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TACD

TRANS ATLANTIC DIALOGUE TRANSATLANTIQUE
CONSUMER DIALOGUE DES CONSOMMATEURS

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Resolution on enforcement of copyright, trademarks, patents and other intellectual property rights

Introduction

The enforcement of any particular intellectual property right, whether copyright, trademark, patent or others, is a complex and important area of public policy that touches on personal privacy, civil rights, freedom, social and economic development, and plethora of other issues.

According to the WTO TRIPS Agreement, the enforcement of intellectual property rights should be consistent with the promotion of technological innovation and the transfer and dissemination of technology. The policies should be to the mutual advantage of producers and users of knowledge, in a manner conducive to social and economic welfare, and to a balance of rights and obligations.¹ Governments have responsibilities in formulating or amending their laws and regulations to adopt measures necessary to protect public health and nutrition, to promote the public interest in sectors of vital importance to their socio-economic and technological development, and to include appropriate measures that may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.²

The European Union and the United States are engaged in extensive efforts to shape global norms for the enforcement of copyright, trademarks, patents and other intellectual property rights. These discussions and norm setting activities are taking place in multilateral, plurilateral, bilateral fora and through unilateral actions. The proposals that are under consideration would in important areas be significant departures from the norms of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

While trademark, copyright, and patents are private rights that enable the right holders to seek remedies for infringements through legal proceedings, some initiatives create public responsibilities to monitor, prevent and penalize infringing activities, creating burdens on state resources. The extent to which this is appropriate will depend upon the specific initiative, and the competing priorities regarding scarce

¹ See, for example, Article 7 of the TRIPS.

² See Article 8 of the TRIPS, and paragraph 4 of the 2001 Doha Declaration on TRIPS and Public Health.

resources.³ This is a special concern in developing countries, where the public enforcement of private intellectual property rights may not be a high priority.

The members of the Trans Atlantic Consumer Dialogue (TACD) agree to the following concerning the enforcement of intellectual property rights:

Recommendations

1. General Principles and Concerns

- a. **Transparency and Openness.** Negotiations concerning norms for the enforcement of intellectual property rights should be transparent.
 - i. Governments should explain the rationale and evidence in support of proposed policies, and invite public comment and questions regarding both.
 - ii. Governments should disclose the date and location of meetings, the names of negotiators, and the rules of negotiations.
 - iii. Documents that are distributed to all countries in a negotiation should be public, and not withheld on grounds of secrecy.
 - iv. Governments should disclose negotiation-relevant contacts and communications with representatives of right owners and other stakeholders.
 - v. Consumers should be allowed to attend negotiations as accredited observers.
- b. **Human Rights.** The enforcement of intellectual property rights should not undermine essential human rights, particularly as regards to:
 - i. The **freedom** of thought, speech, or expression, or the right to communicate,
 - ii. The **civil rights** of individuals,
 - iii. The **rights to health, education** and to **freely participate in the cultural life of the community**, and
 - iv. The enforcement of intellectual property rights should be consistent with the 1986 UN Declaration on the **Right to Development** as a human right.

³ See TRIPS Part III, Enforcement Of Intellectual Property Rights. Section 1: General Obligations. Article 41.5. "It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general."

c. Privacy

- i. National implementation of enforcement measures should be least restrictive of consumer **privacy**.
- ii. An IP address is personally identifiable information subject to legal protection.
- iii. Any monitoring of consumer activity should be undertaken in accordance with the principle of proportionality.

d. Competition.

- i. **Free movement of goods.** Legitimate goods in transit should not be subject to enforcement measures that are based upon territorial patent rights or other inappropriate measures.
- ii. **Anti-Competitive Practices.** The enforcement of intellectual property rights should not undermine competition or limit the ability of governments to control or prevent anticompetitive practices.⁴
- iii. **Exhaustion of Rights.** Enforcement measures should not eliminate the flexibility now available to countries under the WTO TRIPS Agreement to protect consumers by policies that embrace the national, regional or international exhaustion of intellectual property rights.

e. Consumer Protection. Enforcement measures should not undermine appropriate measures to protect consumers.

- i. **Unfair contracts.** In recent years, publishers have sought to limit consumer rights to use copyrighted works through non-negotiated contracts. Enforcement rules should not automatically enforce such contracts, when they are unfair or contrary to other public policy concerns.
- ii. **Interoperability.** Many manufacturers or publishers attempt to restrict the use of copyrighted works to particular devices, software programs or services. Consumers want the right to modify, translate or otherwise transform data or software to extend the functionality or expand the choices for devices, software or services.
- iii. **Defective products.** Consumers should have the right to refunds if digital goods are defective.
- iv. **Excessive pricing.** Governments should act to protect consumers in cases of excessive pricing.

f. Access to Knowledge. Personal, social, and economic empowerment and development depend in part upon access to knowledge. Measures to

⁴ See Article 8 and 40 of the TRIPS Agreement.

enforce intellectual property rights should not themselves become barriers to access to knowledge.

- g. **Preservation of culture and cultural diversity.** The preservation of culture requires overcoming technical and legal barriers to making copies of works, adapting works to new formats, and preserving the integrity and accessibility of works. Enforcement measures should recognize the social value and importance of such activities.

2. **Evidence and Analysis.** Public policy on the enforcement of intellectual property rights should be informed by credible evidence, transparent and realistic assumptions and objective peer reviewed analysis. Multiple approaches to addressing the legitimate concerns of right owners and consumers should be considered.

- a. Statistics on counterfeiting and or infringement must be objective, accurate, and presented in the appropriate context.
- b. Statistics on counterfeit and substandard medicines should not be combined when this misleads policy makers about the extent of either problem. The solutions to counterfeit and substandard products are often quite different.
- c. Estimates of losses from infringements of intellectual property rights should be based upon realistic demand and usage parameters.
- d. Governments should collect and analyze statistics on the relationship between infringement and affordability of products.
- e. Counterfeiting is one part of broader public health concerns regarding drug quality. Addressing the problem of counterfeiting will not eliminate the range of public health concerns about drug quality. Governments should evaluate whether or not improving drug registration frameworks of quality, safety and efficacy regulation and its enforcement and/or policies that facilitate access to quality assured medicines and their rational use is a more cost effective solution than policies that are excessively focused on intellectual property enforcement measures.
- f. Confusion in terminology should be avoided and not encouraged. 'Counterfeit' should not be used as a generic term to designate all infringements, or to indicate the lack of quality of certain products. Policy makers should not allow public health terminology to be appropriated by intellectual property rights holders, in order to use public health terms and concerns to defend their own interests in areas where the terms confuse and mislead policy makers and the public.

3. **Specific Concerns.** In light on these general principles and concerns, TACD offers the following specific recommendations:

a. **Enforcement of Internet Related Intellectual Property Rights.**

- i. The EU and US should implement the recommendations set out in the TACD July 2008 Resolution on the Role of Internet Service

Providers (ISPs) in Mediating Online Content and Communications (TACD Doc No. IP 06-08).

- ii. Digital Rights Management (DRM) schemes and Technological Protection Measures (TPMs) can and often do harm consumers directly and indirectly. The legal protection of DRM and TPMs should be limited, and subject to safeguards.
 - iii. Hypertext linking to protected works on the Internet should not be subject to criminal sanctions.
 - iv. Any proposals for online enforcement of IPRs, such as monitoring the use of digital content, should be accompanied by a review of alternative systems of remuneration for creative communities, in order to foster the development of innovative business models and, more broadly, the development of the digital economy.
 - v. Governments should take due account of the distinction between the intentional or unintentional character of acts, and between the commercial or non-commercial nature of infringement. Criminal provisions must be limited to cases of commercial infringement with direct motivation of financial gains, excluding acts carried out by those acting in good faith.
 - vi. For any online enforcement efforts, careful assessment on the sanction and the crime targeted should be conducted, pursuant to the principles of effectiveness and of dissuasiveness.
 - vii. Governments should not cut off access to communications systems or the Internet as a sanction for infringement of copyrighted works.
- b. **ACTA.** The proposed Anti-Counterfeiting Trade Agreement (ACTA) negotiation lacks transparency and legitimacy, and needs safeguards for consumers.
- i. There should be no further meetings on the Anti-Counterfeiting Treaty until the EU and the US publish the full text of all negotiating documents, and agree to additional transparency measures, including the accreditation of consumers and/or their representatives as observers.
 - ii. The term "counterfeit" should not be used to describe activities relating to the mere infringement of copyrights or trademarks where there is no intent to deceive or any likelihood of confusion as to the authorized manufacturer, distributor or provider of the service. Possible patent infringements should not be referred to as counterfeits.
 - iii. EU and US negotiators have acknowledged that ACTA is designed to be expanded to apply to developing countries. Developing countries should therefore be allowed to participate in the ACTA negotiation, as either as full parties or as observers.

- iv. ACTA should not reduce the flexibilities regarding injunctions that currently exist in Article 44.2 of the TRIPS.
- v. ACTA should not require governments to impose inappropriate damages on consumers. Damages should not be excessive. In appropriate cases, governments should be able to tailor damages to public purposes.
- vi. ACTA should not foreclose the ability of governments to create reasonable liability rules for the use of protected works or inventions, such as to facilitate access to orphaned copyrighted works, to address infringement of architectural plans for building under construction, to allow governments to use or authorize uses of patents, copyrights or other intellectual property rights (such as 28 USC 1498), or to facilitate access to biomedical inventions or inventions necessary to implement standards involving complex technologies.
- vii. ACTA should not interfere with legitimate parallel trade, or goods in transit. For example, legitimate medicines in transit should not be subject to enforcement of patent rights in countries where goods are only in transit.
- viii. ACTA should not incorporate enforcement measures against individuals that undermine privacy, civil rights, or other human rights.
- ix. Patent infringement should not be subject to criminal penalties.
- x. Customs officials should not be required to devote excessive resources to the overzealous enforcement of possible intellectual property violations, at the expense of other pressing needs, such as those presenting other threats to public health and safety, or constituting other more serious illegal activities.