

Memorandum to: ACTA Negotiators

Subject: Comments and Recommendations on the Consolidated Text of the Anti-Counterfeiting Trade Agreement released on April 2010

From: INTA and ICC BASCAP

Date: June 24, 2010

The International Trademark Association (INTA) and the ICC's Business Action to Stop Counterfeiting and Piracy (BASCAP) initiative appreciate and welcome the release of Consolidated Text of the Anti-Counterfeiting Trade Agreement (ACTA), along with your continued efforts to maintain an open and transparent negotiation process.

We continue to support the objectives and the spirit of ACTA as an agreement designed to build on existing international rules in the area of intellectual property, in particular on the TRIPS Agreement and on addressing counterfeiting and piracy. In that context, we have compiled the attached recommendations and comments, which we hope you will find informative and useful as you endeavor to complete your negotiations. As a preface, we would like to emphasize the following recommendations, which are crucial to creating an ACTA that would make a significant difference in combating trademark counterfeiting and copyright piracy:

1) Scope of IPRs to be covered in ACTA

We have noted that the draft text of ACTA contains language that would include various, if not all, intellectual property rights to be covered under the trade agreement. While we support and believe in the importance of strong enforcement of all IPRs, we urge negotiators to maintain the original narrow scope of ACTA to trademark counterfeiting and copyright piracy. The focus should remain on counterfeits and pirated goods and not general enforcement of intellectual property rights. With the varying stages of protection of IPRs other than trademarks and copyrights – from simple registration of rights to levels of infringement – in many countries, the inclusion in ACTA of additional IPRs will jeopardize the conclusion of an agreement and/or put at risk ACTA's implementation.

2) Inclusion of goods in transit and transshipment

We note that in the Border Measures section, "in-transit" goods remain in brackets. We strongly recommend that "in-transit" be formally included in ACTA. Goods passing through free trade zones (FTZ) and transshipped through multiple ports, create major opportunities for counterfeiters to disguise the true country of origin of goods and contributes to the trafficking of counterfeit and pirated goods. It is critical that customs authorities are expressly given the authority to seize goods in transit that are suspected of being counterfeit and pirated whatever their final destination.

We have also noted a provision in the current text that states: “provide that where shipments are exported from that Party, or shipments are in-transit through that Party, it shall cooperate to provide all available information to the destination Party, upon request of the destination Party, to enable effective enforcement against shipments of infringing goods.” We strongly urge the deletion of this alternative, which ultimately allows the Parties to pass on the responsibility of enforcement against counterfeiting and piracy to another Party. This would allow for criminal counterfeiting networks to take advantage of communication gaps and lengthy coordination among Parties to distribute counterfeit and pirated goods.

3) *De Minimis* provision

We strongly urge the deletion of the *de minimis* provision that would exclude small quantities of counterfeits of a non-commercial nature contained in personal luggage or in small consignments from customs seizures. The demand in counterfeit and pirated goods is a key contributing factor to the growth in counterfeiting and piracy. The *de minimis* exception would send the wrong message to consumers that buying counterfeits is accepted by the government. In addition to suggesting that laws can be disregarded, this inevitably contradicts future public awareness efforts that may be conducted by governments or private organizations. Furthermore, many counterfeiters are now distributing their fakes in small consignments knowing that those are more likely to escape customs inspections. Excluding small consignments would exacerbate this large loophole through which counterfeiters and pirates easily distribute their products.

Please note that our recommendations and comments are organized into a table format for ease of reference. ACTA provisions are listed in the left-hand column as they appear in the released text. The right-hand column contains our views on all or parts of the relevant provision. Due to the length of the ACTA text, we have chosen to only include those provisions of ACTA on which we have comments.

We reiterate our support for the objectives of ACTA and encourage the negotiators to conclude an agreement that will be an effective international mechanism and framework for fighting counterfeiting and piracy. As always, we stand ready to provide further assistance to the ACTA negotiators as you complete your most valuable work.

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