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Re: Anti-Counterfeiting Trade Agreement (ACTA): Request

The undersigned associations and companies appreciate that the United States Trade Representative (USTR) and the Department of Commerce have organized a public meeting to consult with interested parties on the proposed ACTA anti-counterfeiting agreement. We also appreciate the call for additional comments prior to the public meeting. As you may be aware, many of the signatories below have submitted extensive prior comments and expressed a variety of procedural and substantive concerns about the ACTA agreement, which we very much appreciate your considering.

We submit these additional brief comments because we have a strong interest in ensuring that the "Internet provisions," which we understand will presently be under discussion, not disrupt the delicate balance with respect to Section 512 struck in the Digital Millennium Copyright Act, result in increased liability for intermediaries or adopt solutions that directly or indirectly suggest changes to U.S. law.

We understand that one idea under discussion is the possible inclusion of an abbreviated form of the Digital Millennium Copyright Act into ACTA. Given the complexity of Section 512, and the delicately arrived-at compromise contained in that Section, we think it ill-advised to include this (or any other) provision of the DMCA in the Agreement in the first place. Nevertheless, if the parties decide to incorporate Section 512, we strongly encourage USTR to adhere closely to the DMCA safe harbor language (17 U.S.C. §512) contained in prior FTAs. It is important to keep in mind that each word in Section 512 of the DMCA intentionally appears in the statute as a result of Congressionally-supervised industry negotiations. Removing or altering the substantive provisions of the DMCA could result in significant unintended consequences to U.S. law.

For example, any language relating to the termination of repeat infringers under Section 512(i) should include the FTA/DMCA language that emphasizes that termination occur only "in appropriate circumstances." Removing the important words "in appropriate circumstances" could lead to arguments that ISPs automatically terminate infringers in all cases without the necessary discretion intended by Congress. Similarly, the obligation for an ISP to comply with "standard technical measures" defines that term as an open and voluntary multi-industry standards process that does not impose substantial costs or burdens on service providers' networks. It is critical that ACTA make clear that limitations not be conditioned on requiring a service provider monitoring its system or network. Similarly, the wording of Section 512(h) addressing the ability of a copyright owner to issue a subpoena for the identity of an alleged copyright infringer must not be abbreviated in a manner inconsistent with the two circuit court decisions (*RIAA v. Verizon and RIAA v. Charter)* that have held that the 512(h) subpoena applies only when the alleged infringing material resides on the service provider's system or network. These are only a few examples of how changes to the DMCA's language could affect U.S. law. Finally, it should be noted that if the DMCA is included in ACTA, it

must only apply to copyright and not to the inapplicable areas of trademark law or trademark counterfeiting.

We also understand that there is a possibility that other sections of ACTA may propose the discussion of "best practices" including future government-imposed private sector agreements on subjects that are either inconsistent with existing U.S. laws or would inevitably lead to changes in U.S. law. As you are aware, numerous discussions on best practices are already occurring between companies in many different countries as part of private commercial agreements in the marketplace. Government-led negotiations roping in different private industry sectors are inappropriate for an international trade agreement. These kinds of discussions will result in international governments picking industry winners and losers, accommodating a long list of changes to law at the expense of consumers and other important industry sectors.

Although we can only glean a general idea of what some of these proposed "best practices" might be from the prior submissions of the copyright and trademark communities, it is clear that virtually all these ideas may have significant implications for U.S. law:

1. The "best practices" idea of encouraging government-led discussions on a "graduated response" three strikes approach to termination of repeat infringers re-opens the DMCA. The graduated response could easily take away the discretion ISPs were given by Congress to terminate repeat infringers only "in appropriate circumstances."
2. Discussions to extend the DMCA's "take down" requirements beyond copyrighted materials that are hosted on the service providers' network, including those transmitted over the ISPs' networks, drastically narrows the DMCA's "mere conduit" provision in Section 512(a) and expands the take down requirements applicable only to Sections 512 (c) and (d).
3. Any proposal to extend the idea of "take down" to trademarks, including trademark counterfeiting, will require changes to the Lanham Act. Trademark takedowns require a new statutory scheme imposing secondary liability where none exists today. Such an idea would likely require a DMCA-like limitation of liability under the Lanham Act.
4. Any discussion of "best practices" regarding the use or testing of filtering technologies would also require changes to both the DMCA and existing trademark law. No obligation exists today to filter under U.S. law. In fact, Section 512(m) of the DMCA expressly states that none of the obligations in the DMCA are conditioned on the service provider monitoring its service. Filtering obviously has significant privacy, technical, due process and cost concerns that would implicate many other U.S. laws.
5. Discussions regarding "take downs" of words or terms in search engines or marketplace sites raise First Amendment issues and weaken the protections afforded under Section 230 of the Communications Act.
6. Efforts to impose new duties on payment intermediaries to take down, disrupt, monitor or interfere with financial transactions would impose new liabilities for the financial services sector and require changes to U.S. laws.

7. New practices relating to the proposed "right of information" will require amendments to a host of existing federal and state privacy laws, trademark laws and the DMCA. The Section 512(h) subpoena narrowly applies to situations where the content alleged to be infringed is hosted on the service provider's system or network.

For all these reasons, we believe that it is critical that any discussions of "Internet issues" in ACTA be carefully circumscribed and consistent with U.S. law. We cannot know, at present, whether the current draft actually poses the concerns that we have pointed to. Conversely, there may be other entire and separate areas about which the undersigned will express concern once the draft provisions are known.

All solutions contained in ACTA, whether they be immediately applicable or forward-looking in nature, must avoid the unintended consequences of requiring changes to U.S. laws. USTR, in its important role of seeking a balanced agreement that addresses counterfeiting and piracy, should not be placed in the role of influencing changes, directly or indirectly, to U.S. law.

Thank you for your consideration,

American Association of Law Libraries

American Library Association

Association of Research Libraries

Center for Democracy & Technology

Computer & Communications Industry Association

Consumer Electronics Association

Digital Future Coalition

Entertainment Consumers Association

Home Recording Rights Coalition

Information Technology Association of America

IP Justice

Intel Corporation

Internet Commerce Coalition

Knowledge Ecology International

Medical Library Association

NetCoalition

Public Knowledge

Special Libraries Association

US Internet Industry Association

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