

Memorandum to: ACTA Negotiators

Subject: Business Perspectives on Criminal Enforcement Provisions

From: Concerned business groups operating in ACTA nations

Date: October 08, 2008

While administrative and civil enforcement are important tools in combating counterfeiting and piracy, they cannot substitute for effective criminal enforcement in addressing today's counterfeiting and piracy issues. The undersigned business associations believe in the critical importance of strict criminal enforcement measures and have compiled the nine critical recommendations set forth below on criminal enforcement provisions for the Anti-Counterfeiting Trade Agreement (ACTA).

We would like to note that some of our recommendations with regards to seizure and destruction of counterfeit and pirated goods, development of calculation methods for fines, providing *ex officio* authority to enforcement officials and elimination of bond requirements to rights holders, among others, appear in previous submissions on border measures and civil enforcement. We have reiterated them in this submission as these provisions should also apply to criminal enforcement.

In some instances, counterfeiting and piracy are conducted by transnational organized crime groups and although some countries have well-developed programs to address counterfeiting and piracy, many governments have insufficient legislative guidance and budget authority to meaningfully deter criminal behavior and prosecute criminals who engage in IP theft. Inconsistencies and differing standards in determining and applying criminal sanctions also add to the many loopholes exploited by infringers to engage in counterfeiting and piracy activities across borders. The business community encourages ACTA negotiators to remove jurisdictional gaps and weaknesses that enable infringers to find safe havens between countries by harmonizing, at an international level, criminal sanctions against counterfeiting and piracy. This would ensure that a common minimum level of deterrence is applied throughout the world through the trade agreement.

We understand that the third meeting of the ACTA negotiators will take place in October 2008. We strongly urge the negotiating countries to continue to engage industry and other stakeholders to create an ACTA with stronger and clearer international guidelines and standards for addressing counterfeiting and piracy. The business associations represented in the memo stand ready to provide further assistance and comments to the drafting process of ACTA.

Recommendations for Criminal Enforcement Provisions

Criminal enforcement provisions in ACTA should:

1. Provide for criminal procedures and penalties to be applied to willful acts of counterfeiting and copyright piracy, which includes acts that cause substantial commercial harm. In addition, governments should treat importation or exportation of counterfeit or pirated goods as illegal activities subject to criminal penalties.
2. Encourage judicial authorities to impose penalties at levels sufficient to deter future infringements, including imposing imprisonment and fines for willful counterfeiting and piracy actions. Governments should be encouraged to develop calculation methods that lead to fines against counterfeiters and pirates commensurate to the harms caused in order to increase the deterrent impact of fines, and impose sanctions, such as contempt of court, for failure to pay such fines.
3. Criminalize the laundering of proceeds from counterfeiting and piracy, to ensure that counterfeiters and pirates are not profiting from their crimes and strengthen confiscation regimes that provide for the identification, freezing, seizure and confiscation of funds and property acquired through counterfeiting and piracy.
4. Take measures to disrupt the sale of counterfeit and pirated goods on leased premises by establishing a legal framework under which landlords would be held liable for failure to terminate existing leases and preventing or otherwise controlling future IP violators on their premises.
5. Ensure the ability of law enforcement authorities to take action at their own initiative and provide relevant officials with the authority to seize all materials and implements used to manufacture or package counterfeit and pirate goods and any documentary evidence relevant to the offense and assets traceable to the infringing activity. Officials should also be given the authority to impose imprisonment as a sanction against failure to comply with a disclosure order.
6. Require that all counterfeit and pirate goods be destroyed, definitively removed from channels of commerce, or disposed of with the rights holders' consent where there is no health or safety risk. Bond requirements and the imposition of the costs of storage and destruction of goods on rights' holders should be eliminated.
7. Provide prompt and reasonable access by rights holders to relevant documents and information on counterfeiters and pirates held by government agencies for the rights holders' use in conducting private investigations, filing of complaints or pursuing proceedings in the courts or with other government agencies.
8. Create specialized intellectual property crimes investigation and prosecution units in law enforcement and prosecution structures, respectively, and allocate resources towards training judges and other relevant enforcement authorities.

9. Establish a system for exchange of information between relevant enforcement officials in the signatory countries on subjects such as criminal counterfeiters and pirates and best practices in investigating and prosecuting them.

On behalf of:



United Kingdom



European Union



Spain



Germany



Canada



European Union



USA



European Union



Mexico



The European Association of
Trade Mark Owners



USA



Austria



France