



April 30, 2008

***BY ELECTRONIC MAIL (consultations@international.gc.ca)***

Consultations and Liaison Division (CSL)  
Foreign Affairs and International Trade Canada  
Lester B. Pearson Building  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2

Dear Sirs and Mesdames:

**Re: Anti-Counterfeiting Trade Agreement (ACTA)**

The Canadian Internet Policy and Public Interest Clinic (CIPPIC) is a legal clinic based at the University of Ottawa. Since the fall of 2003, CIPPIC has been engaged in research and advocacy on a number of issues involving law and technology from a public interest perspective. Our mission is to fill voids in public policy debates on technology law issues, ensure balance in policy and law-making processes, and provide legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology. Copyright law reform has been a focus of our study and advocacy throughout our existence.

Further to the Department's invitation<sup>1</sup> for comments on the ACTA initiative, CIPPIC writes to you to submit to you our views with respect to and comments on the proposed Anti-Counterfeiting Trade Agreement (ACTA), and the role Canada might play in preliminary and substantive discussions addressing the content of ACTA.

Our submissions address 3 general areas: (1) venue, (2) process, and (3) substance.

The content of ACTA could have significant implications for Canada. Counterfeiting activity harms Canadian consumers and Canadian trade. All Canadians endorse the dedication of appropriate law-enforcement resources to addressing trade-debilitating commercial infringement. However, intellectual property policy equally touches on important policy frameworks governing innovation, privacy, security, trade, creativity and freedom of expression. Enthusiasm to address the harms legitimately attributed to counterfeiting could push ACTA's content beyond that sphere to undermine other values that Canadians hold dear. CIPPIC urges Canadian negotiators to remain cognizant of this reality, and to approach ACTA discussions with an understanding that balanced intellectual property policies are the best means of advancing Canada's interests.

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<sup>1</sup> "The Government of Canada is seeking the views of Canadians on the proposed Anti-Counterfeiting Trade Agreement (ACTA)" <<http://www.international.gc.ca/commerce/consultations/active-consultations-en.asp>>.

## SUBMISSIONS

CIPPIC's submissions address three general topics: (1) venue, (2) process, and (3) substantive matters. However, prior to addressing those topics, we consider the absence of any fundamental justification for this initiative. CIPPIC questions the need for a trade agreement addressing intellectual property remedies. The current participants in ACTA discussions all boast sophisticated intellectual property statutes featuring robust remedies. No one has pointed to a remedial failing of these statutes that participants can address only through a new international trade agreement,<sup>2</sup> and one outside of traditional multilateral intellectual property fora. CIPPIC urges the Canadian delegation to advocate meeting legitimate ACTA objectives through voluntary, non-binding co-operative efforts, rather than through an ill-conceived, binding trade agreement.

### 1 Venue

The ACTA discussions are taking shape in a novel venue, outside of the usual international venues for establishing standards of intellectual property law. As a result, developing nations are not at the table. Civil society enjoys no mechanism for input. These features of the ACTA discussions are not simply consequences of the venue – they are the reason for the venue.

This is problematic for a number of reasons. First, ACTA appears to be an effort to establish international standards for criminal *and* civil enforcement of intellectual property rights.<sup>3</sup> It is inappropriate to do so in a venue designed to restrict participation to a small number of developed nations. Exclusive venues will inevitably produce “standards” skewed towards the interests of those nations, and neglect the distinct interests of developing nations in balanced intellectual property enforcement and protection standards.

Second, the exclusion of developing nations from ACTA will ultimately harm developing nations. The practices of some developed nations in embedding standards of IP protection and enforcement in bilateral and regional trade agreements will ensure that developing nations will be introduced to ACTA standards in the context of negotiating such agreements.<sup>4</sup> Eventually, developing nations will be coerced into adopting IP enforcement standards to which they had no input, and which may be inappropriate to their standard of development. More troublingly, ACTA compliance may require the re-allocation of public resources away from more pressing social concerns, such as, for example, policing the drug trade.

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<sup>2</sup> Voluntary efforts have proven effective in dealing with other issues associated with contemporary communications technologies. The London Action Plan for addressing spam, for example, has provided participants with an effective, non-binding forum for sharing anti-spam enforcement information and best practices, and for crafting public-private partnerships. That ACTA participants are not championing a similar approach to IP enforcement speaks volumes. See The London Action Plan <<http://www.londonactionplan.com/?q=node/1>>.

<sup>3</sup> American Trade Representative Susan Schwab characterizes ACTA as an effort to establish “a new, higher benchmark for enforcement” of IP rights. See United States Trade Representative, “Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes” (23 November, 2007) <[http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/October/Ambassador\\_Schwab\\_Announces\\_US\\_Will\\_Seek\\_New\\_Trade\\_Agreement\\_to\\_Fight\\_Fakes.html](http://www.ustr.gov/Document_Library/Press_Releases/2007/October/Ambassador_Schwab_Announces_US_Will_Seek_New_Trade_Agreement_to_Fight_Fakes.html)>.

<sup>4</sup> See, e.g., “Final Text of the United States - Peru Trade Promotion Agreement” (12 April, 2006) <[http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html)>, which provides in Chapter 16 for standards of protection of intellectual property that exceed international standards (for example, requiring term of copyright to last for 70 years past the end of the year of the author's death, rather than 50 as is the term required by applicable treaties) and that mandate anti-circumvention laws that meet the standards set not by international treaty, but by applicable American statute.

Third, ACTA discussion may produce a document that is inconsistent with – or, worse, at odds with – the tenor of current international IP policy interests. Both the Development Agenda at the World Intellectual Property Organization (WIPO)<sup>5</sup> and the discussions around the A2K Treaty<sup>6</sup> include a focus on exceptions and limitations associated with intellectual property. Similarly, WIPO’s Standing Committee on Copyright and Related Rights (SCCR) is currently entertaining a proposal to address exceptions and limitations to copyright law.<sup>7</sup> Nothing in the current proposed content of ACTA indicates at this point that ACTA discussions will address appropriate limitations on the scope and reach of intellectual property enforcement mechanisms.

Fourth, the ACTA discussions are not taking place in the context of a specific trade proposal. In trade discussions, trade concessions occur as part of a give and take. Nations that are net importers of intellectual property-related assets – Canada being one such nation – might be expected to accept trade obligations likely to exacerbate that trade deficit in return for concrete gains in other regions of the economy in which it enjoys a competitive advantage. The venue for the ACTA discussions is designed – again, deliberately – to exclude the possibility of such gains.

CIPPIC recommends that the Canadian government take the following positions in ACTA discussions:

- ACTA discussions should be moved to a traditional venue for addressing international standards pertaining to intellectual property, such as WIPO;
- ACTA discussions should involve developing nations;
- ACTA discussions should formalize a process for involvement of civil society; and
- ACTA discussions should be limited to non-binding voluntary co-operation, and reject binding inflexible trade obligations.
- Canada should not commit to adopting the ACTA framework in the absence of the realization of other trade-related gains for Canada.

## 2 Process

The process for negotiating the terms of ACTA raises concerns. The bedrock principle grounding all aspects of ACTA negotiations should be that the process is manifestly inclusive, open and transparent. CIPPIC fears that ACTA negotiations and implementation will not meet this standard.

First, it is not clear whether there is even a “process” in place, or what the terms of such a process might be. For example, the Department’s “Fact Sheet” makes no mention of the state of discussions, or the process to date. Australia’s Department of Foreign Affairs and Trade, in contrast, indicates in its public consultation document that participating states have already held

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<sup>5</sup> World Intellectual Property Organization, “Member States Agree to Further Examine Proposal on Development” (4 October 4, 2004) <[http://www.wipo.int/edocs/prdocs/en/2004/wipo\\_pr\\_2004\\_396.html](http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_396.html)>.

<sup>6</sup> See, e.g., Draft Treaty on Access to Knowledge (9 May, 2005) <[http://www.cptech.org/a2k/a2k\\_treaty\\_may9.pdf](http://www.cptech.org/a2k/a2k_treaty_may9.pdf)>.

<sup>7</sup> WIPO, “Member States Consider Future Work of Copyright Committee”, PR/2008/541 (13 March, 2008) <[http://www.wipo.int/pressroom/en/articles/2008/article\\_0013.html](http://www.wipo.int/pressroom/en/articles/2008/article_0013.html)> (reporting that “The SCCR also considered a proposal from Brazil, Chile, Nicaragua, and Uruguay on limitations and exceptions. This was an elaborated version of a proposal originally submitted to the SCCR by Chile in 2005, which called for an analysis of limitations and exceptions as they relate to education, libraries and access to protected works by the visually-impaired.”)

“several rounds of pre-negotiation, informal technical discussion”.<sup>8</sup> There are also reports that a draft document has been circulated amongst rights-holder lobbyists (but not amongst civil society or consumer electronic or communications representatives). If true, this is deeply troubling.

Second, consistent with CIPPIC’s view on venue, it is important that trade discussions be transparent. For example, the proposed scope of ACTA’s application remains unclear even now, as the Department solicits public comments. The Department’s public documents speak only to “intellectual property” rights. In contrast, Australia’s Department of Foreign Affairs and Trade in its Discussion Paper indicates that “Currently, the ACTA proposal covers only trade marks and copyrights.”<sup>9</sup> This degree of opacity is unusual, even for trade discussions.

Third, given the nature of intellectual property rights, it is important that participants engage in full stake-holder consultations with respect to the terms of the proposed Treaty prior to any effort to conclude the Treaty. Appropriate stake-holders should include developing nations and domestic stakeholders. Domestic stakeholder consultations should include creator groups (such as musicians and software developers), rights-holder groups (including groups such as documentary filmmakers and academic creators) and user communities (such as consumer groups and security researchers), as well as intermediaries (such as Internet Service Providers (ISPs) and consumer electronics innovators).

Fourth, CIPPIC has concerns that discussions are intended to move swiftly towards completion within 2008. Intellectual property protection and enforcement is complex. Participants must ensure that they appreciate the potential implications of altering the balance between the interests of intellectual property stakeholders prior to arriving at final Treaty terms. This is simply not possible within a short time-frame. This is also a concern given the scant evidence available as to the harms associated with counterfeiting activities. Canadian evidence of the harms associated with counterfeiting activity has proven notoriously unreliable.<sup>10</sup> The Organization for Economic Co-operation and Development is currently undertaking efforts to provide more reliable evidence of the size of the global trade in counterfeit goods. Reliable evidence would provide ACTA participants with guidance as to the quantum of resources participants should divert to intellectual property enforcement matters and away from other important security matters. Canada should

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<sup>8</sup> Australian Department of Foreign Affairs and Trade Discussion Paper, “The Anti-Counterfeiting Trade Agreement (ACTA)” (13 November, 2007, updated 4 February, 2008) <<http://www.dfat.gov.au/trade/acta/discussion-paper.html>>.

<sup>9</sup> *Ibid* at 6.

<sup>10</sup> The RCMP has been the most prominent Canadian source for recent claims of significant economic harm from counterfeiting. Its 2005 Economic Crime Report pegged the cost of IP counterfeiting at between \$10 billion to \$30 billion annually: see “RCMP Feature Focus: 2005 Economic Crime (Canada): Intellectual property (IP) crime in Canada – hazardous and costly” <[http://www.rcmp-grc.gc.ca/economic\\_crime/ip\\_e.htm](http://www.rcmp-grc.gc.ca/economic_crime/ip_e.htm)>. However, an access to information request filed by Professor Michael Geist indicated that this estimate is based on “open source documents found on the Internet.” Such documents include no rigorous Canadian economic analysis, but plenty of self-serving claims by industry lobby groups. See “Misleading RCMP Data Undermines Counterfeiting Claims” (18 September, 2007) <<http://www.michaelgeist.ca/content/view/2243/135/>>. A more accurate figure is likely only a small fraction of that figure. The independent US Government Accountability Office in a 2007 study found counterfeiting violations in only .06 per cent of 287,000 randomly inspected shipments entering the United States between 2000 and 2005: Government Accountability Office, “Intellectual Property: Better Data Analysis and Integration Could Help U.S. Customs and Border Protection Improve Border Enforcement Efforts”, report number GAO-07-735 (27 April, 2007) <<http://www.gao.gov/new.items/d07735.pdf>>. The OECD’s most recent study puts the global trade in counterfeits at \$200 billion annually. See Organization for Economic Co-Operation and Development, “The Economic Impact of Counterfeiting and Piracy” (2007) <<http://www.oecd.org/dataoecd/13/12/38707619.pdf>>.

take the position that ACTA should impose no resource commitments in the absence of sound evidence that the commitment is warranted.

### 3 Substance

The Department's ACTA Fact Sheet of March, 2008, indicates that ACTA negotiations might touch on each of (a) the legal framework supporting intellectual property rights, (b) international co-operation, and (c) enforcement practices.

#### (a) Legal Framework

DFAIT's ACTA Fact Sheet states that ACTA will aim to "provide private citizens, law enforcement agencies, and the judiciary with the appropriate tools to deal effectively with counterfeiting and piracy through a strong and modern legal framework."<sup>11</sup> CIPPIC offers several comments on this statement and on the substance of the legal framework that is appropriate for ACTA's forum.

First, this statement is ambiguous, and leaves open the possibility that ACTA will circumvent domestic, democratic, and accountable policy-making fora to address substantive elements of intellectual property law such as subject matter, the creation of new rights, or the curtailment of exceptions and limitations. Such an approach should be rejected out of hand. ACTA should focus on enforcement of existing intellectual property rights and leave substantive matters to domestic legislatures.

Second, ACTA discussions should reflect existing intellectual property enforcement mechanisms, and not create new, far-reaching remedies that have the potential for misuse or to tip the balance inherent to intellectual property law's existing allocation of rights among stakeholders. Experience under the WIPO Copyright Treaty<sup>12</sup> and the WIPO Performers and Phonograms Treaty<sup>13</sup> demonstrates that the creation of novel intellectual property rights can have unforeseen and negative consequences. These treaties introduced a new "anti-circumvention right" that did not previously exist in the laws of any nation, and which have proven extremely controversial.<sup>14</sup> Currently, parties are debating the merits of controversial remedies to repeated infringement, such as mandatory termination of Internet access.<sup>15</sup> There is the remote possibility that such unanticipated remedies could be crafted, for the first time, in ACTA. International treaties are not the place to be legislating novel intellectual property remedies or rights.

Third, ACTA should not overturn domestic trade policy through mandatory interpretation of the scope and limits of domestic intellectual property rights. For example, in the recent Supreme Court of Canada decision in *Euro-Excellence v. Kraft Canada*, the Supreme Court permitted the

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<sup>11</sup> Department of Foreign Affairs and International Trade, "Anti-Counterfeiting Trade Agreement - Fact Sheet" (March, 2008) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/IP-factsheet-fiche.aspx>> [DFAIT, ACTA Fact Sheet].

<sup>12</sup> WIPO Copyright Treaty (20 December, 1996), (entered into force 6 March 2002) <[www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html)>.

<sup>13</sup> WIPO Performances and Phonograms Treaty (20 December, 1996) (entered into force 20 May 2002) <[www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html)>.

<sup>14</sup> See, e.g., Electronic Frontier Foundation, "Unintended Consequences: Seven Years under the DMCA" (April, 2006) <<http://www.eff.org/wp/unintended-consequences-seven-years-under-dmca>>.

<sup>15</sup> See, e.g., Danny O'Brien, "Three Strikes, Three Countries: France, Japan and Sweden" (18 March, 2008) <<http://www.eff.org/deeplinks/2008/03/three-strikes-three-countries>>.

importation of goods despite associated packaging materials bearing copyright-protected logos.<sup>16</sup> The Court cautioned against the extension of intellectual property rights beyond their “proper limits”.<sup>17</sup> ACTA should not operate to overturn domestic law.

Fourth, ACTA should focus on commercial-scale infringement of intellectual property rights, and exclude application to behaviours, groups and institutions that fall outside of this sphere. ACTA should not focus on innocent intermediaries – such as Internet Service Providers and consumer electronics innovators – or dealings that fall within exceptions and limitations of intellectual property rights. ACTA must reflect an appreciation for the limits of intellectual property rights, and the important policy objectives those limits serve. Similarly, ACTA should not impose burdens on public institutions such as libraries, archives, educational institutions and museums. Such institutions operate in the public interest and do not engage in any activities that could credibly be characterized as “counterfeiting”. For example, statutory damages imposed on such institutions frustrate the public interest as they foster risk-averse behaviour that undermines innovation and creativity in the provision of services to the public.<sup>18</sup> Canada should be removing the threat of statutory damages from these institutions, not imposing further remedial threats. This focus also cautions against broadening the sphere of behaviours defined as “criminal” under the current Act. Ordinary consumer activity, such as time-shifting, media-shifting and format-shifting, should not be criminalized. Research and development should not be criminalized. Criminal provisions of intellectual property statutes should remain focused on commercial-scale infringement.

Fifth, ACTA should reflect Canada’s ongoing commitment to technological neutrality in intellectual property statutes. ACTA should not target specific technologies and should not facilitate the imposition of technology mandates, such as mandatory filtering of Internet traffic. Enforcement measures that target specific technologies or classes of technologies, or the Internet, are inappropriate. ACTA should not be a vehicle for banning trade in technologies that facilitate the circumvention of technical protection measures, as such technologies are lawful in Canada and have lawful application even in countries that boast anti-circumvention laws. Similarly, it is inappropriate to privilege intellectual property rights-holders over others who have interests implicated by communications technologies, such as those affected by defamation or hate speech or anti-competitive behaviour, who will not enjoy similar technologically focused remedies.

Proposals to mandate filtering of ISP networks merit particular caution. Filtering proposals generally require content-based intervention in private communications. Such intervention invades consumer privacy in contravention of Canadian privacy laws. Filtering is necessarily both under-inclusive – filters are trivially frustrated by encryption – and over-inclusive, in that the technology is incapable of distinguishing lawful use of content (pursuant to a statutory exception such as fair dealing) from infringing use. Filters represent a prior restraint on communication, and as such will face significant constitutional challenge in demonstrably justifying the burden placed on legal communications. Mandatory filters will also impose costs and burdens on intermediaries, such as Internet Service Providers (which include not just commercial entities, but also public institutions such as government agencies, libraries and educational institutions). In our

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<sup>16</sup> *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37.

<sup>17</sup> *Ibid.* at para. 79.

<sup>18</sup> In seeking to provide innovate public services, public institutions may engage in activity that may ultimately infringe intellectual property rights – for example, rolling out technological services that infringe a patent – but they do so for no purpose that contributes to the harms associated with counterfeiting. As such, the activities of such institutions should lie entirely outside of the scope of ACTA.

submission, Canada's policy commitment to technological neutrality wisely counsels against the imposition of a filtering mandate on Canadian ISPs.

Sixth, ACTA must not overturn domestic laws addressing disclosure of the identity of alleged infringers of intellectual property rights. In Canada, such laws require a party alleging infringement to obtain a court order.<sup>19</sup> These laws offer important protections of due process that require those alleging infringement to offer a bona fide allegation of infringement, to hold the rights being asserted, and to provide sound evidence substantiating the allegation.<sup>20</sup> The targeted individual and intermediary have the opportunity to object to the request and participate in the decision. The decision is judicial and may be appealed. These rules protect the privacy interests of the public and protect the public against abuse of judicial resources. These protections must not be overturned by international treaty.

Finally, ACTA discussions should proceed with an appreciation of the implications of its commitment to trade. Both intellectual property rights and exceptions and limitations to those rights facilitate trade and innovation. Exceptions and limitations to intellectual property have *enormous* economic value. The Computer and Communications Industry Association's 2007 economic study of fair use in the United States, conducted in accordance with World Intellectual Property Organization methodology, concluded that:

The research indicates that the industries benefiting from fair use and other limitations and exceptions make a large and growing contribution to the U.S. economy. The fair use economy in 2006 accounted for \$4.5 trillion in revenues and \$2.2 billion in value added, roughly 16.2 percent of U.S. GDP. It employed more than 17 million people and supported a payroll of \$1.2 trillion. It generated \$194 billion in exports and rapid productivity growth.<sup>21</sup>

ACTA discussions, if myopically focusing on the interests of rights-holders, may in fact impede trade and innovation while at the same time undermining other important policy objectives, including consumer privacy, threatening security research, restricting the free flow of information, or undermining net neutrality and open communications systems.

### **(b) International Co-operation**

DFAIT's ACTA Fact Sheet states that ACTA will aim to facilitate "cooperation and sharing of information between law enforcement authorities."<sup>22</sup> The Fact Sheet goes on to suggest that such activities could include "international co-operation among enforcement agencies", including customs authorities, "capacity building" and the provision of "technical assistance".<sup>23</sup> CIPPIC cautions that moving enforcement resources to the borders and away from domestic enforcement mechanisms carries risks.

First, enforcement of intellectual property at the borders pursuant to *international* pressures must

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<sup>19</sup> *BMG Canada Inc. v. John Doe* (F.C.), 2004 FC 488, <[www.canlii.org/ca/cas/ft/2004/2004fc488.html](http://www.canlii.org/ca/cas/ft/2004/2004fc488.html)>, [2004] 3 F.C.R. 241, (2004), 32 C.P.R. (4th) 64.

<sup>20</sup> See CIPPIC, "Brief of Federal Court of Appeal decision in *BMG Canada v. Doe*, 2005 FCA 193" <[http://www.cippic.ca/documents/Brief\\_of\\_FCA\\_Decision.pdf](http://www.cippic.ca/documents/Brief_of_FCA_Decision.pdf)>.

<sup>21</sup> Computer & Communications Industry Association, "Fair Use in the U.S. Economy" (12 September, 2007) at 52 <<http://www.cciainet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf>>.

<sup>22</sup> DFAIT, ACTA Fact Sheet, note 11, above.

<sup>23</sup> *Ibid.*

not preclude, replace, or assume the *domestic* adjudication of controversial claims that go to subject matter, scope, or exceptions and limitations of intellectual property rights. For example, the motion picture industry long took the position that manufacturers of video cassette recorders infringed copyright in the United States. Ultimately, the US Supreme Court found that not to be the case.<sup>24</sup> However, one can imagine, had ACTA been in place at that time, that customs authorities could have taken an aggressive position, at the urging of lobbyists and supportive government trade representatives, to block importation of VCRs prior to the adjudication of the issue. This is not a speculative concern. Content industry trade groups often object to innovative consumer electronics on copyright grounds. Enforcement at the border should not move in advance of domestic law in such cases.

Second, border enforcement and information sharing must not undermine domestic civil liberties. Criticism, parody, review, and transformative and innovative use of pre-existing works and inventions all enjoy constitutional protection in Canada pursuant to the guarantee of freedom of expression pursuant to s. 2(b) of the *Charter of Rights and Freedoms*.<sup>25</sup> Canadians also enjoy protections against the unauthorized collection, use and disclosure of personal information under federal and provincial privacy laws. ACTA “co-operation” should not grant governments licenses to spy on citizens or trade in the fruits of spying on foreign citizens.

### (c) Enforcement Practices

DFAIT’s ACTA Fact Sheet states that ACTA will aim to facilitate the development of “best practices” that will “promote strong IP protection in collaboration.”<sup>26</sup> The Fact Sheet states that possible avenues for addressing this issue include the creation of “[f]ormal or informal public/private advisory groups”, the fostering of “expertise within law enforcement”, and measures “for raising consumer public awareness about the importance of IPR protection and the detrimental effects of IPR infringements.”<sup>27</sup> CIPPIC has concerns that, unless structured responsibly, these mechanisms can be used to irresponsibly advance private interests that undermine balanced intellectual property policy at the expense of consumer privacy, innovation, security research, the free flow of information, and open communications systems.

DFAIT’s Fact Sheet suggests that ACTA could institutionalize “advisory groups” offering guidance on “best practices”.<sup>28</sup> This suggestion raises transparency and accountability concerns. CIPPIC urges Canada’s delegation to pay particular attention to process issues associated with such groups. Rights-holders face understandable pressures to move such groups in a self-interested direction, at the expense of values served by Canada’s intellectual property laws. Such groups must offer a balanced perspective, and include consumer advocates, representatives of affected intermediaries, and creator groups in addition to rights-holder representatives. Advisory groups must follow a transparent process in arriving at positions, and be accountable for those positions.

Similarly, efforts to raise “awareness” should reflect a similarly inclusive, open and transparent process. Canada has a history of rights-holder groups advancing “public education materials” that

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<sup>24</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>25</sup> *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 s. 2(b), <[www.canlii.org/ca/const\\_en/const1982.html](http://www.canlii.org/ca/const_en/const1982.html)>.

<sup>26</sup> DFAIT, ACTA Fact Sheet, note 11, above.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*



amount to little more than thinly disguised propaganda.<sup>29</sup> CIPPIC is concerned that ACTA's education mandate will boast a similarly lop-sided perspective. Public education materials will service Canadians best when they focus on not only the scope of intellectual property rights, but their limits, as well, and when their content reflects not industry self-interest in the protection of intellectual property, but the wider public interest in intellectual property. Public education materials should take input from creator and rights-holder groups, but also from consumer groups, educators, librarians, and civil liberties and privacy experts.

Finally, CIPPIC reiterates its concern that ACTA impose obligations on Canada to dedicate to counterfeiting only those resources that are commensurate with the demonstrated and associated harm. Law enforcement and border enforcement resources are scarce. Officers enforcing private intellectual property issues are unavailable to address other harms, such as the investigation and prosecution of child pornography, gun smuggling, and trafficking in illegal narcotics. Intellectual property rights holders are able to enforce their own rights in Canada, and have at their disposal remarkably favourable remedies such as statutory damages and wide injunctions. Victims of child pornography enjoy no such advantages. Canada must be careful in taking on obligations that will compel a redeployment of scarce law enforcement resources, in the absence of compelling evidence of need, to relieve private interests of the burden of addressing private economic harm.

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We thank you for the opportunity to provide you with these comments. We hope you find them helpful. We look forward to engaging with you on these issues in 2008.

Yours truly,

A handwritten signature in black ink that reads "David Fewer". The signature is written in a cursive, slightly slanted style.

David Fewer  
Staff Counsel  
CIPPIC

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<sup>29</sup> See, e.g., the Wikipedia entry for Access Copyright's "Captain Copyright", noting that "concerns were raised in a number of quarters that the character was not appropriate for educational uses, as it was produced by an entity with a commercial interest in the state of copyright law in Canada, and it is unclear that it is following copyright law itself." See <[http://en.wikipedia.org/wiki/Captain\\_Copyright](http://en.wikipedia.org/wiki/Captain_Copyright)>.