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Australian Libraries Copyright Committee

ADA

Australian Digital Alliance

Submission to Joint Standing Committee on Treaties addressing the Anti-Counterfeiting Trade Agreement

By the Australian Digital Alliance and Australian Libraries Copyright Committee

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1 Executive Summary

The Australian Government proposes to ratify the Anti-Counterfeiting Trade Agreement (ACTA) following consideration by the Joint Standing Committee on Treaties. The Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC) welcome the opportunity to comment on the National Interest Analysis of ACTA[1] and to reiterate concerns with the Agreement. The ADA and ALCC also made a submission to the Department of Foreign Affairs and Trade following the release of the official ACTA text in May 2010[2].

The Anti-Counterfeiting Trade Agreement (ACTA) is intended to establish 'best practice' international IP enforcement standards, to combat a perceived growth in international trade in counterfeit and pirated materials[3]. The obligations under ACTA are consistent with existing Australian law, and the Australian Government has confirmed that implementation of ACTA will not require any new legislative measures in Australia.

While ACTA may not require changes to domestic law, it reduces Australia's flexibility to amend its IP provisions and practices. ACTA also further entrenches stringent enforcement and protection measures at the expense of fair and balanced access to content. The ADA and ALCC submission offers brief comment on the importance of adopting a cautious approach to negotiating IP provisions, highlights those ACTA provisions that seem to set a dangerous precent for international IP policy making, and notes the absence of public interest considerations in both ACTA and the National Interest Analysis.

About the Australian Digital Alliance (ADA)

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

The Association for the Blind (WA) are a member of the ADA, and Vision Australia and the Human Rights Commission were also consulted in preparing this submission.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material.

About the Australian Libraries Copyright Committee (ALCC)

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

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[1] National Interest Analysis [2011] ATNIF 22, Joint Standing Committee on Treaties, http://www.aph.gov.au/house/committee/jsct/21november2011/treaties/anti_counterfeiting_nia.pdf

[2] Australian Digital Alliance and Australian Libraries Copyright Committee, 'Anti-Counterfeiting Trade Agreement: Impact on Individuals and Intermediaries' May 2010, http://www.digital.org.au/submission/documents/20100519ADA-ACTAimpactonindividualsandintermediaries.pdf

[3] Above n 1, paragraph 13.

- Australian Library and Information Association
- Australian Government Libraries Information Network
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

2 Adopting a cautious approach to negotiating IP provisions

In December 2010 the Australian Government Productivity Commission published its research report on Bilateral and Regional Trade Agreements, highlighting the need for Australia to adopt a cautious approach to negotiating IP provisions in BRTAs, and to avoid an automatic template[4]. Their conclusions with respect to BRTAs can be extended to the negotiation of IP provisions in plurilateral trade agreements such as ACTA.

DFAT's negotiating position in ACTA, as in current negotiation of another plurilateral trade agreement, the Trans-Pacific Partnership Agreement (TPPA), appears to be that Australia should agree to provisions that do not require changes to domestic law. Further, the National Interest Analysis makes clear that ACTA is intended to internationalise IP standards observed in Australian law[5]. This position makes present law a kind of template for IP negotiations.

Adopting this position ignores the reality that present domestic standards may not be appropriate now, or will rapidly become inappropriate in 5 to 10 years time. Australia's domestic IP regime is based on Australia's obligations under the 2004 Australian United States Free Trade Agreement (AUSFTA). It's been acknowledged that the IP standards implemented under AUSFTA have generated net costs on Australia[6]. In 2004, the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America cited concerns that the AUSFTA 'prevents Australia from retreating from this position in future and implementing policies and laws which do not accord with the provisions of AUSFTA'[7]. The entrenchment of these IP standards in subsequent negotiations of the ACTA and TPPA further restricts Australia's ability to implement flexible IP reform.

DFAT's negotiating position also does not seem to contemplate whether existing Australian standards are even appropriate for an international agreement. The conferral of extensive powers

[4] Australian Government Productivity Commission, Research Report on Bilateral and Regional Trade Agreements, December 13 2010 p 262. The finalised ACTA text was released one month earlier, in November 2010.
[5] Above n 1, paragraph 11
[6] For example, see Dr Phillipa Dee, 'The Australia-US Free Trade Agreement: an Assessment', prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004, 33 (the copyright term extension implemented under AUSFTA would result in a net increase of 25% per year in royalty payments for Australians, or $88 million)
[7] Final Report of the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, paragraph 326

on custom officials in Australia, for example, to seize infringing goods, may be acceptable in a system with strong accountability of local officials; it may not be suitable in some developing countries where such accountability cannot be guaranteed.

In their 2010 report, the Productivity Commission cautioned against adopting IP provisions that are of main interest to other parties[8]. The main beneficiaries of ACTA's IP enforcement standards will be in net IP exporting countries – namely, the United States.

Ratification of ACTA enforces a starting point for future plurilateral IP negotiations beyond the optimal balance between access and enforcement, to the detriment of Australia and other net IP importing countries[9]. Current negotiations of the Trans-Pacific Partnership Agreement (TPP) reinforce this concern, with DFAT's starting position in negotiation of the IP chapter be to ensure that the TPP is not 'ACTA-plus'.

IP provisions that are not in Australia's national interest should not be 'locked in' through further trade agreements. Each new agreement, like ACTA and the TPP, reduces Australia's flexibility to make changes to its domestic IP regime.

In 2012, for example, the Australian Law Reform Commission will undertake a review of the Australian Copyright Act[10] to consider its adaptability and appropriateness in the digital age. Australia's ability to make legislative changes based on recommendations by bodies like the ALRC, with due consideration of the benefits and costs inherent in our existing IP regime for Australian rights holders and users, may be severely confined by a negotiating stance taken in trade agreements that existing IP standards in Australia are "just fine". Similarly, it is far from clear that the various extensions of international obligations on secondary or third party liability in copyright (both criminal and civil) are appropriate in the online environment, where both technology and law are changing rapidly.

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3 Benefits and costs of IP protection to the community as a whole

The only reasons given for Australia to ratify ACTA in the National Interest Analysis are:

- The increased protection for Australian-owned IP overseas
- a perceived reduction of the importation of counterfeit and pirated goods into Australia
- a reduced burden on enforcement agencies; and
- the "alleviation of pressure on Australian businesses currently spending money enforcing their IP rights in Australian and foreign courts."

The ADA and ALCC do not dispute that individual sectors may benefit from stringent IP enforcement mechanisms under ACTA to protect their rights abroad, although we note that there does not appear to have been any attempt to analyse whether issues and barriers are being experienced by Australian companies in countries that are signatories or immediately prospective signatories to ACTA: it seems to us to be far more likely that issues arise in non-ACTA countries where this text is unlikely to have any impact. In any event, benefit to one sector is not a sufficient

[8] Ibid 260
[9] Ibid 264
[10] *Copyright Act 1968* (Cth)

condition for seeking such strengthening through trade agreements[11]. A National Interest Analysis should consider the implications of ratification of ACTA beyond these sectors, for the broader Australian community, as consumers of content, as well as Australian companies and individuals liable to have their goods seized (in Australia or overseas) with limited procedural protections.

ACTA is significantly more stringent and rights holder friendly than the TRIPS Agreement[12], to which Australia is a signatory. Despite concerns also raised by the Productivity Commission on Australia's ratification of TRIPS[13], TRIPS contains statements of fundamental balance and protections for users that are simply absent from ACTA.

ACTA neglects to consider appropriate exceptions and limitations to IP rights to facilitate access to knowledge, culture, information and research; it also removes TRIPS safeguards on a number of IP remedies and provides no concrete protection for interests such as individual privacy or commercial confidentiality or the rights of defendants to legal action. Its emphasis on the rights holder deepens the imbalance between appropriate protections for creators and the public interest in flexible and fair use of content.

Finally, we note that the National Interest Analysis asserts that there are 'few foreseeable additional costs' attendant on adhering to ACTA. The Productivity Commission has in the past criticised the failure of DFAT to provide indicative estimates of the cost of negotiating and administering agreements. In our view, a National Interest Analysis should include an analysis of the ongoing personnel costs of administering the ACTA in any relevant departments (including, for example, Customs) as well as an assessment of the extent to which participation in the ongoing administration of ACTA will lead to doubling up of tasks given the large number of other international institutions involved in negotiating and monitoring the area of IP enforcement (including the WTO, the WIPO, APEC, ASEAN, and the International Customs Union as well as our existing FTAs such as those with the US, Singapore, Thailand, and, potentially, the TPP). The use of trade agreements as a vehicle for IP policy making undermines multilateral processes, like WIPO and the WTO, and may lead to a fragmentation of international law.

4 Objections to the negotiating process

The National Interest Analysis attaches a comment on consultations undertaken by DFAT over the course of negotiation of the ACTA, and notes a 'perceived' lack of transparency criticised by some stakeholders. Public consultations offered by DFAT between November 2007 and April 2010 were conducted without any public access to the draft text and negotiating documents. This lack of transparency negated any meaningful public consultation, and while stakeholders were invited to make inquiries to DFAT at any time, queries as to substantive aspects of the negotiating texts were not satisfactorily answered. The ACTA draft text was only released on April 22nd 2010, following sustained and global demand for increased transparency.

[11] Above n 4, 264
[12] See, for example, the ACTA assessment commissioned by the European Parliament's Committee on International Trade in 2011, http://www.erikjosefsson.eu/sites/default/files/DG_EXPO_Policy_Department_Study_ACTA_assessment.pdf
[13] Above n 4, 263

We note that in 2004, critical of the manner in which AUSFTA was negotiated without proper economic analysis or adequate public consultation, Labor published a set of recommendations to govern future trade negotiations[14]. The Labor recommendations called for increased opportunities for review of any proposed agreement by JSCOT and the Productivity Commission, and advocated increased Parliamentary scrutiny of the negotiating process.

In 2011, the Gillard Government highlighted transparency as one of five principles to govern future Labor Government trade negotiations[15]. Despite this, present negotiations of the Trans-Pacific Partnership Agreement by DFAT continue to take place in secrecy, without public access to negotiating texts. The persistent lack of transparency associated with these negotiations has received international media attention, particularly following public outcry over similarly stringent and enforcement-focussed IP legislation, the Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA), proposed in the US. The TPP trading area currently encompasses nine negotiating countries, and is likely to widen. Negotiations of this magnitude should not be shrouded in secrecy.

5 Comments on specific provisions

Despite assurances from Government that ACTA will not result in changes to domestic law, it is worth noting those provisions that reflect concerning developments in international IP policy making.

A. Secondary liability

Article 23.4 provides for criminal liability for 'aiding and abetting' criminal copyright and trademark offences. Articles 8.1 and 12.1 grant Courts the authority to direct third parties to prevent infringing goods, as well as goods that 'involve the infringement of an IP right', from entering the channels of commerce. Article 27.2, regarding enforcement procedures for an infringement of copyright over digital networks, can be read as incorporating intermediary liability for copyright infringement into IP policy making. These secondary liability provisions can be read expansively in establishing intellectual property infringement, particularly in the online environment.

The inclusion of secondary liability provisions in ACTA may sidestep judicial decisions[16] that would otherwise limit the scope of an online intermediary's liability. This is an area of law that is far from clear, and without analysis of the potential implications for internet businesses, should not be adopted.

[14] Recommendations of Labor Senators, Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, http://www.aph.gov.au/senate_freetrade/report/final/alp.htm
[15] 'Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity', April 2011, http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf
[16] i.e. in Australia, where the outcome of *Roadshow Films & Ors v iiNet Limited* in the High Court, concerning an internet service provider's liability for copyright infringements of its clients, has not yet been decided

B. Criminal provisions

ACTA entrenches criminal penalties in copyright and trademark that go beyond obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the leading international IP treaty. For example, the broad definition of 'commercial scale' under Article 23.1 of ACTA, 'carried out as commercial activities for direct or indirect commercial or economic advantage' , encompasses single acts, effectively removing any requirement of *scale* in determining whether an act is criminal. This definition seems to raise minor infringements of copyright by businesses (i.e. pasting images into emails and presentations) to criminal acts.

The ADA and ALCC refer the Committee to Associate Professor Kimberlee Weatherall's comments in her submission [17] on ACTA regarding Australia's expansion of criminal penalties in copyright as a result of obligations under AUSFTA. It is worth noting that the ACTA text is broader than Australia's obligations under AUSFTA, which Weatherall elaborates on in some detail.

C. Border measures

As mentioned in Part 3 of this submission, ACTA is absent of the safeguards for defendants which parties are obliged to provide under TRIPS. JSCOT must clarify that ACTA does not remove the TRIPS safeguards.

Further, powers granted to 'competent authorities' under Article 19 of ACTA, to seize and destroy goods deemed to be infringing, does not require judicial oversight and may be wielded inappropriately or exploited by officials in countries where accountability measures have not been established.

D. Enforcement in the digital environment

Article 27 of ACTA, regarding enforcement in the digital environment, was substantially watered down during the negotiating process. While the final text is absent of any explicit provisions regarding implementation of graduated response laws, or similarly, demands on internet intermediaries to terminate access to infringing sites, Article 27 is so vague as to leave the door open for lobbyists and negotiating countries in favour of a stringent enforcement agenda to pursue these restrictive and stifling provisions in future.

Recent attempts to implement such measures in the US in the form of SOPA and PIPA were met with widespread public condemnation and criticism from other member States. JSCOT must seek a positive statement from Government that ACTA will not require graduated response laws or other similar SOPA or PIPA style laws to be implemented.

6 The need for further economic and non-economic analysis of ACTA

At the very least, ratification of ACTA should be postponed until robust economic analysis of its net benefits and costs for Australia, including the effects on consumers, have been undertaken by a review body like the Productivity Commission. To the extent that the Government relies on the

[17] Kimberlee Weatherall, 'Submission to the Joint Standing Committee on Treaties: Anti-Counterfeiting Trade Agreement', 27 January 2012

possibility of countries in our region joining at some later point after Australia joins ACTA, there should be evidence to support that speculation. The Government's confirmation that ACTA will not result in changes to existing domestic law is an insufficient basis for ratifying plurilateral agreements without proper consideration of their effects on Australia's ability to undertake future reform.

This is particularly important given current negotiation of the Trans-Pacific Partnership Agreement and DFAT's incorporation of ACTA provisions as a starting point in IP negotiations. In presenting its report to Parliament, we urge the Joint Standing Committee on Treaties to demand independent analysis of the benefits and costs of implementing ACTA before any decision is made on ratification.

The ADA and ALCC would welcome the opportunity to make further submissions should the Committee require them. If there are other issues, analysis or evidence which the ADA and ALCC can usefully provide information to the Committee, the principal contact is Ellen Broad, copyright law and policy adviser, who can be contacted at ebroad@nla.gov.au or (02) 6262 1273.