

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE  
WASHINGTON, D.C. 20508

January 16, 2009

By E-Mail

Ms. Gwen Hinze  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110

Dear Ms. Hinze:

This is our final response to your Freedom of Information Act (FOIA) request of June 11, 2008, as amended by your fax of July 24, 2008, in which you sought certain records concerning the Anti-Counterfeiting Trade Agreement (ACTA).

In our prior letter to you dated December 22, 2008, we provided you with a final determination on 806 pages of records responsive to your request. At that time, we also advised you that we were continuing to process the remaining records responsive to your request, which required further consultation and review before we could provide you with a determination.

Our review of the remaining records is now complete. I have determined that ten pages are appropriate for release without excision, and copies are enclosed. Also enclosed are four pages which are appropriate for release in part, with excisions made pursuant to Exemptions 5 and 6 of the FOIA of the FOIA, 5 U.S.C. § 552(b)(5) and (6). In addition, 580 pages are being withheld in full pursuant to Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1), as well as to Exemption 5. Exemption 1 pertains to information that is properly classified in the interest of national security pursuant to Executive Order 12,958, as amended. Exemption 5 pertains to certain inter- and intra-agency communications protected by the deliberative process and attorney-client privileges. Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. The withheld records do not contain any substantive information which can reasonably be segregated for release.

Additionally, to the extent that the withheld records contain private e-mail addresses and/or telephone numbers, such information is also protected by Exemption 6.

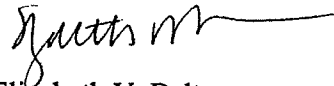
Finally, in our December 22, 2008 interim response, we withheld 186 e-mail chains, totaling 493 pages, pursuant to the deliberative process privilege of Exemption 5. We advised you that these e-mails may also be protected pursuant to Exemption 1, and that we would provide you with a final determination of the applicability of Exemption 1 in our final response. Please be advised that, upon further review of these e-mails, we have now determined that seven pages are protected only by Exemption 1. The remaining 486 pages are protected by both Exemptions 1 and 5.

Although I am aware that your request is the subject of ongoing litigation and that appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right

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to file an administrative appeal. If you have any questions regarding this response, please contact Vanessa Brinkmann at (202) 616-5462.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth V. Baltzan", with a long horizontal flourish extending to the right.

Elizabeth V. Baltzan  
Associate General Counsel

Enclosures

## Maintaining Confidentiality of Documents

The policy underlying the following approach is to maintain the confidentiality of documents, while at the same time allowing our sides to develop negotiation positions and communicate internally and with each other.

First, we agree that documents relating to the proposed Anti-Counterfeiting Trade Agreement (ACTA) will be held in confidence. This means that the documents may be given only to government officials or persons outside government who participate in the party's domestic consultation process and have a need to review or be advised of the information in these documents. Anyone given access to the documents will be alerted that they cannot share the documents with people not authorized to see them. The United States plans to hold ACTA documents in confidence for a fixed period of time after negotiations conclude.

Second, while ACTA documents are confidential, we may mail, e-mail, fax, or discuss these documents over unsecured lines with the two groups of people mentioned above (i.e., government offices and persons with a "need to know"). We may also store these documents in a locked file cabinet or within a secured building; that is, the documents do not need to be stored in safes. We can also create and store these documents on unclassified computer systems.

Third, all parties will mark the documents they create in a manner that makes clear that the documents will be held in confidence. The United States plans to mark documents generated by us as "Confidential, Foreign Government Information – Modified Handling Authorized" and include a brief instruction following the marking on how the documents will be handled.

**Baltzan, Elizabeth**

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**From:** McCoy, Stanford

**Sent:** Thursday, July 24, 2008 12:23 PM

**To:** RANDAZZO, THERESE M

**Subject:** Will the border enforcement provisions of ACTA require searching travelers' music players or laptops for infringing content?

***Q: Will the border enforcement provisions of ACTA require searching travelers' music players or laptops for infringing content?***

A: No. The focus of the discussion on border measures has been on how to deal with large-scale intellectual property infringements, which can frequently involve criminal elements and pose a threat to public health and safety. Past U.S. free trade agreements have called for *ex officio* authority for border enforcement, meaning that border officials are empowered to enforce the law on their own initiative, without waiting for a complaint from a right holder. But this in no way requires searches of travelers' music players or computers.

**Baltzan, Elizabeth**

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**From:** Marla Poor [mpoor@loc.gov]  
**Sent:** Thursday, November 15, 2007 2:17 PM  
**To:** CHARLES R STEUART; GEORGE F MCCRAY; Therese M Randazzo; TODD REVES; Matthew Skelton; Marsha M McIntyre; JoEllen Urban; John Zacharia; Stuart.Chemtob@usdoj.gov; Caridad Berdud; Bae, Rachel S.; McCoy, Stanford  
**Subject:** RE: TPSC Draft Document 2007-209, ACTA Proposals Regarding Border Measures

It's Geist so you know where this is headed before you even start.

Ask First, ACTA Later  
By Michael Geist

<http://www.michaelgeist.ca/content/view/2380/125/>

Thursday November 15, 2007

Kim Weatherall notes that the Australian government has launched a public consultation on its possible involvement in the Anti-Counterfeiting Trade Agreement negotiations. Unlike the Canadian government, which jumped at the chance to join the U.S. in the negotiations with no advance warning and no public discussion, the Australians are taking the time to ask the public whether it thinks the country should participate in the negotiations, whether change is needed, and, if they participate, what should be avoided. The consultation includes a background document (which interestingly makes no mention of Canada's participation) that provides far more information on the process than the Canadian government has told its own citizens. For example, it reports that:

The ACTA is at a very early stage, with a first round of pre-negotiation technical discussions held on 4 October 2007. Australia, Japan, the Republic of Korea, Mexico, New Zealand, the EC, the US, Switzerland and others attended these discussions in Switzerland. A second round of technical discussions is scheduled for the first week of December. No date has yet been set for beginning formal negotiations, although this is likely to occur in early 2008. No draft text has yet been prepared. Early negotiations are likely to include the same countries as above, with more countries likely to participate as negotiations continue.

The background document also notes that Australia has been recognized by the OECD as having a low incidence of intellectual property rights infringement. While you would never know it from the rhetoric of some lobby groups and even our own MPs, Canada actually ranked even lower than Australia and the U.S. in the OECD's General Trade Related Index of Counterfeiting. Australia may join the ACTA discussions, but at least it is adopting an open, transparent process where the public is both informed and invited to provide their views.

Canadians should demand the same.

FOIA Exemption (b)(5)

**Brinkmann, Vanessa R**

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**From:** Christophe Zimmermann [Christophe.Zimmermann@wcoomd.org]  
**Sent:** Thursday, December 06, 2007 2:36 PM  
**To:** Bae, Rachel S.; Massimiliano Caruso  
**Cc:** ConwayKM@state.gov; DolanDA@state.gov; Mullaney, Daniel  
**Subject:** Re: KORUS FTA IPR Border Provisions

Dear Rachel,

It was our pleasure. We will inform Mike and will keep in touch with you through Kathy and Dave but please consider that we are very pleased to help you.

With our best regards

-----Original Message-----

**From:** Bae, Rachel S. <Rachel\_Bae@ustr.eop.gov>  
**To:** Christophe Zimmermann; Massimiliano Caruso  
**CC:** ConwayKM@state.gov <ConwayKM@state.gov>; DolanDA@state.gov <DolanDA@state.gov>; Mullaney, Daniel <Daniel\_Mullaney@USTR.EOP.GOV>  
**Sent:** Thu Dec 06 20:27:56 2007  
**Subject:** KORUS FTA IPR Border Provisions

Dear Christophe and Max,

Thank you again for making the time to meet with me. It was very helpful to hear your thoughts on moving forward within the WCO. I will get back to you as soon as possible, through Kathy and David, on the matter of giving a presentation before the Enforcement Working Group/Committee. In the meantime, as promised, attached is the border enforcement section of the Korea-US FTA to give you an idea of what those provisions may look like in ACTA.

Kind regards,

Rachel

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Sent from my BlackBerry Wireless Handheld

----- Original Message -----

**From:** Meyers, Ronald W.  
**To:** Bae, Rachel S.  
**Sent:** Thu Dec 06 14:07:16 2007  
**Subject:** KORUS FTA IPR Border Provisions

See attached.

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Japan, Korea & APEC Affairs

Phone: (202) 395-9549, Fax: (202) 395-3597



**Brinkmann, Vanessa R**

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**From:** Bae, Rachel S. [Rachel\_Bae@ustr.eop.gov]  
**Sent:** Thursday, December 06, 2007 2:28 PM  
**To:** Christophe.Zimmermann@wcoomd.org; Massimiliano.Caruso@wcoomd.org  
**Cc:** ConwayKM@state.gov; DolanDA@state.gov; Mullaney, Daniel  
**Subject:** KORUS FTA IPR Border Provisions  
**Attachments:** KORUS FTA IPR border provs.pdf

Dear Christophe and Max,

Thank you again for making the time to meet with me. It was very helpful to hear your thoughts on moving forward within the WCO. I will get back to you as soon as possible, through Kathy and David, on the matter of giving a presentation before the Enforcement Working Group/Committee. In the meantime, as promised, attached is the border enforcement section of the Korea-US FTA to give you an idea of what those provisions may look like in ACTA.

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**Subject:** KORUS FTA IPR Border Provisions

See attached.

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Japan, Korea & APEC Affairs

Phone: (202) [REDACTED], Fax: (202) 395-3597

FOIA b 7, exempt from release

*Special Requirements Related to Border Measures*

19. Each Party shall provide that any right holder initiating procedures for its competent authorities to suspend release of suspected counterfeit or confusingly similar trademark goods, or pirated copyright goods<sup>30</sup> into free circulation is required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply sufficient information that may reasonably be expected to be within the right holder's knowledge to make the suspected goods reasonably recognizable by its competent authorities. The requirement to provide sufficient information shall not

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<sup>30</sup> For purposes of paragraphs 19 through 25:

(a) **counterfeit trademark goods** means any goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country of importation; and

(b) **pirated copyright goods** means any goods that are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

unreasonably deter recourse to these procedures. Each Party shall provide that the application to suspend the release of goods shall apply to all points of entry to its territory and remain applicable for a period of not less than one year from the date of application, or the period that the good is protected by copyright or that the relevant trademark registration is valid, whichever is shorter.

20. Each Party shall provide that its competent authorities shall have the authority to require a right holder initiating procedures to suspend the release of suspected counterfeit or confusingly similar trademark goods, or pirated copyright goods, to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Each Party shall provide that the security or equivalent assurance shall not unreasonably deter recourse to these procedures. Each Party may provide that the security may be in the form of a bond conditioned to hold the importer or owner of the imported merchandise harmless from any loss or damage resulting from any suspension of the release of goods in the event the competent authorities determine that the article is not an infringing good. In no case shall an importer be permitted to post a bond or other security to obtain possession of suspected counterfeit or confusingly similar trademark goods, or of pirated copyright goods.

21. Where its competent authorities have seized goods that are counterfeit or pirated, a Party shall inform the right holder within 30 days of the seizure of the names and addresses of the consignor, importer, exporter, or consignee, and provide to the right holder a description of the merchandise, the quantity of the merchandise, and, if known, the country of origin of the merchandise.

22. Each Party shall provide that its competent authorities may initiate border measures *ex officio*<sup>31</sup> with respect to imported, exported, or in-transit merchandise,<sup>32</sup> or merchandise in free trade zones, that is suspected of being counterfeit or confusingly similar trademark goods, or pirated copyright goods.

23. Each Party shall provide that goods that have been suspended from release by its customs authorities, and that have been forfeited as pirated or counterfeit, shall be destroyed, except in exceptional circumstances. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of the goods into the channels of commerce. In no event shall the competent authorities be authorized, except in exceptional circumstances, to permit the exportation of counterfeit or pirated goods or to permit such goods to be subject to other customs procedures.

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<sup>31</sup> For greater certainty, the Parties understand that *ex officio* action does not require a formal complaint from a private party or right holder.

<sup>32</sup> For purposes of paragraph 22, *in-transit merchandise* means goods under "Customs transit" and goods "transshipped," as defined in the *International Convention on the Simplification and Harmonization of Customs Procedures* (Kyoto Convention).

24. Where an application fee or merchandise storage fee is assessed in connection with border measures to enforce an intellectual property right, each Party shall provide that the fee shall not be set at an amount that unreasonably deters recourse to these measures.

25. Each Party shall provide the other Party, on mutually agreed terms, with technical advice on the enforcement of border measures concerning intellectual property rights, and the Parties shall promote bilateral and regional cooperation on these matters.

**Brinkmann, Vanessa R**

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**From:** James Love [james.love@keionline.org]  
**Sent:** Monday, September 22, 2008 3:33 PM  
**To:** McCoy, Stanford; Bae, Rachel S.; Amanda.Wilson@mail.doc.gov  
**Cc:** Manon Anne Ress  
**Subject:** Injunctions, damages and ACTA  
**Attachments:** kei\_injunctions\_acta\_21sep2008.pdf

Dear Stan, Rachel and Amanda,

Attached in PDF format is a memo on the EC proposal for provisions on injunctions and damages in ACTA.

Jamie Love and Manon Ress

[http://www.keionline.org/misc-docs/1/kei\\_injunctions\\_acta\\_21sep2008.pdf](http://www.keionline.org/misc-docs/1/kei_injunctions_acta_21sep2008.pdf)

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James Love, Director, Knowledge Ecology International  
<http://www.keionline.org> | <mailto:james.love@keionline.org>  
Wk: +1.202. [REDACTED] | US Mobile +1.202. [REDACTED] | Geneva Mobile + [REDACTED]

FOIA Exemption (b)(6)

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