

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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March 21, 2008

The Honorable Susan Schwab
United States Trade Representative
Executive Office of the President
600 17th Street, NW
Washington, DC 20508

Dear Ambassador Schwab:

The U.S. Chamber of Commerce is pleased to submit the following comments in response to the United States Trade Representative's Federal Register Volume 73, Number 32.

Intellectual property (IP) protection is among a handful of issues that will determine America's economic growth and competitiveness in the 21st century. The ability to create, innovate, and generate the best artistic, technological, and knowledge-based IP is essential to global economic growth and the advancement of human progress. To that end, we are prepared to support an ambitious, comprehensive, and enforceable Anti-Counterfeiting Trade Agreement (ACTA).

We encourage the administration to collaborate with other ACTA partners to ensure a timely launch of negotiations. This agreement must establish a high standard and effective international framework for the protection and enforcement of IP. This may initially require negotiations with a small group of partners that are able and willing to reach the high standards required for an effective agreement.

Any new agreement must build on the enforcement text of Trade-Related Aspects of Intellectual Property Rights and recent U.S. Free Trade Agreements (FTAs) to produce a measurable improvement in the prevailing legal framework for the protection and enforcement of IP rights. Specific provisions of recent FTAs, especially those with Korea and Oman, should serve as templates for this agreement.

The agreement should include an effective and credible mechanism to monitor and provide incentives to encourage parties' compliance with obligations. As a binding dispute resolution mechanism is not contemplated, a system such as a peer review mechanism should be included. It must also include a meaningful level of deterrence.

The following list identifies measures we would consider essential for inclusion in a high-standard ACTA.

LEGAL FRAMEWORK:

Criminal Enforcement:

- Criminal penalties for IP crimes, including online infringements.
- Provisions mandating that physical and financial assets of violators may be seized.
- Provisions to make trademark counterfeiting an extraditable offense.
- Provisions requiring that penalties be sufficiently high to provide a deterrent and are "consistent with removing the monetary incentive of the infringer."
- Enhanced measures to allow rights holders and law enforcement agencies to identify and take action against proceeds of crimes.
- Enhanced legal framework relating to landlord liability.
- Provisions to clarify that the concept of counterfeiting or piracy "on a commercial scale" includes both infringing acts carried out for commercial advantage or private financial gain, and infringing acts of undertaken without a profit motive but which cause damage on a commercial scale.
- Measures to provide judicial authorities with the authority to order forfeiture of assets of violators traceable to the infringing activity.
- Commitment of all parties to criminalize unauthorized camcording of motion pictures in theaters.
- Broader search orders, without formal complaint by a rights holder, that facilitate seizures of all counterfeit and pirated material found at a raid site; the seizure of implements of the violators used in committing the offense; and the seizure of assets and documentary evidence without qualification.

Border Measures:

- Commitment by all parties to expand the powers of national customs authorities (ex-officio authority) to interdict shipments entering or exiting their jurisdiction, in transit or in free trade zones based on legally accepted and recognized terms of probable cause and acting on reliable information. Without prejudice to right holders' ability to initiate and terminate legal action against infringers, customs officials and prosecutors must have the authority to bring IP enforcement action without a formal complaint from rights holders.
- Measures to provide competent authorities with the authority to provide right holders with information, including identifying the consignee, exporter, importer, and consignor as well as the country of origin, quantity of goods seized, and description of goods.

Civil Enforcement:

- The agreement must establish global minimum standards in areas of adjudication of infringement cases, and include commitments to:
 - Ensure that civil damages must compensate the rights holder for damages suffered and deprive infringers of any profits from the infringement.
 - Establish a statutory (pre-established) damages option—at the election of the rights holder. Statutory damages must be “in amount sufficient to constitute a deterrent to further infringement.”
 - Abolish rules against self-incrimination in civil IP cases.
 - Expansion of the authority of judicial authorities to cover infringing activity with regard to imports and exports of counterfeit and pirated material.
 - Require parties to authorize the seizure, forfeiture, and destruction (without exception) of counterfeit goods and the equipment used to produce them.

- Ensure that interpretation of data privacy rules appropriately balances the fundamental rights of privacy and property, including intellectual property, to ensure they do not create undue impediments to the enforcement of rights. In particular, ACTA should ensure that overly strict interpretations of national data privacy rules do not impede legitimate online enforcement efforts, including the graduated response mechanism, or leave right holders with the sole recourse of pressing criminal charges against online copyright infringers as the only avenue to enforce their rights.

Other:

- A universally acknowledged definition of “counterfeit goods” and “counterfeiting activities,” that includes trafficking in illicit product packaging and labels (e.g., stolen or misapplied labels or packaging elements that indicate product authenticity) within the scope of “counterfeiting activities.”
- Measures to ensure that government agencies do not infringe copyright and only use copies of works that have been lawfully licensed or acquired.
- Provisions tracking the language of recent U.S. FTAs to require each party to provide “legal incentives for service providers to cooperate with copyright owners.”

INTERNATIONAL COOPERATION:

To effectively fight a problem that is truly global in scope, we must have cooperation across governments and law enforcement. We applaud the innovative provisions that are being considered to improve and strengthen coordination, especially the following:

- Measures to require keeping/publicizing of enforcement information.
- International cooperation among enforcement authorities including information-sharing.

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- Commitment by all members to improve cooperation to carry out appropriate legal action against Internet sites that engage in the unauthorized reproduction, distribution, or transmission of copyright works.
- Provisions that mandate the sharing relevant information relating to counterfeit products and counterfeiting activities among relevant law enforcement agencies of participating governments.

The U.S. Chamber stands ready to provide whatever assistance you may think necessary to make progress on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom", with a long horizontal stroke extending to the left.

Thomas J. Donohue