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Submission online at <http://www.digital-copyright.ca/node/5099>

Dear Sirs,

The following is a submission to the ongoing consultation by Foreign Affairs and International Trade Canada, as documented at <http://www.international.gc.ca/consultations/active/>, on the so-called Anti-Counterfeiting Trade Agreement (ACTA).

I am a self-employed Internet and Free/Libre and Open Source Software consultant. I am the volunteer policy coordinator for CLUE: Canada's Association for Free/Libre and Open Source Software <http://cluecan.ca/policy>, co-coordinator for Getting Open Source Logic INto Government (GOSLING) <http://goslingcommunity.org>, and the host for Digital Copyright Canada <http://digital-copyright.ca>

## **Recommendations**

- Canada should cease involvement in ACTA.
- Canada should indicate interest in a WIPO treaty on counterfeiting, using a traditional meaning of counterfeiting (IE: offense against recipient).
- Infringements of copyright, patent and related exclusive rights should be clearly dealt with in treaties under their proper titles, and not deceptively wrapped up in unrelated concepts of counterfeiting.
- All submission from the 2001 and 2009 Canadian consultations on copyright carried out by the departments of Industry and Canadian Heritage should be considered included in any consultation by Foreign Affairs and International Trade Canada on related issues. Many submissions to these consultations directly speak to provisions within ACTA, and it seems inappropriate for representatives from DFAIT to be negotiating a primarily Copyright treaty without the benefit of these insights.

## **Discussion**

I am very concerned about these negotiations. I see many indications that some of the parties involved in promoting this "trade agreement" are not willing to be honest about their intentions, for fear that it would be rejected by fully informed citizens and governments.

We start with the title of "Anti-Counterfeiting Trade Agreement" which highlights a theme of being opposed to counterfeiting. A simple dictionary definition of counterfeiting would be "made in imitation so as to be passed off fraudulently or deceptively as genuine; not genuine; forged". If looked at correctly, this is an offense against the recipient of the imitation, making laws against counterfeiting a form of consumer protection. This is how trademark law was conceived, although this form of consumer protection has been abused by trademark holders to become something quite different.

How could anyone be opposed to such a law as it would protect us from potentially harmful drugs being passed off as something they are not, or airplane parts which may never have been tested?

This seemingly positive and minimally controversial policy is then wrapped around extremely controversial forms of copyright law. I can see no other reason to do this other than to try to distract policy makers and the public as to the true nature of the treaty -- to in effect, try to "pass off fraudulently or deceptively as genuine" a treaty on copyright as if it were a treaty on counterfeiting.

The origins of this specific form of copyright revision are well established. We first saw this publicly articulated in 1995 as part of the USA's National Information Infrastructure (NII) Task force. The idea was to lock down communications technologies such that it would be large corporations, rather than private citizens/creators, that were ultimately in control of this technology. The proponents were a laundry list of incumbent industries that felt threatened by new communications technologies and the new competing industries that were emerging along with it. They wanted to do anything they could to shut down or otherwise cripple these technologies and competitors. The NII implementation bill did not pass within the united states, and was policy laundered though WIPO with a watered down version forming the 1996 WIPO Internet treaties.

I see ACTA as yet another unethical form of policy laundering and forum shopping. Since the 1996 WIPO treaties there has been a transition within WIPO where the countries that represent the vast majority of the population of the planet have started to understand the implications of some of the recent treaties. They are now pushing for things such as the Development Agenda and treaties on limitations and exceptions. Given this change and the highly controversial nature of the 1996 WIPO treaties, it is more likely that WIPO would forge forward with more balanced copyright than in the past. Those that want to move to further cripple technology will have realized that WIPO will no longer be able to be as easily manipulated as it was in 1996 when so few understood the benefits of citizen controlled technology.

While I am a strong opponent of the 1996 WIPO treaties and believe that Canada should never ratify (should instead renegotiate), I expect far better things from WIPO in the future now that a larger number of country and NGO participants are informed and engaged.

According to [http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect\\_property.aspx](http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx) , "The objective of an eventual ACTA is to put in place international standards for enforcing intellectual property rights in order to fight more efficiently the growing problems of counterfeiting and piracy."

If this is truly the goal, then the obvious question is why these negotiations are not happening at WIPO? The main difference appears to be one of accountability and transparency given WIPO, as a special agency of the United Nations, must honor some basic tenants of a democratic process. Everything about the level of secrecy around the Orwellian double-speak named ACTA seems to suggest something is very wrong. If this was intended to be an enforcement agreement then it would not include any new policy proposals, or make any activities into infringements that were not already infringements (including not pressuring countries into ratifying other treaties in any specific way).

In drafting a petition against ACTA <http://www.digital-copyright.ca/petition/acta> I note that "while signing a treaty is to ratification as dating is to marriage, some parliamentarians believe that signing a treaty creates an obligation for Canada to ratify". This is why policy laundering and forum shopping by special interest groups has been so successful in the past. It is also why governments (including responsible bureaucrats) should push back against this fundamentally anti-democratic activity.

## ***Controversial potential provisions***

It should not be surprising that the section that is most controversial is the one that is most distant from the concept of "counterfeiting", and that is "Internet Distribution and Information Technology".

Provisions discussed here come under two broad categories:

- making ISPs liable for copyright infringement committed by their customers unless they become private enforcers of copyright
- locking down technology such that it is third parties and not the owner that is able to control the technology, and allowing copyright holder the new anti-competitive right to impose brands of technology able to access content

These two highly controversial topics have been included in all Canadian copyright revision discussions in the last decade, and are nothing new. I discussed them in my submissions to copyright consultations in 2001 <<http://www.flora.ca/copyright-2001.shtml>> and 2009 <<http://www.flora.ca/copyright2009/>>

## **Anti-circumvention**

I have dedicated much of my volunteer time since the summer of 2001 opposing the legalization or legal protection of the two locks of DRM. I have given many presentations to the public, politicians and bureaucrats over the years. Rather than repeat the entire discussion I will point you to <http://flora.ca/own> . I am available to discuss this with bureaucrats at DFAIT if desired. A key problem is that most of the discussion is based on a form of science fiction around what the DRM vendors claim their technology does, and not the science of how it actually works.

I consider the lock on content which ties access to that content to specific authorized technology to be a form of "tied selling" which is harmful for all the reasons Canada correctly includes "tied selling" as an offense under our Competition Act.

I consider the lock on devices where someone other than the owner holds the keys to be a form of theft, as offensive as if we legalized or legally protected home builders who wanted to continue to manage the keys after a home had been sold.

I believe that these locks should not only not be legally protected, but legally prohibited.

The following are related points from my 2009 copyright consultation submission:

- Truly private activities (non-commercial and non-public in nature) should be carved out of copyright such that they do not require permission or payment.
- Any hardware assistance for communications, whether it be eyeglasses, VCR's, or personal computers, must be under the control of the citizen and not a third party. This should include screen readers (technology that reads out loud), or any other technology used by citizens to

enhance or augment their senses in order to access legally acquired copyrighted works. I do not believe that copyright holders have any legitimate interests in this area, and copyright should be limited to ensure it never restricts this hardware assistance. Business models based on a form of "theft" (third-party control of devices not authorized by owner) should not be legalized or legally protected.

- Do not extend copyright to include a new "right of non-interoperability" where authors can encode their content to only be interoperable with chosen brands of access technology (technical measures applied to content).
- Ensure that any legal protection for technical measures only extend to infringing acts, and not simply "unauthorized" acts. This critical issue was articulated in the 1996 WIPO treaties and the proposed Liberal Bill C-60. Ideal is if legal protection for technological measures only modified remedies, and was not considered at all prior to a court finding of infringement.
- Clarify that any legal protection for technological measures does not extend to locks applied to devices where the owners are not given the keys when devices are sold. This business practice should be made clearly illegal (under other laws).
- Clarify that software is neither a "device" (as interpreted in the USA with relation to their DMCA) nor a "service" (as could be misinterpreted in the context of C-60), and that there would be no prohibition over the authoring, distribution or use of software that had substantial non-infringing uses.
- Canada should not offer copyright protection to computing interfaces, as described in the European Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs which recognized the importance of interoperability. We should have explicit limits and exemptions to disallow copyright to be abused to deny interoperability, and a positive right to reverse engineer for the purpose of creating interoperable software.

## **ISP liability**

I believe that the notice-and-notice regime proposed within Canada strikes the right balance. Ultimately the individual committing the infringing acts should be liable for their own infringement, with intermediaries only needing to be conduits for communication and discovery.

This is what I included in my submission to the copyright consultation.

- Intermediaries should not be liable when they are simply acting on behalf of their customers, or providing solutions under the control of customers. The "notice and notice" regime for ISPs proposed in Bill C-60 and Bill C-61 should be retained. Authors of software with non-infringing uses should not be held liable for any abuses of that software to infringe copyright.
- Canada should not adopt a "graduated response" or "3 strikes" law. The reality is that with excessively high Statutory Damages that Canada already has a "one proven strike and you are out" law. What the proponents seem to be asking for is the ability to receive remedies without having to present any proof of infringing activities to a judge. This is similar to some of the "ISP liability" proposals such as "Notice and Take Down" (AKA: "Claim and Censor") or "notice and terminate" where alleged copyright holders want to have material removed without adequate court oversight.
- Any "ISP liability" or "graduated response" law must hold accusers liable for false accusations of infringing activity, with far harsher penalties than copyright infringement. A balanced "graduated response" law would revoke Internet access or copyright itself for copyright holders that continue to falsely accuse citizens of copyright infringement.

Some of the suggestions I am hearing in context of ACTA are, at best, a bad joke such as "3 strikes". This appears to be a situation where the concept of the punishment fitting the crime is flipped on its head with the least serious forms of copyright infringement receiving the most serious penalties.

I recently wrote an article for IT World Canada's blog titled *Word manipulation, hypocrisy, and the so-called Anti-Counterfeiting Trade Agreement (ACTA)*

<http://www.itworldcanada.com/blogs/insights/2009/11/10/word-manipulation-hypocrisy-and-the-so-called-anti-counterfeiting-trade-agreement-acta/52435/> where I discussed this concept a bit further.

The reality is that, if we took graduated response and applied it proportionately to all copyright infringement, that the proponents of these provisions wouldn't be around to be lobbying governments at all.

ACTA appears to propose that non-commercial infringement by average citizens should, after 3 accusations without judicial oversight, require that the citizen (and their family/etc) no longer be allowed access to the Internet.

At the time I wrote that article a quick media scan found that Microsoft had been accused of infringing the copyright of the ImageMaster software, something that was later confirmed. In this case we should just be calling this "strike 1", but instead Microsoft was allowed to say "oops" and comply with the license requirements. A quick media scan today indicates that Microsoft was accused of and has now admitted to copying code from rival Plurk. This should be considered "strike 2", and under an honest version of a 3 strike law it would take less than a month for Microsoft as a corporation to not be legally allowed to have an Internet connection.

The same is true of other proponents of these provisions, such as the major label recording industry which recently had possibly the largest copyright infringement case in Canadian history launched against them relating to the "pending list". This is far more serious than the mere accusation that ACTA appears to be contemplating, but a launched lawsuit.

It should be obvious that more serious offenses should receive more serious punishment. Commercial infringement by commercial entities are orders of magnitude more serious than non-commercial infringement by citizens. I also believe that a court proven cases or where the accused has admitted their guilt are far more serious than mere accusations. A fair and balanced law that revokes Internet access from private citizens for non-commercial infringement would be contemplating revoking corporate charters for proven commercial infringement.

Please don't misinterpret: I don't think you should be creating a treaty that would likely within a year of its coming into force cause the revoking of the corporate charters of the members of the so-called International Intellectual Property Alliance (IIPA). What I am suggesting is that no country should be taking "3 strikes" style proposals seriously, and should be rejecting them out of hand.