



**Comments Submitted by Google Inc.
Regarding the Anti-Counterfeiting Trade Agreement
In Response to USTR Public Notice of September 5, 2008 (73 FR 51860)
September 17, 2008**

Google Inc. appreciates the opportunity to comment on the pending negotiations for the proposed Anti-Counterfeiting Trade Agreement (ACTA). We have three areas of concern: (1) the scope of the issues proposed to be covered in the agreement and the competency of an Executive agreement to address such issues; (2) the alacrity with which the agreement is being negotiated and the need for transparency and openness to ensure a balanced agreement reflective of the balance in U.S. law; (3) specific substantive provisions affecting intermediaries, such as Internet Service Providers (ISPs) and other innovative companies. We address these below.

I. The Scope of ACTA

The ACTA should not address issues beyond border and customs enforcement issues. Internet companies and other intermediaries, like Google, telecom companies and ISPs more generally, do not engage in counterfeiting and piracy; they are legitimate businesses critical to the U.S. economy. To impose potential liability and obligations on them, or to dictate terms of substantive intellectual property law that affect Internet intermediaries, is shooting at the wrong target, potentially contrary to U.S. law, and in any event not appropriate subject matter for an Executive agreement not submitted to the Congress.

U.S. law regarding ISP/intermediary obligations and liability is sensitive and carefully balanced; there are ongoing legislative debates and litigation in domestic courts that seek to balance the interests of right holders according to the Congressional policy of encouraging innovation. Indeed, a decision this summer from the Second Circuit (the *Cablevision* case) calls into doubt what prior U.S. FTAs had assumed was U.S. law on temporary copies. A trade agreement should not affect or freeze these developments (especially one that will not even be submitted to the Congress). For this reason, provisions on obligations and liability of Internet intermediaries, such as ISP safe harbors, technological protection measures, and statutory damages, have no place in ACTA.

II. Process and Transparency

If, despite the concerns of a number of intermediaries, ACTA is to cover issues beyond border and customs enforcement issues, we believe it will be challenging to secure a balanced agreement based on full consultation with all stakeholders in the ambitious time frame signaled by the Administration (the end of the year). Given the complexity of the issues and range of U.S. economic interests at stake, such an agreement should not be negotiated on a rushed, artificial schedule.

Whatever the schedule, it is critical that U.S. negotiators pursue this agreement in a transparent, consultative manner. The issues under consideration are actively disputed and are of tremendous economic importance to Internet intermediaries like Google. We appreciate USTR' and Commerce's invitation for comments and the September 22 public meeting as a good first step. Given the critical economic interests at stake and the careful balance reflected in U.S. law, the key affected industries need an opportunity to review and comment on the specific proposals before they are offered and with sufficient time to comment constructively and intelligently. Consultation should be meaningful and genuine.

We in particular want to emphasize the importance that this agreement not tilt the balance of interests, even inadvertently, among key U.S. economic stakeholders. Google Inc. and other Internet companies contribute significantly to the U.S. economy and represent one of the United States' strongest areas of growth. Google alone has approximately 20,000 employees in the United States and throughout the world. Google is the world's leading search engine; YouTube is the world's leading video hosting service. In addition, Google is a leading provider of email and many other Internet services. Much of Google's success is founded upon its partnerships with small businesses, as Google last year provided \$4.5 billion to its online advertising partners. There are of course many other Internet companies and other companies that provide products and services related to the Internet. A 2007 study showed that these products and services accounted for \$4.5 trillion in revenues and \$2.2 billion in value added for the United States in 2006. They are directly responsible for more than 18% of US economic growth, significant U.S. exports, and nearly 11 million American jobs.¹

Indeed, the United States economy has led investment in the growing Internet space and U.S. Internet companies are leaders in Internet e-commerce in part because of the balance of U.S. law – a position that should not be put in jeopardy through an overbroad trade agreement.

The interests of Internet and other intermediary companies therefore need to be carefully factored in as the U.S. government formulates its negotiating positions for ACTA. Internet intermediary companies should have a seat at the table and receive the same consideration in negotiating positions that right holders do.

¹ Computer & Communications Industry Association, Fair Use in the U.S. Economy.

III. Core Issues Affecting Internet Companies

As noted above and already expressed to USTR, Google believes strongly that Internet issues should not be addressed in ACTA. But recognizing that U.S. officials are seeking to develop negotiating positions on Internet issues, we outline below some particular bright lines that should not be crossed. Whether other provisions may negatively affect Internet companies can only be determined if Internet companies are closely consulted about proposed ACTA text/positions. Moreover, given the distinct U.S. legal frameworks between copyright and trademark, for example, one must be careful not to over-generalize an intellectual property agreement seeking to address counterfeiting and piracy (and be sensitive to how such terms are defined).

Temporary Copies

ACTA should not address substantive issues of copyright law, including the issue of temporary copies. U.S. law regarding temporary copies is unsettled, and how it is resolved will have significant implications for Internet companies, Internet users, and other intermediaries. Indeed, in August 2008, a key U.S. court rejected a view of U.S. law on temporary copies that had been previously considered by some to be prevailing.² The United States should not agree in ACTA, or in any other trade agreement, to provisions dictating legal protection of temporary copies.³

If, on the other hand, substantive provisions of copyright law are ultimately included in ACTA despite the objection of a number of intermediaries, the agreement should make clear that indexing, buffering, caching and similar activity that is incident to the ordinary operations of the Internet do not amount to infringing activity.

Technological Protection Measures (TPM)

TPMs that control access to works do not relate to enforcement of copyright and should not be included in ACTA. Instead, such TPMs are often used towards anti-competitive ends and do little to deter counterfeiting (in the correct use of that term).⁴ If trade

² See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, --- F.3d ----, 2008 WL 2952614, (2d Cir. August 4, 2008).

³ While some U.S. trade agreements have addressed the issue of temporary copies (mirroring the prior "prevailing" view that the Second Circuit recently rejected), that was a mistake that should not be repeated. See, e.g., U.S.-Korea FTA § 18.4.1; U.S.-Australia FTA § 17.4.1. At the time the U.S.-Australia FTA was negotiated, there was one line of cases from the Ninth Circuit that involved a specific set of facts: a computer program that was fixed and that was being serviced by a third party in alleged violation of a maintenance contract. Those facts have nothing to do with buffering and caching on the Internet. The Ninth Circuit line of cases has been criticized by scholars and questioned by the Copyright Office – and now rejected by the Second Circuit – as applying to buffering and caching.

⁴ The Digital Millennium Copyright Act (DMCA) prevents a wide range of legitimate activity that has nothing to do with counterfeiting (e.g., TPMs are the reason that you cannot: load a lawfully purchased DVD on to your iPod; play a legitimate DVD bought in the U.K. at full-price on your DVD at home in the U.S.; transfer songs lawfully purchased on iTunes to a different music service; operate a device like a DVD player on Linux, an open source program, even though there is no question of copying a single work of authorship). Indeed, the DMCA was used by original equipment manufacturers of printer toner cartridges and electric garage door openers to shut out cheaper substitutes.

agreements are generally intended to remove barriers to trade, TPMs are just such a barrier that ought to be scrutinized carefully.

To the extent that ACTA nevertheless includes provisions on TPMs, only those measures required by the 1996 WIPO Treaty – and not TPMs for access – should be included.⁵

Safe Harbors

In addition to fair use and implied license, safe harbor regimes are critical to the ability of Internet companies like Google to function and for the United States to continue its global leadership in the Internet economy. However, there are wide divergences in approaches that evolve as the Internet evolves. In light of the diversity of approaches, no provisions involving safe harbors should be included. They are, at any rate, well beyond the scope of an anti-counterfeiting enforcement initiative.

If the Administration persists in pursuing provisions on safe harbors, at a minimum those provisions must cover passive carriers, e.g., Internet services that act as conduits; the ordinary operations of search engines such as hyperlinking and other information location tools such as indexing and caching; copying incidental to search results that is fair use or otherwise lawful hosting sites; and blogs. At the same time, the agreement should not address in any way controversial issues such as the nature of the knowledge and financial benefit that might disqualify one from safe harbors.

Filtering Mandates

Google appreciates USTR's assurances that filtering will not be addressed in ACTA, whether cast as "voluntary" or explicitly as mandatory. Filtering is a truly nascent area globally, fraught with legal, technological, and commercial controversy and uncertainty, and should not be imposed or encouraged in any Executive agreement.

Statutory Damages

Countries around the world vary in their approaches toward statutory damages. In the United States, the House Judiciary Committee has stated that it intends to undertake a much-needed review next year of the entire U.S. legal regime regarding statutory damages in intellectual property cases. Under these circumstances, the Executive should not seek to or agree to include provisions on statutory damages in ACTA.

If nevertheless a provision were to be included, it must do no more than state that parties may provide a statutory damage regime without any details on that regime.

⁵ The WIPO Copyright Treaty provides: "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law." (Art. 11)