

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.