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US Copyright Official Pretends That Concerns About ACTA Are Unfounded; Mocks Legitimate Concerns

from the *nothing-to-see-here* dept

Direct link to the News/Story:-

<http://techdirt.com/articles/20100527/0120329597.shtml>

The session kicks off with U.S. Copyright Office official Steven Tepp defending ACTA, by saying right from the outset, "Quite candidly, we're in the midst of a worldwide epidemic of copyright piracy." What kind of epidemic? Well, he uses that old line about how organized crime groups and terrorists are being funded by copyright infringement -- a claim that the industry keeps making, but which makes little sense. Even if it were true that some crime operations are selling bootleg DVDs and such, aren't they under the same, if not more, pressure from unauthorized internet file sharing?

But, even more to the point, tossing out the "organized crime" and "terrorists" claim (never with any actual evidence, of course) is a pure moral panic. If organized crime groups and terrorists are a problem, go after them for their organized crime and terrorism efforts. Don't claim that we need to put in place restrictive copyright laws that impact *everyone* just because law enforcement is unable to stop these organized crime groups. And it's worth pointing out while Tepp claimed this is all about organized criminals and terrorists... pretty much all of his comments following that had nothing whatsoever to do with either, but were more directed towards file sharing.

Tepp's next point is to back this up by quoting the widely laughed at (even by Tepp's own bosses) USTR Special 301 report, which has no actual methodology, other than to repeat whatever complaints are made by the entertainment industry and the pharma industry, without any effort to back that up with facts or data. That's not evidence. That's just US companies begging the government for protectionist policies against competitors. Amusingly, Tepp won't even name the countries he's talking about, so that people can point out the mistakes or problems in the USTR's report. He refers to "one Latin American country" or "one Western European country," by which he means Spain, but never says that -- perhaps because the USTR's report on Spain is misleading and not accurate. For example, he claims that in Spain (er this "Western European country") "internet piracy is no longer prosecuted and that government seems to be moving in a number of wrong directions with regards to online enforcement."

That's insulting to the Spanish and blatantly incorrect. Spanish copyright law has recognized that private, non-commercial file sharing is not the same thing as commercial counterfeiting. It's really quite misleading and disingenuous for Tepp to kick off this talk by saying he's not talking about internet downloading but about organized crime and terrorists... and then just a couple sentences later, complain about Spain not punishing kids for downloading some songs for their iPods. Furthermore, the big complaint about Spain is that it *properly* recognizes that a search engine or a tool should not be blamed for the actions of users. The US used to believe that too. But does Tepp explain any of this? Nope. He makes it out like the Spanish gov't is supporting terrorists. This is blatantly untrue and misleading. And, honestly, claiming that Spain's decision to create copyright laws that make sense is the country going in "the wrong direction"? That's

insulting.

However, it does show how the whole ACTA debate is being distorted by the industry. They'll claim over and over again that it's about stopping organized crime and terrorists, but then immediately assume that people doing file sharing online should get lumped in with those people.

From there he goes on to pull out the usual bogus (and legally false) claim that these actions "rob" the United States. Uh, what? If the US is being robbed, charge the perpetrators with theft, and move on. A government official should not be making such legally incorrect statements to support a policy. This is not about anyone being robbed. This is about countries that have made reasonable determinations on how copyright law should be applied. And many folks have figured out how to work successfully within those legal regimes. That a few US companies don't want to adjust shouldn't lead the US gov't to forcing other governments to change their laws.

And then, the kicker. Like Ron Kirk [recently claimed](#), Tepp says that now that the ACTA document has been released, it's proved all the "wild internet rumors" to be "false." Um. Except that's not true. The details showed that there are [massive problems](#) with ACTA, in that it only exports the restrictions with none of the exceptions. While it is true, technically, that it is "consistent with US law," today, that ignores the fact that US law is constantly changing, and ACTA would lock in aspects of the law, without allowing Congress to make important and necessary changes for fear of "not living up to our international obligations." Fixing problems with current case law (not statutory law) on what constitutes "contributory" infringement? ACTA limits that. That's a huge problem that many people pointed out in those "wild internet rumors" and it was proved 100% true.

Later on Tepp makes even more bizarre claims (amusingly, right after he slips up and calls it a "treaty" despite all the efforts of US negotiators to make sure they never called it a treaty). He says that ACTA has no intention of changing whatever balance each individual country makes in terms of copyright sanctions or exceptions. He specifically says:

"ACTA very clearly, from day one, has never been about changing the balance of copyright law. It doesn't talk about rights. It doesn't talk about exceptions... ACTA's just saying, whatever the infringement provisions and exceptions you have in your law, are up to you (consistent with all those other treaties we've all negotiated and agreed to), and you should have some minimum type enforcement actions available so that the remedies for violating those rights... have some meaning... So to say that ACTA is exporting without exceptions is to ignore that it's also exporting without rights. It's not talking about rights or exceptions."

That's blatantly untrue. The provisions on secondary liability do exactly that -- increase restrictions, without corresponding exceptions. And if it's not changing what any country does, then *what's the point of the document* in the first place? To say that it's just setting a "minimum type [of] enforcement" is to say that it's requiring specific copyright sanctions, which was exactly the complaint. Furthermore, the idea that this is needed to make sure enforcement "has some meaning" is again incredibly insulting to the decisions on copyright law that those other countries have made -- such as Spain's decision that personal, non-commercial copying should not be treated like for-profit, commercial copying.

Tepp is playing sneaky word games. When people complained about how ACTA exports *enforcement provisions* without the exceptions, Tepp focuses on the fact it doesn't export *rights*, but ignores the enforcement provisions -- which is what people were concerned about in the first place!

Anyway, he goes on to try to address the secondary liability claim, first by mocking the example that was brought up earlier of the Google execs [found guilty](#) of criminal privacy violations:

In terms of secondary liability issue, this is another red herring. The Google case in Italy, that happened entirely without ACTA. How is that possible? How could something bad happen without ACTA?

Once again, blatantly misleading. The example of the Google execs was used to show how secondary liability could create harm for American companies, by highlighting troubling secondary liability rulings *in a different realm* -- in this case privacy law. It wasn't saying that it was directly an example of what would happen with ACTA, but highlighting how secondary liability, as a concept, can lead to bad results. Tepp either feigned ignorance or was actually ignorant of the fact that this example was just showing secondary liability problems in privacy law, to suggest how those problems might also show up in copyright law. Mocking such a serious problem with secondary liability does not inspire confidence that Tepp or the US Copyright Office has even thought through the consequences of secondary liability.

That's scary.

Tepp continues:

ACTA doesn't mandate every jot and tittle of secondary liability. It sets forth the basic approach to it in the US and proposes that as standards to follow elsewhere. Could countries go beyond that? Sure. Have countries already gone beyond that already? Sure. Does ACTA require it? No... This is something ACTA does not require...

Um. What? Section 2.18.3 of ACTA, as it stands, appears to require third party liability (i.e., "secondary liability") and the related footnote to that section defines it pretty clearly:

For greater certainty, the Parties understand that third party liability means liability for any person who authorizes for a direct financial benefit, induces through or by conduct directed to promoting infringement, or knowingly and materially aids any act of copyright or related rights infringement by another.

Once again, Tepp is being misleading. He's pointing out that ACTA sets the floor for secondary liability based on what's in the US, but *totally ignores* the fact that secondary liability for copyright in the US is a highly dynamic area. It's *not* in the statute anywhere -- a law that tried to put it there did not pass -- and really was only defined by the Supreme Court just a few years ago in a manner that many people find problematic. If ACTA sets that as the floor, then it limits the US from being able to fix the problems with the Supreme Court's definition. At the same time, note that Tepp only talks about going "beyond" what's in the US today. He doesn't seem to realize that many countries find the US's view of secondary liability as already having gone way too far.

He's right that countries can already go further, and some do, on their own, but that does not minimize the fact that encouraging greater secondary liability will likely come back to haunt many US companies.

Thankfully, Michael Petricone from the Consumer Electronics Association responded to Tepp's statements by making many of the same points I'm making. Later he highlights many of the other problems with ACTA, including the lack of Congressional oversight, and the failure to involve stakeholders and the public (Tepp, amazingly, says that the process has been open to anyone who wanted in). A great moment, about halfway through, is when Petricone challenges Tepp, by saying that if he's right that "there's no 'there' there," then "why the secrecy?" Tepp's response? Basically "that's not my department."

A few other points:

Richard Bengloff, from A2IM (representing independent labels), admits that they decided to support ACTA *despite not having seen it*. He says that someone from the RIAA "briefed him" on the background and that was enough for them to support it wholeheartedly. That's scary. Considering that the specific language choices are really important for the kind of impact ACTA will have, to say that an entire organization was in full support of the document, *without even knowing what it really said*, is stunning and a huge question mark for A2IM. Why would you trust an organization that blindly accepts an important document it hasn't seen?

Later on Bengloff makes this hilarious statement: "We're going to support anything of any type that stops this crime." And, of course, he emphasizes the word crime. Like Tepp before him, he is deliberately mixing

certain criminal activities and civil infringement for personal use as if they are the same thing. And, he's being woefully uninformed if he thinks that ACTA will actually do anything to actually stop file sharing. He's doing the labels he represents a great disservice.

Petricone does an excellent job responding to Bengloff on this point, noting that it's ridiculous to say you'll support "any" action designed to stop file sharing, when you don't look at the wider consequences of those actions -- including on other industries and the public at large.

Petricone also highlights how the entertainment industry has been blurring issues by lumping copyright in with counterfeiting, saying that if the agreement focused on actual counterfeiting, there wouldn't be so many complaints about the proposed agreement.

Malini Aisola, from KEI, reminds everyone how silly it was that the USTR wouldn't share the documents earlier, despite FOIA requests, claiming that keeping the documents secret was a matter of national security (a position that still has never been explained).

Tepp is incredibly condescending to Aisola, when she expresses concerns about some of the language in the text and how it will impact seizure of legal generic drugs. He reads off a press release from ACTA negotiators that says ACTA won't impact that issue. As if the press release of what ACTA negotiators say the agreement will do has any impact on what the agreement actually says. Aisola has a list of text KEI would like included in the document, as a "consumer Bill of Rights" to ensure that what's in the press release is true, and Tepp shoots her down by saying that such agreements don't usually contain that kind of text. He says we should only discuss what's directly in ACTA, and if it violates those principles -- again, dismissing the idea that exceptions are important to making sure enforcement is not overly draconian. A final point from Bengloff, equally as jaw dropping as his earlier comments: "If we don't stop piracy, we won't be in the music business because there will be no more creation." Yes, that's why more music is being created today than ever before, and there are more people making money from music than ever before. This argument that without strong copyright law there will be no more creation is beyond laughable. Lots of folks have figured out business models that work without involving copyright law. Pretending those models don't exist is blatantly ridiculous. You would think that, as an industry association for independent labels, A2IM would be on the forefront of encouraging these better business models, but instead they're sucking up to the RIAA demanding protectionism for the same copyright laws that have allowed the major labels to be the gatekeepers in the market, at the expense of indie labels.