

July 25, 2012

Mr. Harold Koh
The Legal Adviser
United States Department of State
Washington, D.C. 20520

Dear Mr. Koh:

Thank you for your letter, dated March 6, 2012, regarding the Anti-Counterfeit Trade Agreement (ACTA). In it, you suggested that the Pro IP Act of 2008 (15 U.S.C. 8113(a)) gave the Executive Branch the authority to negotiate and enter into the binding terms of ACTA absent Congress' consideration of the trade agreement. You specifically relied on a provision of the Pro IP Act that required the Executive Branch to produce a "Joint Strategic Plan" that details how the Administration is "working with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights."

This was a remarkable change in view, given that during the previous six years the Executive Branch declared ACTA a "sole executive agreement" to which Congress need not be involved. The mistaken view that ACTA was solely an executive agreement gave license to its U.S. negotiators to avoid the robust consultations Congress requires for trade negotiations, particularly those that are directly authorized by Congress.

I strongly disagree with any contention that the Pro IP Act of 2008 authorized the President to negotiate and enter the United States into binding international agreements on intellectual property without Congress' ratification of such agreement. If Congress wanted to authorize the Executive Branch to take such actions it would have said so explicitly, particularly given that ACTA negotiations were well underway before the Pro IP Act of 2008 was enacted into law.

In light of the Administration's view that the simple requirement that the Administration establish a plan for international cooperation is an authorization to enter into binding international agreements over the subject matter of such a plan, I ask for the Department of State's interpretation of a cybersecurity bill that is now before the Senate, S. 3414.

S. 3414 is replete with provisions directly calling for international cooperation on cybersecurity. Section 108 instructs the Secretaries of State and Homeland Security to take efforts to "coordinate" with foreign governments on "implementation of cybersecurity measures or other measures to the information infrastructure to mitigate or remediate cyber risks." Furthermore, Title 6 of S. 3414 is dedicated toward instructing the Department of State to engage with other countries to advance cybersecurity objectives of the United States, specifically calling on the Department to "develop and lead Federal Government efforts to engage with other countries to advance the cyberspace objectives of the United States, including efforts to bolster an international framework of cyber norms, governance and deterrence."

Do these provisions, or any others, in S. 3414 authorize the Executive Branch to enter into binding agreements with foreign governments for purposes of establishing disciplines on cybersecurity? If so, under what circumstances would Congress need to consider such agreements and under what circumstances would you argue that Congress need not consider such agreements? If S. 3414 does not authorize the Executive Branch to enter into binding international agreements over cybersecurity without Congress' consideration of such an agreement, how do you square this view with your interpretation of the Pro IP Act of 2008?

Given that the S. 3414 is currently under consideration by the Senate, I ask for an expedited response, which may guide how Senators choose to vote on the measure.

I appreciate your attention to this important matter.

Sincerely,



Ron Wyden
United States Senator