



Homeland
Security

AUG 07 2008

The Honorable Susan C. Schwab
Ambassador
Office of the United States Trade Representative
Executive Office of the President
600 17th Street, N.W.
Washington, D.C. 20508

U.S. TRADE
REPRESENTATIVE

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OFFICE OF
GENERAL COUNSEL

Dear Ambassador Schwab:

I understand that the Office of the United States Trade Representative (USTR) is leading an effort to negotiate a multilateral Anti-Counterfeiting Trade Agreement (ACTA). While the U.S. Department of Homeland Security (DHS) supports this effort, I am concerned that some possible outcomes of the ACTA negotiations may harm national security and the ability of Customs and Border Protection to exercise managerial discretion in setting priorities for intellectual property-right (IPR) enforcement.

I urge the USTR to consider the DHS concerns laid out in the enclosed white paper and to adopt the recommendation of including a preamble in the ACTA language that will safeguard DHS against any resource commitment that may detract from other important Departmental priorities. While IPR enforcement remains a duty of DHS, we must balance our resources to accommodate both our traditional customs revenue functions and our critical anti-terrorism mission.

I would be happy to discuss this issue with you further.

Sincerely,

Stewart Baker
Assistant Secretary
for Policy

Enclosure



**Homeland
Security**

**DHS Policy Position on the Border Measures Draft Language
of the Anti-Counterfeiting Trade Agreement**

The United States Trade Representative (USTR) is leading an effort, co-sponsored by the Government of Japan (GOJ), to negotiate a multilateral Anti-Counterfeiting Trade Agreement (ACTA). The U.S. Department of Homeland Security (DHS) supports this effort, but is concerned that some possible outcomes of the ACTA negotiations may harm national security and the ability of Customs and Border Protection (CBP) to exercise managerial discretion in setting priorities for intellectual property-right (IPR) enforcement.

DHS, therefore, seeks to ensure that, in the ACTA negotiations, (1) CBP will not be committed to IPR-enforcement processes we may need to alter in the future, (2) other nations' customs and border authorities will not be required or encouraged to devote resources to IPR enforcement at the expense of more important anti-terrorism efforts, and (3) DHS's discretion to set priorities in its own border-enforcement mission will not be restricted.

Given these significant concerns, DHS suggests that, as ACTA is reduced to a written proposal, a preamble be included in the proposal clearly stating that ACTA does not obligate the U.S. government (or other nations) to act in any way that might infringe on national security priorities.

Recommendation

DHS urges USTR to add the following passage to the ACTA preamble in order to mitigate DHS concerns:

The United States approves the Anti-Counterfeiting Trade Agreement (ACTA) with the following reservations, which shall apply to the obligations of the Signatories under this agreement:

That nothing within this agreement shall be understood to restrict the United States customs authority [or the customs authorities of other Signatories] to exercise discretion in setting the priority given to intellectual property right enforcement and to reprioritize its enforcement activities in response to national and homeland security or other changing circumstances.

That nothing within this agreement shall be understood to limit the United States customs authority [or the customs authorities of other Signatories] to establish or revise future fee collection policy.

That nothing within this agreement shall be understood to require Signatories to significantly alter the allocation of intellectual property right and customs enforcement authority and resources to the detriment of existing responsibilities and higher priority mission areas, such as national and homeland security.

DHS concerns with ACTA explained:

1. ACTA language could bind the United States to unrealistic and unfavorable rules relating to fees for services

The proposed language on the "Border Measures" section of ACTA could codify in international law, certain provisions that would be unfavorable to CBP and, once adopted as an international agreement, even Congress would be unable to alter the rules to make them more economically justifiable. For example, the proposed U.S.-Japan language of the ACTA Border Measures section currently states:

Chapter 2, Section 2.12: *"Each Party shall provide that any application fee, merchandise storage fee, or destruction fee to be assessed in connection with the procedures described in this Section shall not be allocated in a manner or set at an amount that unreasonably burdens right holders or unreasonably deters recourse to these procedures."*

While CBP currently bears the costs of storage and destruction, it does so as a matter of grace. The cost of enforcing private rights, such as trademarks, can reasonably be placed on the beneficiary. That is particularly true in a context such as this; rights holders often have a choice whether to bring enforcement actions on their own or through border measures. That choice should not be influenced by the consideration that using government enforcement resources will save the rights holder the cost of storing and destroying the infringing goods. For these reasons, if CBP concludes that waiving storage or destruction fees has created an unhealthy incentive to shift enforcement from the private sector to government, it should have authority to recommend that fees for storage and destruction be charged to the beneficiary of the enforcement action.

This section of ACTA could be interpreted as taking away that authority and protecting rights holders from measures to recover costs incurred for their benefit. This is imprudent and difficult to justify on fiscal or policy grounds.

2. ACTA would expend international goodwill by requiring other governments to change organizational and legal structures

The language being proposed under the ACTA negotiations seeks to put other countries' IPR enforcement on par with U.S. standards. For example, the proposed language states:

Chapter 2, Section 2.7: *"Each Party shall provide that its customs authorities may act upon their own initiative, to suspend the release of suspected counterfeit or confusingly similar trademark goods or suspected pirated copyright goods with respect to imported, exported [Option US:, or in-transit] goods including suspected counterfeit or confusingly similar trademark goods or suspected pirated copyright goods admitted to, withdrawn from, or located in free trade zones."*

In essence, this language would encourage foreign customs authorities to bar imports and exports if the authorities concluded on their own initiative that the goods *might* violate copyright or be confusingly similar to trademarked goods. These are sweeping powers to act against suspected IP violators, and the powers can easily be misused either intentionally or unintentionally. Misuse could even harm small U.S. exporters competing with foreign companies favored by local governments. Generally speaking, the customs agencies of the other participating countries do not possess the same level of authority as CBP – many of them are not designated competent authorities to make determinations on IPR infringements. This substantially increases the risk that the sweeping powers will be misused.

The draft agreement also seeks to establish processes and timelines regarding infringement determination, penalty application, and destruction of goods. Hence, for these countries to comply with the proposed ACTA language would require significant legal and organizational changes, as well as resource commitments for staffing and training purposes. No one is more aware than DHS of how costly a reorganization of government functions can be. With this proposal, we are running the risk of setting off turf wars inside other governments – and of alienating the agencies that have IPR authority today. This could cost us cooperation from those agencies. Without a clear, demonstrated improvement in enforcement from such a reorganization, we should not push reorganization as a U.S. priority in the talks.

3. ACTA could limit CBP's discretion in its enforcement of IPR

While recognizing that CBP continues to maintain traditional customs responsibilities, including IPR enforcement, the current ACTA language would require DHS to allocate a certain level of resources to enforcing trademark and copyright IPR infringements and restrict the Department's flexibility to re-prioritize the issue in the future. DHS has been fully supportive of IPR enforcement, but it does not support the U.S. Government (USG) entering into international obligations that would limit CBP's future ability to respond to changing circumstances by reprioritizing all of its enforcement activities. In particular, the USG should not obligate the Department, through an international document, to pursue IPR enforcement at the expense of other serious enforcement priorities, and certainly not at the expense of the anti-terrorism mission of the Department. CBP should retain the ability and flexibility to re-prioritize resources and attention to the ever-changing demands facing the Department.

Similarly, we should also be quite cautious about pressing foreign governments to "fence off" dedicated resources to non-terrorism mission areas, for fear of sending a message that would be inconsistent with the need for increased cooperation on and commitment of resources to anti-terrorism activities, which we emphatically advocate in other multilateral and bilateral venues. In managing relationships with international counterparts, DHS has and will continue to emphasize resource commitment and cooperation on priority anti-terrorism mission areas and will appropriately try to minimize expending our partners' goodwill in areas of lesser priority.