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Computer & Communications Industry Association

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*Via Electronic Mail*

Honorable Member of the European Parliament  
Mr. Jerzy Buzek  
President of the European Parliament  
Paul-Henri Spaak  
11B011  
60, rue Wiertz  
B-1047 Brussels, Belgium

*Re: Concerns regarding IP provisions in Free Trade Agreements and the Anti-Counterfeiting Trade Agreement*

Dear President, Dear Jerzy:

The Information and Communication Technology (ICT) sector supports free trade and the negotiation of international free trade agreements (FTAs) as a way to foster development of its products and services in a growing number of countries around the world.

The leading role of Europe in the deployment of broadband networks and the move towards next-generation networks offers promising opportunities for European economic growth. At the same time, the online environment enables European businesses to more effectively compete on the world stage. It also provides the platform for new content and business models to expand users' legitimate access to the great diversity of European content.

In order for Europe to fully benefit from these opportunities, trade agreements must support the balance established between the protection of Intellectual Property Rights (IPR) and the liability limitation of Internet Service Providers (ISPs). If creative content needs to be protected online, it should not be done by imposing measures hampering the uptake of ICT products and services, which - among other benefits - support new ways to develop and use creative content.

Failing to appropriately replicate ISP liability limitation provisions in trade agreements would undermine the capacity of the ICT sector to innovate and extend the reach of its services in new countries. Unbalanced trade agreements could produce similarly unbalanced legislation compelling ISPs to implement policies governing users' communication that would threaten some of Europe's core values such as freedom of expression, access to information, and protection of users' privacy.

Recent developments in international trade agreements are raising serious concerns in that respect. The proposed agreement with Korea, initialed in Brussels on 15 October 2009, contains provisions that create unnecessary and unjustified liability for technology and Internet companies.

- *Criminalizing “aiding and abetting” IPR infringement may unintentionally create liability for ISP and deter innovation.* The proposed FTA extends criminal liability to actors to “aid and abet” commercial counterfeiting and piracy (art. 10.57). Due to the breadth and vagueness of what constitutes aiding and abetting criminal conduct, an ISP or online service provider may be alleged to have ‘aided or abetted’ a counterfeiter or pirate to whom it unwittingly provided service in the ordinary course of business.

If such measures are envisioned in the 2006 proposal for a “Directive on criminal measures aimed at ensuring the enforcement of IPR,” this directive has not been adopted by the European Council and Parliament. It is interesting to note that the European Parliament first reading report proposed provisions to prevent misuse of such criminal measures, which is not provided for in the proposed FTA. As a result, it is not appropriate for the proposed FTA to include such measures, and doing so raises issues regarding the Commission’s negotiating mandate. Aid-and-abet liability should be removed from the proposed agreement.

- *The lack of appropriate ISP liability limitations or related copyright limitations and exceptions exacerbates the risks created by broad liability rules.* While the proposed agreement contains liability limitation for “mere conduit,” “caching” and “hosting” (10.63 to 10.65), Article 10.62 introduces an ill-defined requirement, nullifying the application of these provisions by limiting their application to the cases where services providers are “in no way involved with the information transmitted”.

This ill-defined requirement does not reflect recital 43 of the E-commerce Directive, which states that ISPs are allowed to make technical manipulations in the course of the transmission provided that these manipulations do not alter the information transmitted. The proposed agreement should be amended to fully reflect on the EU framework for ISP liability limitations.

The Korean FTA provisions are particularly worrying in the context of the on-going negotiations of the Anti-Counterfeiting Trade Agreement (ACTA). While acknowledging the need to protect IPR, the CCIA questions the attempt to set new international enforcement standards through trade agreements rather than a conventional legislative process. The lack of transparency in the negotiation of this enforcement-focused exercise is even more alarming because of the wide range of business and public interests that could be affected by the agreement.

The CCIA would like to thank you for your consideration of our concerns and invites for further discussions in our newly established Brussels office.

Sincerely,

Erika Mann  
Executive Vice-President  
Computer & Communications Industry Association (CCIA)