

United States Senate

WASHINGTON, DC 20510

January 6, 2010

The Honorable Ron Kirk
United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Dear Ambassador Kirk,

I write today to learn more about the Anti-Counterfeiting Trade Agreement (ACTA), on which your office is leading the negotiations on behalf of the U.S. As the world's largest market, the U.S. has disproportionate ability to shape international economic accords so, from my perspective, American policy makers must be very thoughtful about how any international agreement will impact American and overseas producers and consumers.

Members of civil society have approached me with concerns about the potential outcomes of ACTA and the process by which it is being negotiated. I feel strongly that in order for our nation to effectively tackle foreign barriers to goods designed or produced in America, we must employ a trade policy that is clear and broadly compelling. I commend you and your office for taking bold, unprecedented steps to promote transparency around the nation's international trade agenda. Regarding the discussions on the ACTA, I respectfully suggest that the objectives behind the negotiations still remain inadequately clear to the American public. I believe that the specific objectives that are held by the office of the United States Trade Representative (USTR) for the purposes of negotiating ACTA should be clearer in order to help build broad public support for an agreement that appropriately seeks to strengthen enforcement of Intellectual Property Rights (IPR). I have taken the time to propose several questions that, once answered, I believe will go a long way to providing the clarity that the American public needs and deserves in order to more fully support the ongoing negotiations.

1. I understand that the office of the USTR has indicated that no agreement would be made that would require a statutory change to U.S. law. However, are you also reviewing negotiating proposals to ensure that no agreement would constrain the ability of the Congress to reform our domestic IPR laws?
2. In what ways are you taking steps to ensure the ACTA will not interfere with public health flexibilities included under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and the Doha Declaration on TRIPS and Public Health?
3. What types of IPR do you seek the ACTA to cover and how do you define "counterfeit"?

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C: Reif

Jimenez

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GENERAL COUNSEL
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4. If you are negotiating provisions in the ACTA that address the enforcement of patents please help me understand your positions related to:
 - a. The current U.S. practice of considering the possibility of imposing royalty payments in lieu of an injunction to those found infringing upon a patent;
 - b. Enabling the unfettered movement of non-counterfeit pharmaceutical products and active pharmaceutical ingredients that may move through national markets with very different patent landscapes, including for example, to national developing country markets where the U.S. supports treatment programs for HIV/AIDS and other diseases;
 - c. Commitments, if any, you are seeking related to parallel trade;
 - d. The willful movement of patent infringing goods as unlawful activities that could be subject to criminal penalties; and
 - e. Measures to ensure that foreign entities cannot block access to U.S. goods by using dubious foreign patents?
5. For the purpose of providing enforcement procedures against acts of copyright infringement under Article 41 of the TRIPS agreement, what legal incentives are you seeking to encourage Online Service Providers (OSPs) to cooperate with copyright owners to deter the unauthorized storage or transmission of copyrighted materials?
6. With respect to limitations in U.S. law regarding the scope of remedies available against OSPs for copyright infringements that they do not control, initiate, or direct, and that take place through systems or networks controlled or operated by them or on their behalf, are you seeking obligations on OSPs as a condition of qualifying for such limitations:
 - a. Which are more specific than the obligations under U.S. law to, in appropriate circumstances, terminate services of repeat infringers of copyrighted work?
 - b. To monitor consumers' online behavior to identify activities related to copyright infringement?
 - c. To provide copyright owners the ability to expeditiously receive information identifying the person allegedly infringing upon a copyright?
7. Do you intend to resist efforts to expand the circumstances in which a rights-holder may, for the purpose of collecting evidence to support the enforcement of IPR, obtain any information that the infringer or the alleged infringer possesses or controls regarding any aspect of the infringement or the alleged infringement? What tools are available to assist rights-holders in obtaining information pertaining to infringement of their property online?

8. To what extent are you advocating that border measures be applied to goods-in-transit, and are you willing to seek removal of any provision in the agreement that applies border measures to goods-in-transit?
9. Are you seeking any commitments related to third-party liability for IPR infringements and, if so, what is the outcome that you seek?
10. Are you taking any positions in the ACTA negotiations that, if successful, would commit the U.S. or any ACTA parties to obligations currently found under the Digital Millennium Copyrights Act?
11. Are you proposing any means to remove impediments to, or encourage, inter-industry arrangements to reduce the risk of piracy and facilitate its detection and elimination, and if so, how?

I thank you in advance for a prompt response to these questions and look forward to working with you on these and other important matters.

Sincerely,

A handwritten signature in black ink that reads "Ron Wyden". The signature is written in a cursive, slightly slanted style.

Ron Wyden
United States Senator