

## **MEMORANDUM**

**To:** ACTA Industry Segment Representatives

**From:** Megan Campbell, ATIS General Counsel

**Re:** ACTA Liability

**Date:** July 2, 2001

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Pursuant to an action item assigned during the May 22<sup>nd</sup> meeting of the ACTA, this memorandum and the attached memorandum from ATIS' outside counsel, provide a detailed assessment of the potential liability risks associated with ACTA activities. Liability issues, as well as related insurance coverage, will be discussed at the upcoming Council meeting on July 11, 2001. Supplemental information regarding insurance coverage will be distributed at a later time. A summary of the more detailed memorandum from outside counsel is provided below. ACTA representatives are encouraged to share these materials with their legal counsel and to direct any questions or concerns to Tim Jeffries, ACTA Director, at 202-662-8669 ([tjeffries@atis.org](mailto:tjeffries@atis.org)) or me at 202-434-8847 ([mcampbel@atis.org](mailto:mcampbel@atis.org)).

### **SUMMARY**

The memorandum from outside counsel (Outside Counsel Memo) advises that potential liability for the ACTA, its sponsors, and its participants is limited provided that the Council only engages in the activities specifically assigned under the Report and Order (R&O) and operates consistent with the recently approved Operating Principles and Procedures (OP&P). In addition, there are several measures (i.e., appropriate disclaimers and procedural steps) the Council and its secretariat can take to minimize liability risks further.

### **ACTA ROLE/RESPONSIBILITIES UNDER THE REPORT & ORDER**

In order to assess the liability risk, the ACTA role or responsibilities under the R&O must first be discussed. As pointed out at several points in the Outside Counsel Memo, the ACTA's role is "administrative in nature," and not to develop standards or engage in policymaking or dispute resolution. The ACTA is not in the position to make any substantive decisions regarding the development of technical criteria. The ACTA is, in essence, a clearing-house publishing technical criteria for terminal equipment developed by ANSI-accredited standards development organizations (SDOs). It is important to note, that while the R&O uses the term "adopt" in relation to the ACTA's responsibilities, the R&O defines "adopt" as "the act of publishing criteria developed by ANSI-accredited SDOs." (§ 52.) The ACTA does not have any decision-making authority with respect to the technical criteria and publishes the same based on certain certifications made by the SDO.

The ACTA does, however, have the right to exercise discretion in two areas – the database and, the numbering and labeling responsibilities. The details of the database's

structure, content and maintenance are all delegated to the ACTA for determination. Likewise, on the issue of numbering and labeling schemes, the FCC deferred the decision-making to the ACTA but instructed that the schemes must be nondiscriminatory, creating no competitive advantage for one entity or industry segment.

## **LIABILITY DISCUSSION**

The Outside Counsel Memo discusses recent case law in the areas of antitrust and negligence liability specifically relevant to the activities of the ACTA. **Antitrust Liability:** As the discussion of antitrust case law shows, antitrust liability has been found in the organization context only where conduct has been deliberately aimed at manipulating the standards process or otherwise causing an anticompetitive effect. Given the structure provided in the R&O, the potential for a successful antitrust claim against the ACTA, which is one step removed from the standards development process, is less than in the traditional SDO context. In addition, there may be even further protection against antitrust liability on the basis of the *Noerr-Pennington* doctrine. The doctrine is a judicially created exemption that protects group action intended to influence legislative, executive, administrative or judicial decision-making. The doctrine may be invoked where the Commission accepts the ACTA published technical criteria as presumptively valid. Thus, provided the ACTA operates consistent with the R&O and pursuant to the adopted OP&P, antitrust liability is *de minimis*.

**Negligence/Tort Liability:** The overwhelming majority of negligence cases in the trade association and SDO context fail to establish liability where the courts refuse to find a duty on the part of the association or SDO. The primary reason being that the association or SDO lacks control over the manufacturers. It deserves mention, again, that the ACTA is one step removed from the standards developing stage in its administrative functions. Nonetheless, the recent and highly publicized cases finding liability in this area can be distinguished on the facts. For example, in Meneely (the case against the National Spa & Pool Inst.), the Washington State Court of Appeals upheld a verdict of liability where it was proven that NSPI investigated safety issues related to its pool safety standard, ***found potential problems and then failed to change the standard***. The Court appears to have relied upon the facts that problems were identified and not subsequently addressed. Since the Meneely decision other courts have refused to find a duty on the part of the association or SDO where the distinguishing facts identified above were not present.

## **SUGGESTED PREVENTATIVE MEASURES**

The Outside Counsel Memo discusses several preventative measures that the ACTA and ATIS, as the secretariat, can implement. In addition to those measures mentioned in the Outside Counsel Memo, ATIS typically provides legal training to its sponsored committees. The training accomplishes two objectives. First, the training itself serves as a mitigating factor should a claim ever be asserted. Second, the training has proven successful in sensitizing participants and encouraging dialogue among the leadership, secretariat staff and ATIS legal. The legal training materials used with Committee T1 are provided as an attachment to this document.

Attachments: 1- Thelen Reid & Priest LLP Memorandum  
2- Committee T1 Legal Training Materials