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President and Chief Executive Officer

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Mr. Stanford K. McCoy
Acting Assistant US Trade Representative for
Intellectual Property and Innovation
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508
ACTA@ustr.eop.gov

RE: Anti-Counterfeiting Trade Agreement (ACTA): Request for
Public Comments, 73 Federal Register 8910 (February 15, 2008)

Dear Mr. McCoy:

The National Electrical Manufacturers Association (NEMA) is pleased to have the opportunity to submit the following comments on the proposed Anti-Counterfeiting Trade Agreement announced by Ambassador Schwab on October 23, 2007.

The National Electrical Manufacturers Association is the trade association of choice for the electrical manufacturing industry. Founded in 1926 and headquartered in Rosslyn, Virginia, its 430 member companies manufacture products used in the generation, transmission and distribution, control, and use of electricity. These products are used in utility, medical, industrial, commercial, institutional, and residential applications. Domestic production of electrical products sold worldwide exceeds \$120 billion.

Counterfeiting in the electrical products industry has been a growing problem for over a decade now. The threat posed to the export and domestic markets served by NEMA member companies is just one dimension of the problem; the threat to the safety of persons and property is the other equally, if not more important dimension. Our industry's experience with counterfeit electrical products is that they are almost always substandard, posing a risk of harm to persons and property. The counterfeiters are very good at copying the external appearance of an electrical product and its packaging, but the internal design, materials or chemical composition, which is typically not seen by the purchaser or the installer, is very different from the genuine product. For example:

- Counterfeit power and extension cords are often found to conceal an inadequate gauge of copper wire, which will not carry the intended current and erupts into flames.

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- Counterfeit residential circuit breakers conceal the fact that they are either made with missing safety components or in some cases no components at all. See: <http://www.voltimum.co.uk/news/9428/infopro.whatsnew.latest/Counterfeiting-Alert.html>
- Counterfeit grounding rods are made with only 20% of the copper coating required by safety standards, causing them to degrade forty or fifty years earlier than normal, and putting property and persons at risk.
- Numerous other examples can be cited, and I invite you to visit NEMA's website at <http://www.nema.org/gov/anti-counterfeiting/news.cfm>

Counterfeiting in the electrical sector is a global problem. For NEMA members who manufacture and sell "NEMA type" electrical products for the electrical infrastructure of the Americas, most of the genuine products (almost all of which is copied in China and exported to the Americas) are made in the United States, Canada, Mexico and the Caribbean for this Hemisphere. For those NEMA members who also manufacture "IEC type" products for the electrical infrastructures of Europe, the Middle East, Africa, and parts of Asia, the genuine product may be exported from the United States or manufactured in local markets abroad before being faced with unfair competition from dangerous fakes in those export markets.

NEMA regards the ACTA initiative as an important announcement, because it intends to (a) increase international cooperation, (b) strengthen enforcement and make it more effective, and (c) strengthen IPR enforcement laws and measures. The efforts of both the private and public sectors to date have fallen short of stemming the growing threats to innovation and public safety above. While it is acknowledged that there has been some growing interest and activity in cooperative IP law enforcement among nations in recent years, much more needs to be done, requiring focused attention and increased resources. Our existing institutional arrangements and agreements, such as the World Trade Organization and the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, have contributed to better IPR legislation around the world and minimum enforcement measures, but they have not promoted, and we believe it is unlikely that they will promote, stronger IP law enforcement and deterrent regimes in the near future. The ACTA initiative must therefore endeavor to work toward solving this deficiency by leading the fight against counterfeiting and piracy *well beyond* what these other institutions and bilateral or multilateral negotiations can likely be expected to achieve in the near future.

1. The role of our various Free Trade Agreements (FTAs) has been to clarify and improve upon the international norms of the TRIPS Agreement, which establishes only minimum enforcement standards. Our ambition with ACTA must be to meet, and where necessary, exceed those FTA provisions with this Agreement. NEMA thus encourages the United States to resist compromising our own national standards for enforcement in ACTA. For example, with the group of countries that have agreed to negotiate the ACTA agreement, the intellectual property provisions of the Oman Free Trade Agreement should not be compromised in the areas of copyright, trademarks and enforcement (including border measures). Here are just a few of the provisions of the Oman FTA (and some other FTAs) that are extremely important to the electrical industry, and which at a minimum must be part of ACTA:
 - A. application of the trademark laws to certification marks;
 - B. protection of famous or well-known marks;

- C. a rebuttable presumption that a registered trademark is valid;
 - D. a presumption of confusion for identical marks for identical goods;
 - E. rights-holder's ability to elect statutory or pre-established damages in a counterfeiting case;
 - F. non-discretionary authority of the judiciary to order the seizure and destruction of infringing goods, materials, and implements relevant to infringement, as well as to order the seizure of documentary evidence; furthermore, the decision to not destroy infringing goods must belong only to the rights-holder;
 - G. that competent authorities have power to initiate border measures *ex officio*, with respect to not only imported, but exported goods and in-transit merchandise in free trade zones, with respect to infringing goods and activities, and those border measures include the right to inspect all shipments, detention of suspicious shipments, and seizure and destruction of all infringing goods identified by rights holders; and
 - H. the other border measure provisions in the Oman FTA.
2. ACTA must include the provisions of the Stop Counterfeiting in Manufactured Goods Act, which became law here in the United States in March 2006, particularly that law's provisions relating to trafficking in packaging, labels, containers, tags, and the like bearing counterfeit marks. Our industry has seen shipments of packaging bearing counterfeit trademarks and goods (including goods bearing no marks) moving in international commerce separately from one another, only to be married in some warehouse near the destination market. Border officials and law enforcement need to be able to stop this trafficking, and criminal sanctions need to be applied here where the *mens rea* requirements are met.
 3. ACTA must include in the treaty meaningful and effective criminal sanctions that promote effective deterrence. We note recent criminal sentences here in the United States for trafficking in counterfeit electrical products have been in the 7 to 8 year range. ACTA must include provisions that if a counterfeit product causes injury to person or property, enhanced criminal sanctions including higher fines and jail time shall be imposed. ACTA must recognize counterfeiting and piracy as serious global crime.
 4. ACTA must include provisions that provide for establishing law enforcement and border protection coordination and information-sharing networks among each of the parties to ACTA with respect to individuals and entities involved in the financing, production, trafficking and sale of counterfeit and pirated goods, and a mutual commitment to prosecute intellectual property crimes in accordance with the provisions of the treaty. ACTA will suffer if there is variability in enforcement among its treaty participants, if that variation cannot be explained by the extent to which counterfeiting and piracy varies among the nations.
 5. ACTA must include a provision that each party will designate a high-level executive branch officer to serve as principal intellectual property law enforcement coordinator to ensure that the protection of intellectual property laws is recognized as a national priority, to oversee effective coordination among all government agencies responsible

for IP policy and enforcement, to allocate financial and personnel resources, and to implement public education and awareness about the impact and harms of counterfeiting and piracy on the public.

6. ACTA should include provisions for the development of sentencing guidelines to be used by prosecutors and the judiciary in connection with the prosecution and punishment of IPR crimes.
7. ACTA should also include provisions that prohibit procedures and practices that have been employed in some countries to make border measure, civil, and criminal enforcement more difficult than it should be. On this latter point, NEMA refers USTR to the Report of the Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-15) on the US-Colombia Trade Promotion Agreement 21-24 (September 20, 2006).
8. ACTA should address the growing problem of the sale or offers for sale of counterfeits on the Internet. NEMA members have documented how foreign websites are introducing those who sell illegal counterfeit product to prospective customers here in the United States and throughout the Americas.

Thank you for your consideration of these remarks. NEMA stands ready to work with the negotiators to establish a strong, effective, and deterrent international enforcement network that will reflect true leadership in addressing IP crimes.

Respectfully,



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