

July 6, 2001

**Paul H.  
Vishny**

**VIA FACSIMILE**

Daniel Bart, Esq.  
Telecommunications Industry Association  
2500 Wilson Blvd., Suite 300  
Arlington, VA 22201

312.602.2050  
Fax: 312.602.3050  
pvishny@dancona.com  
www.dancona.com

**Re: ACTA**

Dear Dan:

You have forwarded to us an inquiry from individual members of ACTA (Administrative Council for Terminal Attachments) as to whether they have or should obtain insurance to protect them if they are sued as a result of action or inaction by ACTA. Those members point out that TIA is a sponsor of ACTA. They note that ACTA soon will be taking on functions – such as “providing guidance on whether a certain requirement applies to a specific piece of equipment, [and] whether changes made to a product require a new round of compliance tests” – previously handled by the FCC. They add that ACTA may be publishing standards promulgated by other organizations, as required by the FCC in its Report & Order issued in CC Docket No. 99-216. Stephen Whitesell of V-Tech asserts that he shares “the concern expressed by some that we are spending way too much time on these sort of things, yet I also worry about being sued in today’s litigious society.” ACTA has requested legal opinions from counsel for ATIS and TIA. This is our opinion.

**Conclusions**

There is a risk that someone injured allegedly as a result of some action or inaction by ACTA might sue *the Council itself* (if it is an entity which can be sued) or *an individual member of ACTA*. TIA’s insurance apparently does not cover ACTA or its individual members. If ACTA is an insurable entity, it should procure insurance to protect itself as well as persons acting on its behalf. It is common for such entities to obtain insurance covering officers and directors, and it is also possible to obtain insurance for volunteers. Whether the specific risks involved in ACTA’s work will be covered can best be ascertained through a competent insurance broker. If ACTA is not an insurable entity, consideration should be given to making it such an entity (by, for example, incorporating as a not-for-profit trade association). In any event, each individual member of ACTA should consult his or her employer’s risk management department with regard to the need for and desirability of obtaining additional liability insurance to cover the activities being undertaken by ACTA.

Daniel Bart, Esq.

Page 2

July 6, 2001

### **Lawsuits Against Trade Associations**

It is easy to understand why individual members of trade associations and similar bodies such as ACTA are apprehensive about being targets of potential tort litigation. The media is fond of reporting the return of staggeringly large verdicts (especially in class actions) against manufacturers, distributors, and retailers based on product liability. Although most products liability or similar cases brought against trade associations have been decided for the defendants, there are exceptions. The most notable decisions against trade associations are *Meneely v. S.R. Smith, Inc.*, 101 Wash. App. 845, 5 P.3d 49 (2000) (National Spa & Pool Institute found liable); *N.N.U. v. American Ass'n of Blood Banks*, 75 Cal. App. 4<sup>th</sup> 1358, 89 Cal. Rptr. 2d 885 (1999); and *King v. National Spa & Pool Institute*, 570 So.2d 612 (Ala. 1990).

To an extent, these cases may turn on the degree of control the trade association or similar organization exercised over the standards-setting procedure. We understand that ACTA will perform primarily administrative functions and, therefore, will not actually formulate standards. However, it will perform functions which, if handled negligently, could conceivably be alleged to form the basis for a lawsuit against the Council or its members. Even when defense of a suit is successful, the cost of defense is often very high, and such costs are borne by insurers when the policy is properly written.

### **TIA's Insurance**

TIA's CGL policy of insurance provides coverage for "Insured Persons," a term referring to TIA and its subsidiaries, and their trustees, directors, officers and employees. ACTA is not a subsidiary of TIA and, therefore, is not an "Insured Person." Accordingly, neither the members of ACTA (unless they are employees of TIA) nor ACTA should expect TIA's insurer to provide liability coverage.

### **Statutory Protection**

#### **Federal Statute**

There is a federal statute and several state statutes that may provide some measure of protection to members of ACTA. Under some circumstances 42 U.S.C. §14503 limits the liability of a volunteer for certain nonprofit organizations or a governmental entity for harm caused by an act or omission of the volunteer. Thus:

(a) The act or omission must have occurred in the course of the volunteer's acting within the scope of his or her responsibilities;

Daniel Bart, Esq.

Page 3

July 6, 2001

(b) The volunteer must have been properly licensed, certified or authorized by appropriate authorities if licensing, certification or authorization is necessary;

(c) The harm must not have been “caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer;” and

(d) The harm must not have been caused by operating a car, boat, airplane or other vehicle for which the state in which the harm occurred requires an operator’s license or mandates the maintenance of insurance.

Further: (a) the tax-exempt organization must be a 501(c)(3) tax exempt group i.e. a charity or educational entity; (b) ACTA is not a governmental entity; and (c) the federal statute does not protect a volunteer from a lawsuit brought by a nonprofit organization or a governmental entity, and the statute does not protect the organization itself from a lawsuit. There are additional caveats and exceptions in the statute. Although 42 U.S.C. § 14502 purportedly “preempts the laws of any State to the extent that such laws are inconsistent with” the federal statute, there are exceptions to the preemption.

It is obvious that a careful attorney can plead around the federal statute. Accordingly, it should not be relied upon to protect members of ACTA or ACTA itself.

#### State Statutes

Section 29-599.15 of the District of Columbia Code grants immunity from civil liability to a volunteer for a corporation under certain circumstances (of course, members of ACTA would not qualify if ACTA is not incorporated). The exceptions include injury or damage resulting from willful misconduct, a crime (unless the volunteer reasonably believed the act was lawful), a transaction in which the volunteer benefitted, or an act or omission not in good faith and beyond the scope of the corporation’s authority. Further, unless the corporation has functional expenses of less than \$100,000 and qualifies for § 501(c)(3) tax exemption (which we believe ACTA could not), the corporation must maintain liability insurance of at least \$200,000 per individual claim and \$500,000 for all claims arising from the same occurrence. The corporation itself is exempt from liability for an amount in excess of insurance coverage.

Section 5-407 of the Maryland Code exempts a volunteer for tax-exempt organizations, which would include a tax-exempt trade association from liability beyond the volunteer’s insurance unless the volunteer’s act or omission “constitutes gross negligence, reckless, willful, or wanton misconduct, or intentionally tortious conduct.” Pleading around the D.C. and Maryland statutes would not be difficult.

Daniel Bart, Esq.

Page 4

July 6, 2001

To date, we have not located any Virginia statute applicable to volunteers.

### **What To Do**

Since ACTA members who are not TIA employees cannot look to TIA's insurance policy for protection, either ACTA must become an insurable entity and procure its own insurance or its members must obtain their own insurance. We assume that, if incorporated, those who are now "members" of ACTA would become its officers and directors.

The members of ACTA probably are officers or employees of corporations that already carry liability insurance covering their officers or employees while engaged in activities in the course of their employment. Participation in ACTA should qualify, assuming their ACTA duties are in the scope and course of their regular employment. Therefore, the individuals should consult their employers' risk management personnel regarding insurance coverage. If the members are not covered by their employers' policies, they should consider purchasing for themselves liability insurance and/or a liability umbrella.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

Paul H. Vishny

PHV:daj