

United States Senate

WASHINGTON, DC 20510

October 19, 2010

David J. Kappos
Under Secretary of Commerce for Intellectual Property
Director of the United States Patent and Trademark Office (USPTO)
P.O. Box 1450
600 Dulany Street
Arlington, Virginia 22313-1450

Dear Mr. Kappos:

We write regarding the proposed Anti-Counterfeiting Trade Agreement (ACTA) and its potential implications for existing United States law. The parties to the negotiations released a near-final draft of the agreement following the conclusion of the final round of negotiations in Tokyo, Japan, on October 2 (ACTA Draft).

It is our understanding that ACTA has been negotiated as an "executive agreement," not requiring Congressional approval, on the premise that it would not require changes to U.S. laws. We request that you examine the ACTA Draft in light of laws within the jurisdiction of your office and advise us of your conclusions at your earliest opportunity.

We request that your assessment include, but not be limited to, specific consideration of the following provisions of the ACTA Draft:

- Article 2.X: INJUNCTIONS
- Article 2.2: DAMAGES
- Article 2.3: OTHER REMEDIES
- Article 2.X: BORDER MEASURES

Since retention or deletion of the bracketed Footnote 2 has potential implications for U.S. patent law, we request that you examine both possibilities as part of this assessment. In particular, please address whether the USPTO would endorse the standards for damages set out in Article 2.2 of the ACTA Draft, in the event patents were not excluded under Section 2 of the final ACTA agreement, including the following language from Paragraph 1 as it regards damages for the infringement of patents in the United States:

"In determining the amount of damages for infringement of intellectual property rights, its judicial authorities shall have the authority to consider, inter alia, any legitimate measure of value submitted by the right holder, which may include the lost profits, the value of the infringed good or service, measured by the market price, the suggested retail price."

Further, we request that your assessment include, but not be limited to, consideration of the following provisions of U.S. law, as well as state sovereign immunity, as established by the U.S. Supreme Court in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank et al. (98-531) 527 U.S. 627 (1999) and subsequent U.S. case law.

Patents

- 35 USC 271(e)(6)(B-C) - Non-disclosed biological product patents
- 35 U.S.C. 287 - Limitation on damages and other remedies; marking and notice. In particular, the provisions of 35 USC 287 (c) with respect to a medical practitioner's performance of a medical activity that constitutes an infringement of patent.

Trademarks

- 15 USC 1114 - Remedies; Infringement; Innocent Infringement by Printers and Publishers. In particular, the several limits on remedies set out in 15 USC 1114 (2).

Copyrights

- 17 USC 512 - Limitations on liability relating to material online.

Thank you very much for your timely attention to this request. Please feel free to contact Michael Behan in Senator Sanders' office at michael_behan@sanders.senate.gov or 202-228-6349 with any questions. We look forward to reviewing your analysis.

Sincerely,



BERNARD SANDERS
Unites States Senator



SHERROD BROWN
Unites States Senator