



March 21, 2008

Via email [ACTA@ustr.eop.gov](mailto:ACTA@ustr.eop.gov)  
Ms. Rachel Bae  
Director for Intellectual Property & Innovation  
Office of the U.S. Trade Representative  
600 17<sup>th</sup> Street NW  
Washington, DC 20508

Re: Anti-Counterfeiting Trade Agreement  
(ACTA): Request for Public Comments  
73 Fed. Reg. 8910 (Feb. 10, 2008)

Dear Ms. Bae:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide comments in response to the request of the Office of the U.S. Trade Representative (USTR) regarding its efforts to negotiate an Anti-Counterfeiting Trade Agreement (ACTA).

### **About the IIPA**

The IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. The IIPA is comprised of seven trade associations (listed in the logo, below), which in turn represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software; theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). A description of all seven IIPA members and links to their respective websites are found on the IIPA website, [www.iipa.com](http://www.iipa.com).

### **About ACTA**

IIPA observes that any negotiation should be entered into with the objective of setting out the very highest standards of effective enforcement. The WTO TRIPS Agreement already sets out the minimum level of enforcement standards. While many countries may have laws in place, those laws are not effectively enforced in practice.

An ACTA should have high level enforcement standards, not those that simply reiterate TRIPS, but rather clarify existing TRIPS obligations and go beyond TRIPS, along the lines of the IPR Chapters the U.S. government has negotiated in its Free Trade Agreements. To the extent such “standards” are not in fact obligations *per se* but are cast more toward creating “best practices,” then the reason for setting the bar high becomes even stronger. Importantly, standards and/or best practices should cover those applicable to the anti-piracy fight in both the hard goods and the online environment. Nations willing to participate in the ACTA negotiations must be willing to commit to supporting and enforcing high levels of disciplines.

## **CONTRIBUTIONS TO THE U.S. ECONOMY AND BEYOND**

The vitality and competitiveness of the U.S. economy depends on a thriving copyright sector that creates jobs and exports. It is essential to the continued growth and future competitiveness of these industries that our trading partners provide not only free and open markets, but also high levels of protection for copyright, and effective policies to enforce that protection. To meet the constantly evolving threats to copyright worldwide, our country’s responses must remain flexible, innovative and committed.

To emphasize why IIPA and its members care about this ACTA endeavor and the economic stakes involved, we provide an overview of several recent economic studies on the contributions of the various copyright-related industries to the U.S. economy.

### **U.S. copyright study by the IIPA (2007):**

On January 30, 2007, the IIPA released an economic report entitled Copyright Industries in the U.S. Economy: The 2006 Report, the eleventh study written by Stephen Siwek of Economists Inc.<sup>1</sup> This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade.

#### *Major Contribution to the U.S. Gross Domestic Product and Real Growth*

- The U.S. “core” copyright industries accounted for an estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP) in 2005, up from 6.48% of the U.S. GDP (\$760.49 billion) in 2004.
- The U.S. “total” copyright industries accounted for an estimated \$1.38 trillion or 11.12 % of GDP in 2005, up from 11.09% of the U.S. GDP (\$1.3 trillion) in 2004.
- The “core” copyright industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole. For the first time, this report includes estimates of the annual contributions made by the copyright industries to real growth experienced by the U.S. economy. This means that the growth contributed by these core industries (12.96%) was almost double their current dollar share of GDP (6.56%).

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<sup>1</sup> Copyright Industries in the U.S. Economy: The 2006 Report, by Stephen E. Siwek, Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), available at [www.iipa.com](http://www.iipa.com). Note: The “core” industries are those copyright-related industries whose primary purpose is to produce and/or distribute copyright materials. The “total” copyright industries contain four sub-sectors called the core, partial, non-dedicated support, and interdependent sectors. The “total” copyright industries include the “core” industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The “core” copyright industries are those that create copyrighted materials as their primary product. A one-page summary sheet on this report can be found at <http://www.iipa.com/pdf/2006SiwekSummary.pdf>.

*Strong Employment and Wages*

- The “core” copyright industries employed 5.38 million workers in 2005 (4.03% of U.S. workers), up from 5.34 million workers in 2004 (4.07%).
- The “total” copyright industries employed 11.3 million workers in 2005 (8.49%), up from 11.2 million workers in 2004 (8.53%).
- This report, for the first time, provides data on the estimated average annual compensation for a worker in the core copyright industries: \$69,839 in 2005 up from \$66,997 in 2004. This represents a 40% premium over the compensation paid the average U.S. worker.

*Foreign Sales and Exports*

- Finally, estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading many other major industry sectors, including chemicals and related products; motor vehicles, parts and accessories; aircraft and associated equipment; food and live animals; and medicinal and pharmaceutical products.

As a result of his work with the IIPA over the past decade, Mr. Siwek has become a leading expert on copyright industry-related studies, and helped formulate the methodology developed by WIPO (discussed immediately below) to measure the copyright industries’ role within all economies.

**WIPO methodology and support for country studies:**

The IIPA’s 2006 Report is the second IIPA report which reflects the recommended economic and statistical standards developed by the World Intellectual Property Organization (WIPO) in 2003. This 2003 WIPO Guide addresses the development of economic and statistical standards to measure the impact of domestic copyright industries on any domestic economy.<sup>2</sup>

Spurred by the issuance of this 2003 WIPO Guide, a number of countries have either published similar studies or are in the process of preparing such reports. For example, studies have been concluded in Singapore, Latvia, Hungary, and Canada (see WIPO publication 624e, which also contains IIPA’s *Copyright Industries in the U.S. Economy: The 2004 Report*). Studies are close to completion, underway or soon to be launched in Malaysia, the People’s Republic of China, Brazil, the Philippines, Mexico, Colombia, Peru, Jamaica, Lebanon, Morocco, Bulgaria, Romania, Croatia, Russia and Ukraine. Proposals are just now being examined by many more governments. IIPA is very supportive of nations’ efforts to conduct such studies.

**New entertainment software industry study (2007):**

The Entertainment Software Association (ESA) recently released an annual report on the growth of the computer and video game industry between 2003-2006.<sup>3</sup> According to the study called Video Games in the 21st Century: Economic Contributions of the U.S. Entertainment Software Industry, the U.S. computer and video game industry’s annual growth rate from 2003 to 2006 exceeded 17%, far outpacing the U.S. economy as a whole (which grew only 4.0% in this same period). This study, conducted by Steve Siwek of Economists Incorporated for the ESA, is the first economic study to

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<sup>2</sup> WIPO, Guide on Surveying the Economic Contribution of the Copyright-Based Industries, WIPO Publication 893 (2003), available at [http://www.wipo.int/ebookshop?lang=eng&cmd=display\\_pub&cat\\_id=1198&cart\\_id=771049-36566208](http://www.wipo.int/ebookshop?lang=eng&cmd=display_pub&cat_id=1198&cart_id=771049-36566208).

<sup>3</sup> ESA, “U.S. Video Game Industry’s Growth Outpaces National Economy,” Nov. 27, 2007, at [http://www.theesa.com/archives/2007/11/us\\_video\\_game\\_i.php](http://www.theesa.com/archives/2007/11/us_video_game_i.php).

outline the specific contributions of the entertainment software industry on the U.S. economy. The report contained the following key findings:

- The computer and video game industry's value added to U.S. Gross Domestic Product (GDP) in 2006 was \$3.8 billion;
- In 2003-04 and 2005-06, the industry's contribution to real growth exceeded its share of GDP by more than four to one;
- The entertainment software industry directly and indirectly employs more than 80,000 people in 31 states,;
- U.S. entertainment software industry employees received total compensation of \$2.2 billion; and
- The U.S. entertainment software industry directly employs more than 24,000 individuals, with an average salary of \$92,300 in 2006.

### **Study of contributions of both the U.S. copyright and patent sectors (2005):**

In 2005, Steve Siwek of Economists Inc. analyzed the contributions to the U.S. economy of the U.S. "IP industries"—industries that rely most heavily on copyright or patent protection to generate revenue, employ and compensate workers and contribute to real growth.<sup>4</sup> This study, entitled Engines of Growth: Economic Contributions of the U. S. Intellectual Property Industries, found, among other things, that these IP industries are the most important growth drivers in the U.S. economy, contributing nearly 40% of the growth achieved by all U.S. private industry and nearly 60% of the growth of U.S. exportable products. It also found that the IP industries were responsible for 20% of the total U.S. private industry's contribution to GDP and 40% of the contribution of U.S. exportable products and services to GDP.

## **COSTS OF COPYRIGHT PIRACY**

In this section, we provide a chronological summary of the findings of several recent reports on copyright piracy, especially in the U.S. markets. But the harm to the U.S. markets is not the sole concern of IIPA and its members; there are additional economic impacts beyond the U.S. borders. Strong, robust national laws are, of course, one solution to combat piracy. Another critical solution is enhanced enforcement efforts that attack copyright piracy. Effective, deterrent anti-piracy actions -- from raids, to prosecutions, to judicial decisions -- are needed, and are needed at a more urgent and more consistent pace than what the copyright industries currently experience.

### **Motion Picture Piracy Study (IPI, September 2006):**

The Institute for Policy Innovation (IPI) released a study in 2006 that describes the impact of movie piracy on the U.S. economy.<sup>5</sup> That study analyzed the movie industry to determine the full upstream and downstream economic consequences including lost economic output, lost jobs, and lost tax revenues. Also written by Steve Siwek, "*The True Cost of Motion Picture Piracy to the U.S. Economy*" concluded the following:

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<sup>4</sup> Engines of Growth: Economic Contributions of the U. S. Intellectual Property Industries, by Stephen E. Siwek, Economists Inc. (2005), available at [http://nbcumv.com/corporate/Engines\\_of\\_Growth.pdf](http://nbcumv.com/corporate/Engines_of_Growth.pdf)

<sup>5</sup> IPI Policy Report # 186, The True Cost of Motion Picture Piracy to the U.S. Economy, by Stephen E. Siwek, issued September 29, 2006, available at [www.ipi.org](http://www.ipi.org).

- Motion picture piracy now results in total lost output among all U.S. industries of \$20.5 billion annually. Output includes revenue and related measures of economic performance.
- Motion picture piracy costs U.S. workers \$5.5 billion annually in lost earnings. Of this amount, \$1.9 billion would have been earned by workers in the motion picture industries while \$3.6 billion would have been earned by workers in other U.S. industries.
- Motion picture piracy costs jobs. Absent piracy, 141,030 new jobs would have been added to the U.S. economy. Of this total, 46,597 jobs would have been created in the motion picture industries while 94,433 jobs would have been added in other industries.
- Motion picture piracy costs governments at all levels \$837 million in lost tax revenue. Absent piracy, an additional \$147 million in corporate income taxes from motion picture corporations, \$91 million in other taxes on motion picture production or sales, and \$599 million in personal income taxes from employees would have been paid annually to federal, state and local governments.

#### **Sound Recording Piracy Study (IPI, August 2007):**

IPI also released a study that attempted to paint a complete picture of the impact of piracy of musical recordings on the U.S. economy.<sup>6</sup> That 2007 study, again done by Steve Siwek, analyzed the recording industry's losses to determine the full upstream and downstream economic consequences including lost economic output, lost jobs, and lost tax revenues. Siwek noted, "The true cost of sound recording piracy far exceeds its impact on U.S. producers and distributors of sound recordings. Piracy harms not only the owners of intellectual property but also U.S. consumers and taxpayers." Key excerpts from the study appear below:

- As a consequence of global and U.S.-based piracy of sound recordings, the U.S. economy loses \$12.5 billion in total output annually. Output includes revenue and related measures of economic performance. As a result of sound recording piracy, the U.S. economy loses 71,060 jobs. Of this amount, 26,860 jobs would have been added in the sound recording industry or in downstream retail industries, while 44,200 jobs would have been added in other U.S. industries.
- Because of sound recording piracy, U.S. workers lose \$2.7 billion in earnings annually. Of this total, \$1.1 billion would have been earned by workers in the sound recording industry or in downstream retail industries while \$1.6 billion would have been earned by workers in other U.S. industries.
- As a consequence of piracy, U.S. federal, state and local governments lose a minimum of \$422 million in tax revenues annually. Of this amount, \$291 million represents lost personal income taxes while \$131 million is lost corporate income and production taxes.

#### **Copyright Industry Piracy Study (IPI, October 2007):**

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<sup>6</sup> IPI Policy Report # 188, The True Cost of Sound Recording Piracy to the U.S. Economy, written by Stephen E. Siwek, issued on August 21, 2007, available at <http://www.ipi.org/>

IPI most recently issued another report by Steve Siwek in late 2007 that looked at several (but not all) copyright industry sectors, and concluded that: "... each year, copyright piracy of motion pictures, sound recordings, business and entertainment software and video games costs the U.S. economy \$58.0 billion in total output, costs 373,375 jobs and \$16.3 billion in earnings, and costs federal, state, and local governments \$2.6 billion in tax revenue."<sup>7</sup> There Siwek noted:

However, these direct losses to copyright owners represent only part of the story. Piracy also causes significant and measurable harm to both the upstream suppliers and downstream distributors who would also have benefited from the sale of legitimate copyright products. Indeed, the harms that flow from piracy produce a cascading effect throughout the economy as a whole. In order to determine the magnitude of these ripple effects, this paper assesses the harmful impact of the piracy of U.S. produced copyright products on the overall U.S. economy. To accomplish this, data were gathered that reflected the piracy losses incurred in 2005 by four of the major U.S. copyright industries: motion pictures, sound recordings, business software and entertainment software/video games. In 2005, piracy conservatively cost these U.S. industries collectively at least \$25.6 billion in lost revenue. This lost revenue translates into lost production of legitimate copyright products, which in turn means lost wages and lost purchases of upstream products and services throughout the U.S. economy. This study measures the lost economic output, jobs and employee earnings that are the economic consequences of copyright piracy.

Additional excerpts from the study results appear below:

- The U.S. economy loses \$58.0 billion in total output annually. Output includes revenue and related measures of gross economic performance.
- The U.S. economy loses 373,375 jobs. Of this amount, 123,814 jobs would have been added in the copyright industries or in downstream retail industries, while 249,561 jobs would have been added in other U.S. industries in support of the copyright industries.
- American workers lose \$16.3 billion in earnings annually. Of this total, \$7.2 billion would have been earned by workers in the copyright industries or in their downstream retail industries while \$9.1 billion would have been earned by workers in other U.S. industries.
- Federal, state and local governments lose at least \$2.6 billion in tax revenues annually. Of this amount, \$1.8 billion represents lost personal income taxes while \$0.8 billion is lost corporate income and production taxes.

### **Business Software Studies (May 2007, January 2008):**

The Business Software Alliance (BSA) periodically issues studies on the state of copyright piracy of business and other selected software worldwide.<sup>8</sup> The Fourth Annual BSA and IDC Global Software Piracy Study revealed that 35% of the software installed in 2006 on personal computers (PCs) worldwide was obtained illegally, amounting to nearly \$40 billion in global losses. The data in this survey cover, in addition to business applications software, computer applications such as operating

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<sup>7</sup> IPI Policy Report # 189, The True Cost of Copyright Industry Piracy to the U.S. Economy, by Stephen E. Siwek, issued on October 3, 2007, available at [www.ipi.org](http://www.ipi.org).

<sup>8</sup> BSA and IDC, Fourth Annual Global Piracy Study, available at <http://w3.bsa.org/globalstudy/> (May 2007).

systems, consumer applications such as PC gaming, personal finance, and reference software. Data on numerous countries are included in this report. An illustrative summary of the overall key findings are:

- Total software installed on computers: more than \$100 billion.
- Total software paid for: \$65 billion.
- Total packaged software loss: nearly \$40 billion.
- Global piracy rate: 35%.
- Changes from 2005: Total losses up 15% to nearly \$40 billion.

In addition, another study recently commissioned by the BSA and conducted independently by International Data Corporation (IDC) finds that while all countries could benefit from reducing the use of illegal software on personal computers (PC), emerging economies with high-piracy rates could experience the most dramatic, positive gains.<sup>9</sup> The Economic Benefits of Reducing PC Software Piracy looks at the bottom line economic benefits of reducing piracy in 42 countries that together account for more than 90 percent of global IT spending in 2007. The study was designed to quantify the economic benefits to domestic economies that could be gained from a ten percentage point reduction in PC software piracy over a four-year period, from 2008-2011.

#### **Sound Recordings and Digital Piracy (IFPI, January 2008):**

The International Federation of the Phonographic Industry (IFPI) issued its IFPI Digital Music Report 2008 in January 2008.<sup>10</sup> This report includes an analysis of the impact of copyright theft on the legitimate music business globally, as well as the industry's anti-piracy strategies for disrupting it. It also outlines the hidden dangers to consumers and businesses of illegal downloading, and provides a summary of the public education work being done internationally by the recording industry to improve awareness of legal online sites and of copyright. Excerpts of the "Highlights" outlined by IFPI are listed below:

- Global digital music sales are estimated at approximately US\$2.9 billion in 2007, a roughly 40% increase on 2006 (US\$2.1 billion).
- Single track downloads, the most popular digital music format, grew by 53% to 1.7 billion (including those on digital albums).
- Digital sales now account for an estimated 15% of the global music market, up from 11% in 2006 and zero in 2003. In the world's biggest digital music market, the US, online and mobile sales now account for 30% of all revenues.
- The music industry is more advanced in terms of digital revenues than any other creative or entertainment industry except games. Its digital share is more than twice that of newspapers (7%), films (3%) and books (2%).
- There are more than 500 legitimate digital music services worldwide, offering over 6 million tracks – over four times the stock of a music megastore.
  
- Tens of billions of illegal files were swapped in 2007. The ratio of unlicensed tracks downloaded to legal tracks sold is about 20 to 1.

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<sup>9</sup> The Economic Benefits of Reducing PC Software Piracy, A Report by IDC, sponsored by the Business Software Alliance, January 2008, available at [http://www.bsa.org/idcstudy.aspx?sc\\_lang=en](http://www.bsa.org/idcstudy.aspx?sc_lang=en).

<sup>10</sup> IFPI Digital Music Report 2008, issued January 24, 2008, available at [http://www.ifpi.org/content/section\\_resources/dmr2008.html](http://www.ifpi.org/content/section_resources/dmr2008.html)

- The growth rate of around 40% in digital sales did not offset the sharp fall in CD sales globally, meaning that the overall market for the year will be down on 2006.

## **Importance of the Online Environment**

The creativity, production and distribution of original content is what drives investment, job creation and increased tax payments to government. The theft of copyrighted creative content -- in both hard goods and online -- severely undercuts the ability of U.S. creators, both companies and individuals, to engage in legitimate commerce and to grow in both the domestic U.S. market, and increasingly, the international market. Positive industry growth simply cannot be sustained in countries where piracy dominates the market.

Many of the copyright industries are currently exploring new ways to distribute their content but are hampered in such efforts by the continuing growth of online piracy. Robust laws and effective enforcement measures must be in place to provide both right holders and governments with the proper means to combat this very damaging form of economic and cultural theft.

## **Final Comments on ACTA**

In the ACTA, the U.S. and other interested governments seek an agreement with provisions in three main areas: international cooperation, enforcement practices, and the legal framework for IPR enforcement. The above discussion of economic contributions and the costs of copyright piracy points to an inescapable conclusion -- it is critical that the ACTA enhance international norms and strengthen standards for the enforcement of intellectual property rights.

The ACTA's objective should be an ambitious agreement that addresses today's challenges, including strengthened legal regimes and strengthened and effective copyright enforcement in both the hard goods and online environments. Such ambition should not be sacrificed for additional signatories or the need for a hurried conclusion of negotiations. As the framework for negotiating the ACTA progresses and actual negotiations commence, U.S. right holders will be able to submit additional comments and discuss those possibilities with the U.S. negotiators.

We appreciate this opportunity to provide our views.

Respectfully submitted,



Eric H. Smith  
For the International Intellectual Property Alliance



Susan C. Schwab  
U.S. Trade Representative  
600 17th Street, N.W.  
Washington, DC 20508  
United States of America

19 March 2008

Dear Ambassador Schwab,

On behalf of the member companies of the International Chamber of Commerce's BASCAP initiative and the International Trademark Association, we would like to thank you for your participation in the March 3 meeting of BASCAP's Global Leadership Group.

In particular, we appreciate the leadership you have taken to initiate and promote the Anti-counterfeiting Trade Agreement (ACTA). We believe that ACTA is a positive and encouraging step forward. Our expectations are very high that this proposed agreement will significantly improve and strengthen international guidelines and standards leading to more effective national IP enforcement regimes.

To complement the recommendations we provided you during the meeting, we now submit the paper as part of your Federal Register request for public comments. In addition to requesting your personal consideration of our views, we urge you to share this document with your counterparts negotiating ACTA.

Additionally, we would like to follow up on your invitation for us to suggest ways in which the business community can effectively engage in and support the ACTA process. An initial approach could be for you and the ACTA parties to hold a business briefing (or business day) on the eve of your next intergovernmental meeting. This would enable you to brief us on the negotiations and for us to provide recommendations on ACTA as the specific provisions emerge. Opportunities for future engagement by business can extend from this initial meeting.

Again, we wish to thank you for meeting with us in New York. We remain available to answer any questions you may have about our submitted comments, and we look forward to providing additional views on the specific provisions of ACTA as the process evolves.

Kind regards,



Guy Sebban  
Secretary General  
International Chamber of Commerce



Alan C. Drewsen  
Executive Director  
International Trademark Association

Enclosure

## The Anti-counterfeiting Trade Agreement

*Business support for an important initiative*

Intellectual property (IP) theft is a global problem that is intensifying across virtually every sector of the world economy. Over the past two decades, advances in technology and manufacturing and growth in international trade have also created greater opportunities for counterfeiters, pirates and organized crime syndicates to escalate the scale and scope of their illegal operations.

Efforts by legitimate businesses and law enforcement officials have simply not kept pace with the criminals. Previously established international IP enforcement standards have not proven sufficient to reduce IP theft through counterfeiting and piracy. A new, higher benchmark for intellectual property rights (IPR) enforcement is necessary.

Despite efforts by some countries, such as the bold programs to protect intellectual property industries in France and the United Kingdom, individual government's legislative guidance and budget authority often fall far short of what is needed to protect borders, deter criminal behavior and prosecute criminals.

Given the challenges to significantly improve the level of the world's national IP enforcement regimes, the proposal for the Anti-counterfeiting Trade Agreement (ACTA) is a welcome and encouraging step to fill some of the gaps in current bi-lateral and multi-lateral agreements. ACTA has the potential to deliver significant improvements in establishing stronger international guidelines and standards and providing individual governments with clear directives for action. Expectations for ACTA are high. Governments around the world must take concrete actions to curb the illegal activities of counterfeiting and piracy.

Recognizing that the parties negotiating ACTA are at early stages in their discussions, the business community would like to lay out a framework for support and indicate its expectations:

- We generally endorse the need for a multilateral treaty to suppress the offenses of trademark counterfeiting and copyright piracy. Therefore, we endorse each of the broad categories proposed in the negotiating terms of ACTA. Commitments to strengthen international cooperation, improve enforcement practices and provide a strong legal framework for IPR enforcement, including criminal sanctions, border measures, and civil enforcement are all necessary elements of an effective IP enforcement regime. We urge negotiators to maintain the comprehensive categorical approach to ACTA and to avoid compromises that will limit the scope and effectiveness of the final agreement. It is essential that ACTA emerge as a new, higher standard for government performance in protecting intellectual property rights.

- To ensure that ACTA goes beyond the current level of available guidance and provides parties with clear and authoritative guidance at the national level, ACTA must rigorously deliver tangible results across the range of topics, and especially in the following areas:
  - Require that each party to the agreement designate a chief intellectual property enforcement officer with high-level authority to raise the profile of the issue, oversee coordination of relevant government officials and agencies, and allocate necessary financial and personnel resources.
  - Ensure that criminal penalties for IP theft – at a minimum – reflect the magnitude of the crime and match existing legal penalties for theft of physical merchandise and that these penalties be applied to both online and off-line IP transactions. In doing so, parties should establish minimum effective standards for calculating these fines and damages.
  - Disrupt the flow of counterfeit goods through Free Trade Zones and other transshipment sites by extending greater authority and effective powers to local Customs and enforcement authorities to inspect all shipments, detain suspicious shipments, and seize and destroy all goods identified by rights holders as infringing.
  - Expand the powers of national customs authorities to be able to interdict and stop shipments entering or exiting their jurisdictions based on legally accepted and recognized terms of probable cause and acting on reliable sources of information. Any strong border control regime requires governments to significantly increase inspections of exports to find shipments of counterfeit or pirated goods and refer those cases to appropriate authorities for investigation and prosecution.
  - Develop global “minimum standards” in the area of adjudication of counterfeiting and piracy cases presented to authorities. Prosecutors must have a minimum basis for prosecution and judges must have basis for assessing penalties.
  - Address the growing problem of the sale of counterfeits on the Internet.
  - Treat counterfeiting and piracy crossing national borders as a transnational crime, recognizing that organized criminals are behind commercial level counterfeiting trade.
- The parties negotiating ACTA have an important opportunity to educate other countries on the harms associated with counterfeiting and piracy and the economic opportunities associated with creating a system that promotes and protects innovation and creativity. Parties should assist other countries with developing assessments of the economic and social benefits of participating in the ACTA process.

- Governments must warn consumers about the harms of counterfeit products. One must look no further than public education campaigns on public health issues and illegal drug trade to understand the crucial role governments play in educating their constituencies on the immediate and extenuating dangers and risks of producing, distributing, marketing, purchasing and consuming counterfeit and pirate products.

Negotiating an agreement of this magnitude will certainly require significant detailed and expert work. It is essential that this renewed effort by the governments engaging in ACTA incorporate the views of the business community. The business community stands ready to work with ACTA partners to create an improved and effective framework for enforcement by providing input and counsel on substantive anti-counterfeiting issues and by creating a forum where businesses work together to contribute to ACTA.

The proposed negotiation of ACTA is a critical step in combating counterfeiting and piracy. We express a hope that clear decisions and actions by the governments involved in the development of ACTA will establish the strong, clear and long overdue global standards on enforcement and governmental cooperation on IP crimes.

## IP Justice Comments to the United States U.S.T.R. on the proposed Anti-Counterfeiting Trade Agreement (ACTA)

21 March 2008

IP Justice appreciates this opportunity to provide comments to the Office of the United States Trade Representative on the proposed Anti-Counterfeiting Trade Agreement (ACTA). IP Justice is an international civil liberties organization that promotes balanced intellectual property laws and Internet policies that encourage innovation and creativity (<http://www.ipjustice.org>).

IP Justice firmly believes that ACTA's costs to the public far outweigh any public benefit it might provide. The financial expense to tax-payers to fund ACTA would be enormous and steal scarce resources away from programs that deal with genuine public needs like providing education and eliminating hunger. ACTA would burden the judicial system and divert badly needed law enforcement and customs resources away from public security and towards private profit.

Unfortunately the zeal to "beef-up" enforcement measures on which ACTA rides often leads to the violation of privacy rights, bypassing due process protections, and cutting-off the free flow of information. ACTA proposes to set new international norms to lock countries into pre-determined policy choices when flexibility is needed.

ACTA's premise that the government should spy on its citizens and exchange that data with other governments in order to protect the intellectual property industry is profoundly misguided. The number of reported cases of US governmental spying on American citizens has never been so high, and ACTA invites a breeding ground for further abuse and erosion of citizen's privacy.

ACTA proposes a policy of "one-size-fits-all" (X-Large) for intellectual property legal and enforcement measures. But the very nature of a digital environment requires that we leave a breathing space for flexibility in information policymaking that is necessary for information and creativity to flourish. The imposition of new international enforcement measures leaves nations with no opportunity to set alternative policy priorities, despite the fact that national priorities regarding information policy vary dramatically from country to country. In the past, the US economically flourished because of its tradition of ensuring a broad range of flexibilities in intellectual property law and by permitting a robust system of limitations and exceptions to exclusive rights. Maintaining flexibility to respond to technological change is important for innovation and creativity in developed and developing countries alike.

ACTA's focus on infringements in the digital and online environment is misguided because it duplicates recent efforts of the WIPO Internet Treaties without learning from the experience. Many countries are only beginning to implement the WIPO Internet Treaties, so it would be unwise to add new obligations to countries that have not had the benefit of the experience of using the WIPO Internet Treaties to address their concerns.

Rights owners are increasingly taking enforcement measures into their own hands by applying digital restrictions to information and entertainment to control its use. This reality provides even

less justification for an allocation of additional public resources toward that end. Particularly since major copyright owners implement digital restrictions that far exceed the level of control over use that copyright law grants to rights owners, the public should not compound that fact with simultaneously devoting even more public resources to further protect those same narrow private interests.

We are concerned about ACTA's negative impact on free market competition by further shoring-up information monopolies. ACTA also threatens to hamper market competition by reinforcing new monopolies on adjacent products (for example, like the way copyright laws are increasingly used to enforce business models over printer toner cartridges rather than protect copyrights).

We note that ACTA's proponents employ emotional rhetoric about dangerous drugs in order to justify expanded protections over Hollywood music and movies. Legal and enforcement mechanisms need to draw an important distinction between the types of infringements that actually do cause the public serious harm and risk of personal safety and those infringements that only impact profit margins for major entertainment companies. This distinction has been entirely lost in ACTA discussions.

The lack of transparency and public participation in the process to negotiate ACTA is deeply troubling to anyone who cares about democracy and the public interest. Outside of a scant press release or two, the USTR has provided the general public with virtually no public information about the proposed substance of ACTA. There are several recent news reports however, of USTR speeches given to international business groups in order to brief them on ACTA and listen to the concerns of transnational companies. No such effort has been made to brief public interest groups with information on the developments of ACTA or to receive input from non-industry sectors of society.

Therefore, we have serious concerns about the inadequacy of public input, absence of non-industry participation, and lack of transparency in the negotiation process surrounding ACTA. Furthermore, the lack of developing country participation in the ACTA process only underlines the flawed and undemocratic process behind ACTA. Given the differing needs of countries in differing stages of development, ACTA's failure to include developing countries in its early negotiations only emboldens ACTA's own illegitimacy as a proposed legal instrument. ACTA's circumvention of existing international legal fora such as WIPO or the WTO TRIPS Council where developing country views must be considered, in order to conclude this trade pact outside of the restraints of democratic process and having to include developing country perspectives also points to ACTA's "anti-public-interest" agenda.

We commend the USTRs solicitation of these public comments on ACTA, but believe the given timeframe in which to submit comments has been far too short and the notices and other information too difficult to find for the general public to adequately participate.

Therefore, we respectfully request that the timeframe in which citizens may submit comments be extended in order to achieve wider public participation. We further ask that the USTR organize discussions with public interest NGOs to better understand non-industry concerns about ACTA.

And we strongly urge the USTR to abandon support for ACTA due its undemocratic process and its misguided purposing of public resources towards private interests.

IP Justice would welcome the opportunity to provide further input into the ACTA process and remains available for any further questions or discussion.

Very truly,

Robin Gross  
IP Justice Executive Director



## **Comments of Knowledge Ecology International on the Proposal for Anti-Counterfeiting Trade Agreement (ACTA)**

Submitted to United States Trade Representative  
Request for Public Comments, via email: ACTA@USTR.eop.gov

March 20, 2008

Knowledge Ecology International (KEI)\* offers the following comments on a proposal for a new Anti-Counterfeiting Trade Agreement (ACTA) with future provisions on international cooperation, enforcement practices, and the legal framework for IPR enforcement.

### **Table of Contents**

The Lack of Transparency is Not Encouraging .....	1
Definitions .....	2
Counterfeiting .....	2
Piracy .....	3
Infringement .....	3
Priorities for Law Enforcement .....	4
Low quality counterfeits .....	4
High quality counterfeits .....	4
Remedies .....	5
Other Solutions .....	..5

### **The Lack of Transparency is Not Encouraging**

The Request for Comment in the February 15, 2008 Federal Register (Volume 73, Number 32), contains very little information about the proposal. The “Fact Sheet” on the USTR website has very little real information. We have, in fact, located an undated “Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement,” that has apparently been circulated to lobbyists for some businesses, but not to civil society groups, which contains far more detail than one can obtain from the Federal Register Notice or the USTR web page. KEI suggests USTR be more open about this

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\* Knowledge Ecology International , 1621 Connecticut Ave, NW Suite 500 , Washington DC, 20009. Tel +1 202 332 2670 .



project.

## **Definitions**

Based upon the documents now available, the ACTA is placed in the context of “counterfeiting and piracy,” but there is no definition of either.

### **Counterfeiting**

The term “counterfeiting” should not be over-used, and, in particular, it should not become a propaganda term. It should be understood to relate to cases where a product is deceptively represented as a product that is produced and legitimately owned by another. For example, a watch that contains a Rolex name, but is not made by Rolex, a copy of Microsoft Office software that is in fact not manufactured or legitimately licensed by Microsoft, or a copy of a drug that is falsely presented as having been legitimately manufactured by Pfizer, could be said to be a counterfeit.

A copyrighted work that is copied and redistributed is not a counterfeit, unless it is redistributed deceptively as legitimately being offered for sale by the rights-owner.

There are countless cases of counterfeit goods being placed in commerce, and it is useful and important to address the appropriate measures to curb such activity. The term “counterfeit” should not be used to describe all activities that may constitute an infringement of a patent, copyright or trademark, however.

Items which are similar to other goods, including goods of inferior quality which are sold for a lower price, should not be considered counterfeits, unless there is an intent to deceptively represent the content or origins.

Generic drugs, car parts or other products that do not use a brand name are not counterfeits. Unauthorized uses of a product that are allowed by law, such as personal copies of copyrighted works made under legitimate exceptions to copyrights, or generic medicines that are off-patent or legitimately licensed under voluntary or non-voluntary licenses, are not counterfeit products. Not all infringements of patents or copyrighted goods can be usefully described as counterfeits, and often the issue of what constitutes infringement is a matter of controversy, particularly, but not only, in the area of patents, where issues concerning patent validity and relevance are quite difficult, or in the area of copyright, where the relationship between rights and exceptions to rights are complex.

It is important, however, to differentiate between counterfeiting (i.e. fake goods) and the importation of legitimate stock at a lower price, as “grey market” parallel traded goods that are acquired legitimately in one market, and resold legally under the exhaustion of rights doctrine in another market. There is a tendency by some to conflate the two issues in order to stigmatize the

practice and ignore the benefits of parallel trade. Restrictions on parallel trade can lead to anti-competitive behavior, and by facilitating market segmentation and price discrimination, lead to higher prices for consumers in markets that have a lack of competition.

## **Piracy**

According to the federal register notice, the proposed agreement will focus on both piracy and infringement. Although there is not an agreed upon definition of piracy, the terms piracy and infringement should not be considered as synonyms. Piracy is a colorful and emotive term that does not elevate or inform debates about enforcement in areas where the intent or the appropriateness of infringing activities are subject to nuance or legitimate policy debate. For example, in the recent U.S. Supreme Court decisions involving eBay and KRS, the Court addressed cases where the exclusive rights of a patent should not be enforced, and a court should permit infringement under a court authorized royalty payment (eBay), or where government agencies and lower court judges make errors in their evaluations of the validity of patent claims (KSR). Do these cases involving disputes over infringement merit or benefit from the phrase “piracy?” Is Microsoft a “pirate” for insisting on the right to continue to infringe the z4 patents in order to use an infringing DRM technology to protect Microsoft software itself from infringement by unauthorized users? Is the maker of the popular computer game *Guitar Hero* a pirate because it faces an assertion of a patent claim? Is the International Trade Commission (ITC) endorsing piracy by refusing to prevent the importation of all mobile phones that use infringing semi conductor chips? Is Abbott Laboratories a “pirate” for seeking a compulsory license for its infringing use of patents on a Hepatitis C virus (HCV) genotyping test kit? Does the USTR engage in “piracy” when its employees copy and share copyrighted articles about counterfeit products, an activity allowed under 28 USC 1498? Are the owners of MySpace, Facebook or YouTube pirates because of the extensive evidence of unauthorized use of copyrighted works on those services?

## **Infringement**

Governments can and should make distinctions between a brazen and criminal enterprise to steal protected works and inventions, including deliberate deception about the content or origin of works (counterfeits), and the increasingly common disputes involving infringement that raise questions about the validity of the intellectual property claim, the extent to which a use is truly protected, and the appropriateness of remedies to address infringement.

It is important for governments to address the enforcement of intellectual property rights, including policies that address infringement. But in real life, disputes over infringement are highly heterogeneous and sometimes involve complex disputes over facts and public policy.

Efforts to fashion a treaty that deals with counterfeits, brazen acts of piracy, and routine disputes involving infringement, covers a lot of territory. The title of the treaty or trade agreement should

not casually mix everything together under a single banner of the word counterfeit, unless the purpose is to use an emotive and misleading term to demonize users, justify economically disproportionate remedies and prejudice defenses based upon assertions of legitimate or tolerated uses.

## **Priorities for Law Enforcement**

### **Low quality counterfeits**

Counterfeit products that are of a low quality are always a concern to consumers, and particularly when the products present risks to consumers, such as drugs with poor quality or the wrong active pharmaceutical ingredients, or car parts that are prone to failure. The highest priorities for law enforcement should be in areas of risk to health and safety.

### **High quality counterfeits**

High-quality counterfeit products present different issues. Examples of high quality counterfeits are (deceptively marketed) copies of digital software, recorded music or audiovisual works, manufactured goods that are made in the same factories as the brand name goods, or pharmaceutical drugs that are medically the same as the legitimate products.

It is important for governments to provide a minimum level of protection to trademark owners, and in the long run, this will benefit consumers even in cases where the counterfeit products are of a high quality. Governments should protect trademark, patent and copyright owners from competition from high-quality counterfeit products, and consumers benefit from the greater incentives to develop new products, and to maintain high quality.

That said, governments have priorities in terms of law enforcement, and consumers have many problems, including a lack of enforcement of consumer protection laws that go far beyond counterfeit products. How much money and time should governments devote to enforcement of high quality counterfeit items? Here some sensible distinctions need to be made. For example, clearly a global failure to enforce laws against the counterfeiting of software, movies and recorded music could destroy livelihoods. However, the impact of low enforcement is less important to livelihoods in some industries if it occurs in economies or communities of users that are marginal to the primary commercial market for the good. For example, countries with very low household incomes that use copies of software products that have a global market are unlikely to have a significant impact on the global market, but may expand access to the goods in the developing country. In those circumstances, it may be difficult to justify large outlays of scarce enforcement resources, given competing priorities law enforcement.

## **Remedies**

Methods and sanctions that are designed to prevent counterfeiting should be carefully considered by policy-makers to ensure that they are properly targeted and do not have adverse effects on competition, innovation, consumer protection or privacy rights. For example, right holders are increasingly using technical means such as digital rights management tools to prevent unauthorized copying of works, but these technologies also have adverse effects on legitimate usages of products. Increased regulatory requirements on the packaging of goods and other preventive measures can be used to raise the cost of entry into the market for competitors. Criminal sanctions in particular must be carefully targeted. There is a tendency to confuse the effects of commercial scale counterfeiting, and non-commercial scale copying or infringement by consumers and to apply the same criminal sanctions to both. There should be a distinction between organized commercial counterfeiting, and the 'infringement' activity of consumers.

## **Other Solutions**

Before investing enormous public sector resources to enforce private intellectual property rights, policy makers should at least consider the reasons why infringement flourishes today, and some alternative solutions to some of the more important problems.

The widespread infringement of patented inventions in software and information technology sectors is based upon deep flaws in the patent system itself. The issues recently addressed by the US Supreme Court in the KSR and eBay decisions illustrate the concerns of many that the USPTO standards for inventive step are too low, and it is highly problematic to enforce exclusive rights in products that use complex technologies where it has become impossible to avoid infringement. Likewise, the entire rise of user generated content illustrates the widely shared belief by the public that they should enjoy some freedom to remix copyrighted content for personal use. Excessive pricing of copyrighted works in developing countries has created a huge market for infringing works. High prices for pharmaceutical products in the US and Europe attracts criminal counterfeiters, who can make greater profits manufacturing fake copies of Pfizer's Lipitor or Viagra, than distributing cocaine or heroin.

In many of these cases, a combination of reforms in the intellectual property systems, curbs on excessive pricing, and the development of new systems of rewards for creative and inventive communities may be more fruitful avenues for addressing the twin concerns of enforcing private intellectual property rights, and providing sustainable incomes for our workforce.

**BEFORE THE  
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE  
Washington, D.C.**

**ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA)**

**Written Comments**

**on behalf of**

**G.G. Marck & Associates, Inc.**

**March 20, 2008**

**Edmund Maciorowski  
Edmund Maciorowski, P.C.  
33 Bloomfield Hills Parkway, Ste. 250  
Bloomfield Hills, MI 48304**

**Attorney for:**

**G.G. Marck & Associates, Inc.  
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Toledo, OH 43612**

## I. BACKGROUND

G.G. Marck & Associates, Inc. (“Marck”) was founded in 1986 to provide products to the decorating industry. Marck’s headquarters is located in Toledo, Ohio, and has an additional office in Mira Loma, California. Marck began importing ceramic mugs and has expanded its product offerings over time. With over 30 established years in the decorating industry, Marck is a leading wholesaler of ceramic, glass, stainless steel and plastic products to the decorating industry in the United States.

The decorating industry, comprising manufacturers, decorating, marketing professionals and design and industry suppliers, relies on Marck’s experience as a resource for quality products in the North American market. More recently, Marck has become an exclusive distributor of glass and crystal ware for prominent companies such as ARC International, O-I Cristar and Anchor Hocking.<sup>1</sup> With sourcing and market access throughout the Asia region and beyond, Marck imports products from China, Columbia, France, India, Taiwan, and Thailand. In 2004, Marck acquired an ownership interest with the Shandong Zibo Niceton-Marck Huaguang Ceramic Factory, to be Marck’s primary supplier. The factory is China’s largest manufacturer of premium quality stoneware ceramic products and has the capacity to produce in excess of 140 million ceramic pieces annually.

As a leading supplier of ceramic articles to retail markets, Marck is aware of certain domestic competitors which are infringing Marck’s protected trademarks. Likewise, Marck is aware that ceramic factories in China are producing and exporting these infringing articles to the

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<sup>1</sup> Additional information on Marck is available at <http://www.marckassoc.com>

United States. Through its industry resources, Marck has identified Shandong Zibo Maolong Ceramics Co., Ltd. in Zibo City, Shandong Province, China as a significant source of the prison made goods being exported into the United States.<sup>2</sup> This factory produces ceramic articles that share common characteristics with Marck's products. The infringing articles have the same physical characteristics and bear the identical word marks as the articles protected under Marck's U.S. trademarks. Additionally, the products of this factory then enter the same market in the United States, which includes consumers, retail outlets, concession sales, promotional product distributors, food service industry providers, etc. This activity is seemingly in direct violation of 15 USC 1124, as well as 19 USC 1526.<sup>3</sup>

In response to The United States Trade Representatives Request for written comments relative to the proposed Anti-Counterfeiting Trade Agreement (ACTA) published in the Federal Register on February 15, 2008, Marck is providing this information for your consideration in adopting the provisions of the agreement.<sup>4</sup> Marck has felt the impact as a wholesaler of imported ceramic mug and dinnerware to the decorator industry in the domestic market. Competitors importing and selling similar, albeit inferior, counterfeit ceramic articles domestically have a competitive advantage despite the import laws prohibiting such goods.

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<sup>2</sup> Marck has additionally identified this same factory as a prison labor factory in its testimony before the International Trade Commission's Investigation 331-492, "China: Government Policies Affecting U.S. Trade in Selected Sectors."

<sup>3</sup> 15 USC 1124 states [N]o article of imported merchandise which shall copy or simulate the name of any domestic manufacturer...shall be admitted to entry at any customhouse of the United States...." Likewise, 19 USC 1526 requires that "[a]ny such merchandise bearing a counterfeit mark...imported into the United States in violation of section 42 of the Lanham Act ...(...15 USC 1124), shall be seized and , in the absence of the written consent of the trademark owner, forfeited for violations of the Customs Laws." 19 USC 1526 (d).

<sup>4</sup> 73 FR 8910, February 15, 2008

China stands as the world's largest exporter of counterfeit goods. Moreover, exports of counterfeit product from China are expected to increase.<sup>5</sup> U.S. enforcement of IPR law has demonstrated that over 80 percent of IPR seizures are exports from China.<sup>6</sup> Despite U.S.-China bilateral trade negotiations and strong Customs enforcement efforts, the staggering influx of counterfeit goods from China into the domestic market, amongst other condemned international trade practices, continues to cause harm to U.S. economic interests. Based on the trends reflecting the likely increase of counterfeit goods from China, there is reason to believe that counterfeit exporters view global markets as potential revenue streams waiting to be exploited. Accordingly, Marck is of the view that strengthening the global enforcement of trademark prohibitions through the ACTA is a meaningful progression in continuing efforts to effectively remedy IPR violations worldwide through cooperative multilateral enforcement of these ongoing illegal trade practices.

## **II. COUNTERFEIT EXPORTS ARE AN INTEGRAL PRACTICE OF CHINA'S GLOBAL TRADE OBJECTIVES**

Marck concurs with the ongoing view that China's global economic strategy is to "maintain access to the open multilateral trading system on which its rapid export driven growth now depends."<sup>7</sup> The objectives appear; however, to be fostered by a variety of unfair trade practices. China is projecting itself as a "more attentive and profitable alternative to the U.S." both regionally and globally because of the U.S. preoccupation with terrorism and security

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<sup>5</sup> *Intellectual Property Rights Issues and Imported Counterfeit Goods Hearing before the U.S.-China Economic and Security Review Commission* 109<sup>th</sup> Cong. June 7-8, 2006, at p.6

<sup>6</sup> <http://cbp.gov>, *U.S. Customs and Border Protection Office of International Trade, 2007 Top Trading Partners for IPR Seizures*, November, 2007.

<sup>7</sup> *China's Growth as a Regional Economic Power: Impacts and Implications*, December 4, 2003, at page iii



relations.<sup>8</sup> It would appear that China's global approach is intended to further its national policy of rapid global trade dominance through its export driven growth.

Counterfeit exports from China fit into this growth objective of the Chinese government. "While most Chinese local governments do not appear to have the will to enforce IPR, the central government's resolve to address the issue is not much stronger."<sup>9</sup> The U.S. administration's bilateral negotiations with the Chinese government have been consistently premised on the strong belief that "China needs to do a much better job of protecting and enforcing IPR."<sup>10</sup> The reluctance to effectively enforce IPR by the Chinese government is primarily economic. Where counterfeit goods have saturated local Chinese markets, some in the central government see enforcement as damaging to local economies. Moreover, these Chinese government parties likewise take the view that trade in counterfeit goods serve a viable means of fostering economic development.<sup>11</sup> Thus, despite the aggressive negotiation efforts of the United States with the Chinese government, an agreement of worldwide partnership on global enforcement cooperation and strategies would increase the prospects of reducing the counterfeit trade through heightened enforcement of offending articles being distributed by China into the world market.<sup>12</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Intellectual Property Rights Issues and Imported Counterfeit Goods Hearing before the U.S.-China Economic and Security Review Commission* 109<sup>th</sup> Cong. June 7-8, 2006, at p.4

<sup>10</sup> *Office of the United States Trade Representative Trade Facts, USTR's Mission to Protect U.S. Intellectual Property Rights*, November, 2007

<sup>11</sup> *Id.*

<sup>12</sup> It is noteworthy that the timing of a global commitment to IPR enforcement is opportune in view of the recently signed U.S.-China Memorandum of Cooperation on intellectual property rights.

### **III. EFFECT OF CHINA COUNTERFEIT IMPORTS ON MARCK'S BUSINESS AND MARKET POSITION**

The influx of counterfeit goods into the United States from China is a continuing and damaging reality in the domestic market place. The effect on Marck's business in their sales to the United States market arises from the overall volume of counterfeit imports of ceramic articles that flood the market. The impact is felt financially in millions of dollars of lost sales; the costs to routinely pursue litigation against competitors who purchase counterfeit product; and, the cost of extensive efforts to work with relevant agencies responsible for the enforcement of IPR statutes and regulations prohibiting entry of such articles.

When domestic companies follow the laws of the United States, they are immediately placed at a competitive disadvantage. In the absence of adequate measures to ensure a level playing field, agencies responsible for enforcement appear to have inadequate resources, acting alone, for protecting the domestic market. Consequently, the flood of counterfeit goods into the domestic market provide competitors purchasing counterfeit articles a significant competitive advantage over Marck. The advantage in buying cheap counterfeit product permits these counterfeit articles to displace products that are otherwise protected under trademark law, resulting in decreased sales.

Accordingly, Marck asserts that enhancing agency remedies will assist the effective enforcement of existing laws and regulations by prohibiting the entry of counterfeit products into the domestic market. In its continuing efforts to make direct and extensive efforts to bring these violative practices to the attention of appropriate agencies for investigation and enforcement of current laws, Marck is of the view that the ACTA provides the opportunity for a unified global

participation which will enhance domestic agency remedies by providing a more effective enforcement of IPR matters where countries choose to evade compliant participation.

In line with the USTR's goal of establishing a common standard for IPR enforcement to combat global infringements through international cooperation, strengthening the framework of enforcement practices, and the strengthening of relevant IPR enforcement measures, Marck considers the global implementation of the initiatives developed under the Strategy Targeting Organized Piracy (STOP!) also relevant in a global application of IPR enforcement.<sup>13</sup> Accordingly, Marck is of the view that global infringement enforcement would be significantly enhanced by:

1. Establishing an international offending country list patterned on the USTR's "Priority Watch" list criteria;<sup>14</sup>
2. Certifications of authenticity from the manufacturers of all items produced in countries identified on the Priority Watch List imported to participating countries, verifying that the items being exported are not counterfeit;<sup>15</sup>

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<sup>13</sup> *Bush Administration Strategy for Targeting Organized Piracy*, April 2006

<sup>14</sup> *Intellectual Property Rights Issues and Imported Counterfeit Goods Hearing before the U.S.-China Economic and Security Review Commission* 109<sup>th</sup> Cong. June 7-8, 2006, at p.6.

<sup>15</sup> *Id.*

3. Implementing New procedures and risk assessments that will allow the Bureau of Customs and Border Protections (CBP) to better identify firms routinely trafficking in fake goods;<sup>16</sup>
4. Conducting Post-entry product audits to verify that an importer is authorized to use trademarks and copyrights;<sup>17</sup>
5. Empowering U.S. District Courts to issue injunctions against pirated and counterfeit goods entering any U.S. port;<sup>18</sup>
6. Department of Homeland Security (DHS) and CBP application of new technologies and new analytical techniques to combat counterfeiting in combination with identification of high-risk companies and shipping techniques, and;<sup>19</sup>
7. Conduct Joint enforcement actions, and actively share information on the movement of suspected fake products.<sup>20</sup>

Marck is of the view that these recommendations and initiatives remain a viable approach to what has otherwise become a frustration of the import laws with regard to China's counterfeit goods flooding U.S. and global markets.

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<sup>16</sup> *U.S. Immigration and Customs Enforcement Fact Sheet, Strategy Targeting Organized Piracy (STOP!)*, 2004

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

#### IV. CONCLUSION

Chinese exports of counterfeit goods flooding into the domestic market adversely affects G.G. Marck & Associates, Inc. because prohibitions against the entry and importation of these goods under U.S. law are routinely skirted. This has had the obvious effect of giving the offending companies the ability to sell products cheaper than their competitors and to produce a higher margin of profit. These companies are doubtlessly encouraged by the seeming lack of resolve of industry and government to take effective preventative measures to change the status quo. Marck appreciates the opportunity to present these materials in furtherance of its continuing efforts to address the continuing harm from these trade realities.

The Government of China has a long history of effectively encouraging production of counterfeit products in its country. These policies of the Chinese government accomplish two goals. First, they strengthen their global position through profiteering from economies driven by counterfeit goods manufacturing and distribution, and second, they decrease the competitiveness of U.S. businesses. To this end, Marck continues to take measures to combat the exportation of counterfeit goods from China and to raise industry and government awareness of the extent of the problems such exports are creating.

Marck reiterates its support of the global enforcement proposed under the ACTA. As discussed, Marck is of the view these enforcement efforts could be further enhanced through incorporation of the STOP! initiatives and a certification and inspection process as effective means of deterring both supply and demand for Chinese counterfeit goods. United States'

companies competing and sourcing products from the various trading regions are painfully aware of the reality these Chinese products have on their day to day operations and their profitability. For these reasons, we would welcome the opportunity to discuss any aspect of these matters as may be necessary in furtherance of the USTR's goals in establishing its Anti-Counterfeiting Trade Agreement.



**MOTION PICTURE ASSOCIATION  
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(202) 293-1966**

March 20, 2008

Rachel Bae  
Director for Intellectual Property and  
Innovation  
Office of the US Trade Representative  
600 17<sup>th</sup> Street, NW  
Washington, DC 20508

**Re: Request for Public Comment on the Anti-  
Counterfeiting Trade Agreement (ACTA)**

Dear Ms. Bae:

This filing responds to the request for written submissions appearing on February 15, 2008, in the Federal Register. The request invites submissions from the public on the specific matters that should be the focus of negotiations for an Anti-Counterfeiting Trade Agreement (ACTA).

Piracy has a devastating impact on the health and competitiveness of the US motion picture industry. The ACTA has real potential to improve the protection and enforcement of intellectual property rights in major markets around the world. Equally important, it has the potential to shift the international debate on intellectual property rights in favor of international cooperation and strong intellectual property enforcement standards.

To meet its potential, however, it is imperative that the ACTA build on international norms and establish strong standards for the enforcement of intellectual property rights. The principal objective should be an ambitious agreement that addresses today's challenges and ambition should not be sacrificed for additional signatories or hurried conclusion of negotiations.

MPAA supports the issues and provisions set forth in the USTR fact sheet and offers the following specific recommendations for your consideration --

- The full and effective implementation of the global legal minimum standards embodied in the WCT and WPPT, including those measures to

prevent the trafficking in anti-circumvention devices, should be the baseline for the Anti-Counterfeiting Trade Agreement.

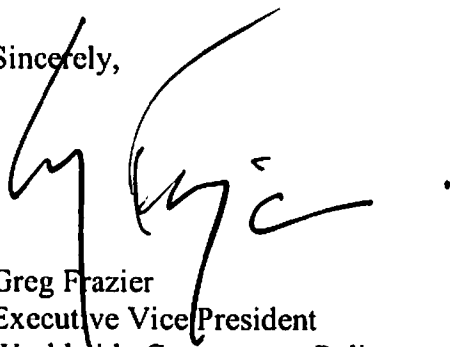
- Practical secondary liability regimes for online infringement are essential to motivate participants to cooperate in implementing the reasonable practices that will make the online marketplace less hospitable for infringers. ACTA parties should refine their secondary liability regimes to reflect the current realities, or to adopt modern, flexible systems where they do not exist. The goal must be to encourage responsible conduct on the part of all parties involved in the transmission of copyright materials.
- ACTA partners should criminalize the unauthorized camcording of motion pictures in theaters, which is imperative to curbing motion picture source piracy.
- Overly strict interpretations of national data privacy rules increasingly impede enforcement against an array of wrongs that occur on the Internet, including copyright theft – often leaving victims without any means of redress. ACTA partners should ensure that the interpretation of data privacy rules appropriately balances the fundamental rights of privacy and property, including intellectual property, in such a way as to encourage meaningful cooperation with telcos/ISPs, in particular the implementation of a “graduated response” mechanism.
- ACTA partners should establish a statutory damages regime that effectively compensates copyright owners and deters piracy, and which could be elected by the infringed party to assist in the calculation of damages.
- The commercial scale test for damages should include harm to the infringed party rather than profit-motive or commercial purpose. The reality is that right holders are also harmed when content is posted to the Internet without charge to the downloader. ACTA partners should clarify that “commercial-scale” includes harm to the infringed party would address this situation.
- ACTA partners should provide *ex-officio* authority for law enforcement officials with respect to IPR offenses, without need for a formal complaint by a right holder. This would address a major impediment to enforcement in many countries.
- ACTA partners should develop effective and deterrent measures to address P2P streaming of pirated content.
- The failure of judges and other enforcement authorities to impose penalties at a level that effectively deters further infringements is a perpetual obstacle to reducing piracy around the world. ACTA partners should ensure that the remedies available to right holders are sufficient to deter future infringement.
- ACTA partners should aim to prevent piracy of satellite and cable television programming by adopting rules to criminalize the willful unauthorized use or distribution of satellite and cable signals, and the underlying copyrighted material.



MPAA views these negotiations as a unique opportunity. Moving enforcement standards from statutory law into practical and specific mechanisms to strengthen enforcement is a key next step in the process of improving IPR protection on a global basis. We hope and expect that an eventual agreement will contain a solid legal framework and strong, practical enforcement provisions that can then be adopted by other countries.

MPAA appreciates the opportunity to comment and stands ready to work with the US and its ACTA partners to develop a gold standard agreement.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Frazier', with a large, sweeping flourish above the name.

Greg Frazier  
Executive Vice President  
Worldwide Government Policy

**Before the  
UNITED STATES TRADE REPRESENTATIVE  
Washington, D.C. 20508**

Regarding )  
 )  
Anti-Counterfeiting Trade Agreement )  
(ACTA): USTR Request for )  
Public Comments )  
 )

**COMMENTS OF NAM  
(THE NATIONAL ASSOCIATION OF MANUFACTURING)  
TO THE UNITED STATES TRADE REPRESENTATIVE  
REGARDING  
THE ANTI-COUNTERFEITING TRADE AGREEMENT**

The National Association of Manufacturers (NAM) - the nation's largest industrial trade association - submits these comments in response to the United States Trade Representative's (USTR) request for comments regarding the Anti-Counterfeiting Trade Agreement (ACTA). All NAM member companies understand and realize the damage that counterfeit and pirated products cause to our economic security. Intellectual property (IP) theft in the United States alone is responsible for over \$250 billion a year in lost sales and the loss of a significant number of high-paying jobs; as such, it is a vital matter for business, as well as for labor and government. According to the World Customs Organization, counterfeiting and piracy accounts for almost \$600 billion in lost sales, almost 7% of global trade. Its impact on consumers, however, is no less devastating. IP theft is a health and safety issue that presents a clear and present danger to the public, with sub-standard pirated products that include automobile parts, airplane parts, food, medical devices, electrical supplies, and pharmaceuticals, to name but a few. Despite the daunting scope of the challenges to the international community, we are hopeful.

The Anti-Counterfeiting Trade Agreement stands to be a new type of plurilateral agreement that will advocate high standards for protection of intellectual property in the increasingly competitive global marketplace. The stated purpose of the ACTA is to create an international agreement addressing three

main areas: cooperation, best practices, and a strong legal framework for intellectual property rights (IPR) enforcement. The parties to the proposed agreement are all signatories to the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); this proposed agreement would not change TRIPS, but set a new, higher benchmark for enforcement that countries may join on a voluntary basis.

We commend U.S. Trade Representative Ambassador Susan C. Schwab for her leadership in introducing this proposed agreement, as well as for engaging important trading partners such as Canada, the European Union (with its 27 Member States), Japan, Korea, Mexico, New Zealand, and Switzerland. Because of USTR's effort to address the pernicious problem of IP theft, we express support for the process and submit the following comments to so as to help strengthen the Anti-Counterfeiting Trade Agreement.

### **Increasing National Standards of Enforcement**

The NAM's first set of suggestions would encourage all signatory nations to commit to substantially elevate IPR enforcement resources and efforts within their own borders. In the U.S. Congress, House Judiciary Chairman John Conyers introduced legislation, The Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2007, H.R. 4279, which would strengthen our nation's ability to protect consumers from counterfeit goods. It focuses on six objectives:

- Improving the coordination of federal government IP enforcement resources;
- Better protecting our borders against counterfeiting and piracy by expanding authorities and improving enforcement practices;
- Strengthening criminal enforcement against IP theft by expanding the resource and tools available for law enforcement at the federal, state and local levels;
- Attacking counterfeiting and piracy beyond our borders through improved enforcement training and technical assistance programs with foreign governments;
- Strengthening the ability of rights holders to protect their IP by civil and judicial reform; and
- Decreasing demand by educating consumers about the harms of counterfeiting and piracy.

The NAM is supportive of Chairman Conyers' efforts to protect American consumers and believe that the PRO-IP Act may have some appropriate elements that would further the goals of the ACTA.

With this in mind, the NAM recommends that it will be necessary to establish enforcement practices that promote strong intellectual property protection in coordination with rights holders and trading partners. Such “best practices” should support:

- Increasing resources devoted to IP enforcement including the creation of specialized IP expertise groups within law enforcement and the judiciary to ensure effective handling of IPR cases;
- Sufficiently penalizing those who engage in counterfeiting/piracy activities;
- Instituting efficient border enforcement procedures, including the acknowledgement that the extension of controls to goods-in-transit is critical;
- Encouraging the use of innovative authentication technologies such as micro-printing techniques, Radio Frequency Identification (RFID), and Smart Cards to safeguard against counterfeiting;
- The establishment of formal and informal public/private advisory groups;
- Creating processes to examine digital piracy and the theft of information technology; and
- Measures for raising consumer awareness of the growing threat that substandard counterfeit/pirated products pose to their health and safety.

### **Increasing International Standards of Cooperation**

At its very core, the ACTA will need to encourage greater cooperation amongst its signatory nations, and efficient information sharing is the key to this effort – both within governments and amongst governments. Creating a framework where signatories can work together on how they can improve prove data gathering and the sharing of that information will be key to reducing impacts and effects of counterfeiting. As noted above, the PRO-IP Act establishes within the Executive Office of the President the Office of the United States Intellectual Property Enforcement Representative to formulate a Joint Strategic Plan for combating counterfeiting and piracy of intellectual property and for coordinating national and international enforcement efforts to protect intellectual property rights. This position of “IP Czar” would allow for more efficient control of information as well as a single point of authority for enforcement. It would not – nor should not – take the place of the U.S. Trade Representative as our nation’s chief trade negotiator on IP or any other issue. It is the NAM’s recommendation that the ACTA include the establishment of a similar position within each signatory nation’s government.

While all the participants to the proposed agreement have instituted the minimum standards for IP regulation within their own borders, many of them have acceded to regional and bilateral agreements whose obligations go beyond those contained in TRIPS. These include many of the above mentioned

objectives, such as expanding the scope of border measures, broadening the scope of civil and criminal remedies and expanding criminal provisions to cover a broader range of IP infringements. The NAM believes that examining these regional and bilateral agreements may also be helpful in determining the full scope of requirements in the ACTA.

The NAM would like to thank Ambassador Schwab for her leadership in bringing this important consumer health and safety issue to the forefront. By enlisting the support of nations such as Canada, the European Union's Member States, Japan, Korea, Mexico, New Zealand, and Switzerland, a framework for success has been created. We are extremely optimistic that this proposed agreement will result in the amelioration of an problem that has become a plague on industry, labor, governments and consumers alike.

The NAM respectfully recommends these suggestions to the U.S. Trade Representative, for use in developing a strong and successful Anti-Counterfeiting Trade Agreement. We thank you for considering our views, and would be pleased to answer any questions the Ambassador may have.

Respectfully submitted,

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