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McCoy, Stanford

From: McCoy, Stanford
Sent: Friday, February 20, 2009 9:02 AM
To: Freiberg, Ken
Subject: FW: Transparency soup
Attachments: ACTA transparency.doc; FW: ACTA update

Ken: FYI, below are some mix/match options that came out of brainstorming with Dave and Beth. Attached is an earlier idea I sent to them. Also attached is my message to Peter (following discussion with Dave/Beth) relaying that we would work with OGC to wrestle down the transparency issue. I am not married to any particular approach, but would really like us to have a sense of direction by the time of the ACTA informal on March 4, and a concrete way forward shortly after that. It's clear that the leadership will want a solution on this transparency issue.

From: McCoy, Stanford
Sent: Tuesday, February 10, 2009 4:29 PM
To: Baltzan, Elizabeth; Apol, David; Bae, Rachel S.; Alvarez, Kira M.
Subject: Transparency soup

Some possible ingredients we discussed, as fodder for your memo Beth:

Starting positions: USTR will post on its website the text of the initial U.S. negotiating proposals. Text may include blank spaces or brackets as appropriate.

Initial (prefinal) text: Before the agreement is signed, USTR will post the final negotiated text (which will be subject to a final technical review).

Meta-text: USTR will not disclose U.S. or trading partner proposals as such, but may seek public comments as needed on "proposed text under consideration" in a negotiation, which will not be identified with any government and may include U.S. proposals and/or any non-FGI proposals of trading partners.

Interim text: USTR may release bracketed interim texts if all trading partners engaged in a particular negotiation agree.

More Cleared Advisors: USTR will add more NGOs to cleared advisor groups and/or create new groups to broaden the range of stakeholders who can see nonpublic texts.

Updates: USTR will periodically provide public updates and/or hold public meetings on the progress of the negotiations.

Open-Door: USTR will maintain an open-door policy for meetings with interested stakeholders.

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 Office of the U.S. Trade Representative

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2/25/2009

DRAFT / PREDECISIONAL / DELIBERATIVE

USTR today announced the following steps to enhance the transparency of the ACTA negotiations:

- USTR will post on its website the text of the initial U.S. negotiating proposals.
- Before the agreement is signed, USTR will post on its website the final negotiated text (which will be subject to a final technical review).
- USTR will periodically provide public updates on the progress of the negotiations.
- USTR's ACTA negotiating team will maintain an open-door policy for meetings with interested stakeholders.

Most of the U.S. initial proposals were already put forward last year in the form of "joint proposal" documents that were shared with an expectation of confidentiality. We intend to respect that understanding and not release those documents. However, in the interest of transparency and a fresh start for the ACTA negotiations, we will go back to those documents, pull out everything that reflected what the United States was proposing, and make it available on our website. We will remove any elements that reflected positions of other governments. Public disclosure of positions of our trading partners will be a matter for them to decide.

We have also approached our partners in the ACTA negotiations to suggest new ground rules for the negotiations that would allow for meeting more documents, such as meeting agendas, to be public in the future. At the same time, our proposed new ground rules ensure respect for real expectations of confidentiality that are necessary to the give-and-take of negotiations.

Q. What if you make new initial proposals for other parts of the agreement?

We will follow the same approach of posting initial proposals on our website.

Q. What if U.S. positions evolve during the negotiations? Will you disclose changes?

The public can see how the U.S. position has evolved when the final negotiated text is signed.

Q. Can we see the full draft text of the ACTA?

At this point there is no draft text of the ACTA as such. There are proposals from different participants in the negotiations. Eventually, those proposals will lead us to a single comprehensive text. That final text will be made public before it gets a final technical review and signature. We would need to have further discussions with our trading partners before making any decisions about releasing interim drafts.

Q. What information will remain confidential?

USTR will not publicly disclose information that is exchanged in confidence. The give-and-take of negotiations requires that trading partners be able to exchange views and explore possible ways forward in confidence. For example, documents commenting on proposals, or suggesting possible compromises, would typically be exchanged in confidence and protected from public disclosure.

Q. Will you be following this approach for other trade negotiations, such as free trade agreements, trade and investment framework agreements, and investment agreements?

We'll have to consider that on a case by case. Our announcement today only relates to the ACTA negotiations.

PRINCIPLES FOR THE ANTI-COUNTERFEITING TRADE AGREEMENT

In response to the February 15, 2008 request for comments published in the *Federal Register*, the undersigned entities submit the following principles that should guide the U.S. delegation in negotiating the Anti-Counterfeiting Trade Agreement (ACTA).

- ACTA should focus on the facilitation of legal action against those entities and individuals that intentionally engage in counterfeiting and intellectual property infringement on a commercial scale for commercial purposes. ACTA should not target innocent intermediaries such as shippers, payments systems, search engines, online marketplaces, and Internet access providers that are used by those counterfeiters and infringers. Nor should ACTA target activities that fall within exceptions to exclusive intellectual property rights.
- While the elimination of counterfeiting and commercial infringement certainly is a very important objective, ACTA must ensure that the pursuit of counterfeit and infringing products does not unduly burden legitimate commerce, impede innovation, undermine consumer privacy, or restrict the free flow of information.
- ACTA should concentrate on measures relating to *enforcement* of intellectual property rights, not on substantive issues of intellectual property such as the scope of protection, limitations and exceptions, and secondary liability.
- ACTA should not serve as a vehicle for changing U.S. domestic law relating to intellectual property enforcement.
- ACTA should be technologically neutral and not create disparate burdens or obligations depending on whether a counterfeit product is sold online or offline. Similarly, ACTA should not encourage the imposition of technology mandates, such as the mandatory filtering of Internet traffic.

The Fact Sheet on ACTA distributed by the Office of the U.S. Trade Representative references provisions that may appear in ACTA. The following comments address some of those proposed provisions.

- **Public/private advisory groups.** Any advisory groups formed pursuant to ACTA must represent the broad spectrum of interests, including rightsholders, intermediaries, and consumers.
- **Consumer Public Awareness.** Public education campaigns must present a balanced and accurate view of intellectual property. Consumers should learn not only about exclusive rights, but also exceptions and limitations to those rights. If consumers are presented with simplistic and draconian perspectives, they will