIPA described in 2009 as having “the worst per capita Internet piracy problem in Europe and one of the worst overall Internet piracy rates in the world” (Smith 2009) also made an active rebuttal of IIPA claims, arguing that “numerous assertions in the report are not based at all on data contained in the report *or on coherent arguments.*” (Jordan 2009). Drawing on its own consumer survey data, the Spanish government challenged the rates of music piracy cited in the IIPA report, drew attention to gaps in the IIPA data, underscored its own solid ranking in the BSA’s business software piracy reports, and reminded the USTR of its commitment to enforcement through its participation in the ACTA negotiations.

For our part, the details or even accuracy of these rebuttals are less interesting than what they suggest about the evolution of the Special 301 process. There is no evidence that the comments have had any effect on USTR decisions. None have been cited or otherwise recognized. But the more accessible comment window and the obvious inclination of countries to use it mark a step toward openness and accountability of a kind the USTR has avoided since the creation of Special 301. These steps are certain to introduce a wider range of perspectives than have typically been a part of Special 301 deliberations. It will be up to the USTR—and to an Obama administration committed to transparency—to ensure that they are not simply dead letters.

Evidence

Like other government agencies, USTR has been subject to recent requirements to adopt higher evidentiary standards and more transparency about the research it uses in policymaking. Much of this pressure has originated with industry groups looking for tools to head off unwanted regulatory action resulting from federally-funded scientific research. This is the background, notably, of the 2000 Data Quality Act, which established procedures for complainants to challenge data used in policymaking.⁴ While many view the Act as a victory of lobbying over science, the interesting question for agencies like the USTR is what the Act implies in contexts where there is no scientific research culture to undermine.

In 2005, the Office of Management and Budget issued an interpretation of the Data Quality Act that required peer review whenever the Federal Government disseminates “scientific information [that has] a clear and substantial impact on important public policies or private sector decisions” worth more than \$500 million (Office of Management and Budget 2005). The OMB specifically included economic and other policy-relevant research under this rule. It noted further that a comment process, in which contending parties submitted and challenge each other’s comments, is not an adequate substitute for peer review. When the Department of Commerce implemented of the OMB directive in 2006, it placed emphasis on “transparency - and ultimately reproducibility” as the crucial standard in policy research. It clarified further that transparency “is a matter of showing how you got the results you got” (Department of Commerce 2006).

The outsourcing of research to the IIPA and other industry groups allows the USTR to exempt Special 301 from such quality control efforts. Nothing in the Data Quality Act or OMB bulletin addresses transparency requirements for privately-produced research, or discusses how to improve policymaking processes that depend entirely on it. The absence of hearings or a reasonably structured comment process ensures, further, that Special 301 fails to meet even the lower evidentiary standards of a robust adversarial process, in which comments from diverse stakeholders are solicited and weighed. The USTR does, nonetheless, set two modest requirements for submitted comments. It specifies that (1) comments should “provide all necessary information for assessing the effect of the acts, policies, and practices”; and (2) “any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses.”

By any reasonable standard, these requirements go unmet. Unsurprisingly, industry reporting presents the industry case, and in the copyright context these cases are

⁴The brainchild of tobacco-industry lobbyists, the Act has been used to challenge federally-funded research on a variety of health and environmental issues, from the effects of exposure to pesticides like Atrazine to studies of animal habitats used to restrict logging permits on federal land.

extremely narrow—made almost entirely without reference to the wider dilemmas that structure piracy in other countries or the manifold complexities of determining net impact on industries or societies.⁵ Industry associations do publish short general descriptions of their methods—in the IIPA’s case, in the methodology appendix to its Special 301 submissions—but little about the assumptions, practices, or detailed findings of their work. IIPA findings, as a result, are generally impossible to verify or reproduce. Because IIPA is, in most cases, simply aggregating research from other industry associations such as the BSA, RIAA, and MPA, the key questions must ultimately be addressed to them. We have tried to do so, but without much success.

It is impossible, for example, to evaluate BSA findings on rates of business software piracy, for example, without understanding the key inputs into the model: how they calculate the number of computers in a country; how they estimate the presence of open source software; or how they model the ‘average software load’ on machines in different countries. It is impossible to evaluate the MPA’s claims from its major 2005 international consumer survey without knowing what questions the surveys ask and how they calculate key variables such as the displacement rates between pirate and licit sales. IFPI aggregates consumer surveys from its local affiliates, but indicates that each affiliate makes its own choices about how to conduct its research. There is no general template for the surveys—nor, for outsiders, any clarity about how IFPI manages the obvious challenges of aggregating the studies. RIAA—drawing on the same data provided by local affiliates—does calculate losses for countries it deemed high priority targets for enforcement, through methods it also attributes to the local affiliates. Although ESA research has only made claims about the street value of pirated games—some \$4 billion in 2007—and expressly avoids the language of industry losses, its figures found their way into the industry loss column in IIPA reports.

Every report has its own secret sauce—the assumptions that anchor the methods and inform the results. Few of these assumptions are public. The typical rationale for withholding such information is that the underlying research relies on commercially sensitive data. This is certainly possible in some cases—notably in the case of sales figures, about which some companies are secretive. But it can hardly explain the across-the-board reluctance of industry groups to show their work. This is a key difference between an advocacy research culture, built on private consulting, and an academic or scientific research culture whose credibility depends on transparency and reproducibility.

In our view, this secrecy has become counterproductive in a context in which hyperbolic industry claims have undermined confidence in industry research.

⁵ Restoring this complexity to the piracy equation is a major focus of our study.

Criticizing MPA, RIAA, and BSA claims about piracy has become a cottage industry in the past few years, driven by the relative ease with which headline piracy numbers have been shown to be wrong, made up, or impossible to source. The BSA's annual estimate of losses to software piracy—\$53 billion to US companies in 2009—dwarfs the other industry estimates and has become an iconic example of the commitment to big numbers despite obvious methodological problems—notably, the BSA's continued valuation of pirated copies at retail prices, a practice abandoned by all the other industry groups. Widely used estimates of 750,000 US jobs lost and \$250 billion in annual economic losses to piracy have proved similarly ungrounded or based in decades-old guesses (Sanchez 2008).

Our work tries to separate the inflated rhetoric from what are often much more nuanced and sophisticated underlying research efforts. But it does not surprise us that other people do not make this considerable effort, nor that the copyright industries have lost the benefit of the doubt when arguing about losses or other impacts. Greater openness and disclosure of the research underlying industry claims is an obvious response, *and one that was supported by nearly every industry researcher we spoke with*. All were prepared to stand by their work. All were frank about the difficulty of studying piracy, the limitations of their methods, and the desirability of improving them. It is well past time, in our view, to let that impulse shape the industry research culture and the policymaking process. As the primary audience for such research, the USTR could simply require it.

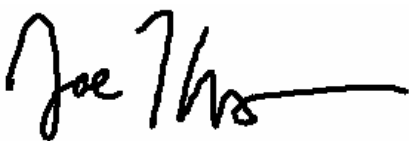
The USTR bears no direct responsibility for industry claims, but it does have statutory responsibility for the information it presents as factual, and it can discount or reject material that fails to meet its own evidentiary standards. Although peer review is difficult to reconcile with third party comment submission, the USTR could do much more to ensure a credible and—in our view—more effective policymaking process. Taking seriously the existing evidentiary requirements in Special 301 is a first step. Upgrading them to reflect the intent of the OMB guidelines is a second.

Transition

In our view, these questions about evidence and participation bring into relief the tensions in what appears to be a transitional moment in the global IP and enforcement regime. Since the inauguration of the WTO in 1994, the USTR has operated in a position of ambiguous legality and soft power—able to threaten countries through Special 301, but (mostly) unable to implement unilateral sanctions for fear of generating an adverse WTO ruling. The stability of this position, in our view, was the product of a number of factors, including the industry's virtual monopoly on the evidentiary discourse around piracy; the disorganization of developing-country coalitions on IP policy; and the general obscurity of copyright and enforcement issues, which allowed IP policymaking to fly

under the radar of most consumers and public interest groups. Where all of these factors held true six or seven years ago, it is difficult to make a strong case for any of them today. Industry research has been widely delegitimized by the excesses of its advocacy campaigns; developing countries are more organized and assertive with regard to IP policy; and enforcement has begun its 'consumer turn' toward measures that are likely to make traditionally closed policy venues like USTR much more visible and controversial in the public eye. A more transparent and participatory Special 301 process is, in our view, the only viable way forward for all parties.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Karaganis", with a long horizontal flourish extending to the right.

Joe Karaganis

Program Director
Social Science Research Council

Citations

- Department of Commerce. 2006. "Department of Commerce: Information Quality Guidelines."
http://ocio.os.doc.gov/ITPolicyandPrograms/Information_Quality/dev01_003914.
- Drahos, Peter. 2007. *Information Feudalism: Who Owns the Knowledge Economy?* New Press.
- Israel. 2009. "2009 Submission of the Government of Israel to the United States Trade Representative with Respect to the 2009 "Special 301 Review"."
<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064808e9bc5>.
- Jordan, Carmen. 2009. "Special 301 2009 Review: Comments from the Spanish Government."
<http://www.regulations.gov/search/Regs/home.html#documentDetail?D=USTR-2009-0001-0050.1>.
- Office of Management and Budget. 2005. "Final Information Quality Bulletin for Peer Review." *Federal Register* 2664.
- Sanchez, Julian. 2008. "750,000 Lost Jobs? The Dodgy Digits Behind the War on Piracy." *Ars Technica*. <http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars>.
- Smith, Eric. 2009. "Overview of the IIPA 2009 Special 301 Submission."
<http://www.iipa.com/rbc/2009/2009SPEC301COVERLETTER.pdf>.
- 19 USC 2242. Identification of countries that deny adequate protection, or market access, for intellectual property rights.*