May 27, 2010

Ambassador Ron Kirk
United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508-0002

Dear Ambassador Kirk:

As representatives of the U.S. broadband, online services, telecommunications, Internet applications and e-commerce industries, we write to thank you and your staff for your efforts to date to negotiate a balanced Anti-Counterfeiting Trade Agreement, and to urge that you make it a top priority in the remaining negotiation sessions to enhance protections for innocent Internet intermediaries (e.g., ISPs, network operators, web hosts, search engines, and e-commerce platforms) so that they are commensurate with provisions in current U.S. law and avoid non-tariff trade barriers to this substantial and growing part of the U.S. economy in the global marketplace.

We support the goal of strengthening enforcement against counterfeiters and copyright infringers, are supportive of many provisions in ACTA, and appreciate that U.S. negotiators do not intend to alter U.S. law in the course of negotiating this trade agreement.

However, after carefully reviewing the April 21st text, we are concerned that this text is currently written in ways that do not reflect the balance in existing U.S. law and create several serious risks for the continued growth and expansion of the Internet. If a significant number of bracketed provisions are not resolved in a manner protective of Internet intermediaries and consistent with existing safe harbors, exceptions and limitations in U.S. law, we are concerned that ACTA will have serious unintended consequences by exposing American companies to new legal risks in international markets.

These concerns are not theoretical. They are of particular concern to us because of recent court decisions in Europe, including: (1) criminal convictions in Italy of individual Internet company executives because of third party content posted to their servers, (2) unfeasible injunctions and very large monetary awards in France against an e-commerce company for not preventing third party behaviors that cannot be entirely prevented, (3) a court order against an ISP in Belgium to engage in the technologically impossible task of completely blocking peer-to-peer infringement of protected works across the ISP network, and (4) court decisions in France barring any online resale of lawfully purchased, authentic products, and a court decision in Germany enjoining online resale of such products without establishing a brick and mortar presence in the country. All of these results differ sharply from outcomes under U.S. law, and appear inconsistent with the European Union’s own E-Commerce Directive.
We are concerned that without important changes, the ACTA text will encourage more of the following sorts of results, none of which are allowed under U.S. law:

- criminal convictions for third party users’ content of which an Internet intermediary is unaware,
- selectively imposed injunctions requiring Internet intermediaries to monitor for favored home industries’ goods,
- court ordered requirements to re-engineer networks or website technologies to attempt to filter out disfavored content, and
- court injunctions banning online resale of lawfully purchased goods.

These obstacles function as non-tariff trade barriers, but risk being legitimized under a Trade Agreement that the U.S. Government is championing.

Thank you in advance for considering our views.

Amazon
eBay
Google
Internet Commerce Coalition
NetCoalition
Time Warner Cable
US Internet Industry Association
US Internet Service Provider Association
US Telecom Association
Verizon
Yahoo!