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Canadian
Anti-Counterfeiting
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(CACN)

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April 30, 2008

VIA E-MAIL & POST
consultations@international.gc.ca

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

Dear Sir / Madam

Re: ACTA

The Canadian Anti-Counterfeiting Network (CACN) is a coalition of individuals, companies, firms and association that have united in the fight against product counterfeiting and copyright piracy in Canada and internationally. The members of CACN include broad-based organizations, such as the Canadian Association of Importers and Exporters, Canadian Manufacturers and Exporters, the Electro-Federation Canada, the Entertainment Software Association of Canada, the Canadian Recording Industry Association and the Canadian Motion Picture Distributors Association; safety certification organizations such as the Canadian Standards Association (CSA) and Underwriters Laboratories' of Canada (ULC), along with companies from a broad cross section of industry and law firms representing a host of intellectual property (IP) rights holders – Canadian and foreign – with significant businesses in Canada.

We are pleased to have the opportunity to comment on the Government of Canada's participation in the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA). As will come as no surprise, the CACN fully supports negotiation of an effective agreement to combat the international trade in counterfeit and pirated goods and welcomes the establishment of new global standards for the enforcement of intellectual property rights (IPR).

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As the Government is obviously aware, intellectual property crime (IP crime) is a serious problem that has grown exponentially in the past decade and continues to grow each year. The globalization of trade and technology, along with the growth of the virtual Internet "market", has created an international "perfect storm", allowing organized criminal networks to reap huge profits through black market distribution of counterfeit and pirated products. The problem in Canada has grown into a complex, sophisticated criminal activity that robs billions from our economy, and is as hard to eradicate as illegal drug operations.

We commend the Government of Canada's commitment to protecting IPR and to improving intellectual property protection domestically. While recognition of and initiatives to address global trademark counterfeiting and copyright piracy are imperative, domestic reform must remain a priority independent of the progress of any international initiatives or negotiations. Canada should be a leader in the international negotiations by both its words and its actions strongly advocating effective measures to address the problem.

The possible areas for provisions raised in the ACTA Fact Sheet provide a starting framework for the negotiations, but some provisions not mentioned should be considered, as discussed below. In any event, we are glad to see the potential provisions identified are reflective of both the need to address supply by enacting provisions and fostering expertise and legal frameworks that in fact act as a deterrent to dealing in counterfeit and pirated products, and demand by raising public awareness of the problems. We also agree that international co-operation has to be a pillar in addressing the proliferation of international IP crime and infringement. However, it is our belief that effectively addressing the problem requires very senior governmental officials having the mandate to provide direction and co-ordination on domestic efforts and coordination on international efforts, as well as effective partnering with rights holders on both the domestic and international levels.

With respect to "public" awareness, in addition to raising consumer awareness, specific efforts are required in order to raise the awareness and promote diligence on the part of retailer purchasers, distributors, importers, exporters, and all others involved in the domestic and international distribution of goods, to raise the likelihood of detection and lower the incidents of inadvertent purchase of counterfeit products.

Recognition must be also be given to the sophistication of international criminal distribution networks and the reality of the virtual marketplace. Effective provisions directed to detection and seizure of counterfeit and pirated products wherever located and whether being imported or simply transiting through a territory, including provisions addressing use of free trade zones and other distribution strategies used by counterfeiters, should be pursued. Similarly, provisions for effective enforcement against digital piracy and marketing of counterfeit and pirated hard goods over the internet should be pursued.

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We briefly discuss each of the areas outlined in the ACTA Fact Sheet below. You will note particular emphasis on the need for strong provisions in respect of border measures and Internet distribution/digital piracy. That is due to the need for strong provisions in any international trade agreement to address the reality of IP crime and infringement being facilitated through international distribution of counterfeit and pirated hard goods and digital products, the latter requiring novel solutions since “importation” occurs without any physical product passing through a border crossing.

A) Increasing International Cooperation

Provisions promoting international cooperation among enforcement agencies and capacity building and technical assistance to improve enforcement are strongly supported by our organization. In addition, provisions setting up an efficient forum for co-ordination between signatories to the ACTA treaty should also be considered. As noted above, we believe that it is important that there be senior leadership in each of the member governments and a forum for regular discussion of progress and issues by the governmental leaders should be established under the treaty. Further, providing an international council involving those leaders and industry representatives would be advisable.

It is also suggested that provisions dealing with international cooperation on measures adopted to address raising awareness in the public (including consumers and those involved in distribution of products), as well as enforcement personnel and intellectual property rights holders worldwide, should be considered. Similarly, consideration should be given to provisions providing for standardization and sharing of data regarding IP crime, IP criminals and their practices.

Generally, we view international cooperation to be correctly identified as a central pillar in any anti-counterfeiting trade agreement. Bilateral and multilateral negotiations to date have proven ineffective in curtailing the flow of counterfeit and pirated products, partly to due inadequacies in the current trade agreements (and principally WTO TRIPS), but also due to the lack of coordination internationally.

B) Establishing Best Practices For Enforcement

We wholly endorse seeking provisions in ACTA providing for public/private advisory groups. Such groups should exist on both the domestic and international scales in order to promote the most effective exchanges of information, coordination of enforcement efforts including on an international scale, identification of impediments to enforcement, and educational initiatives. Specific provisions dealing with the exchange of information between government bodies and rights holders should also be established to facilitate both

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criminal and civil enforcement in a manner that takes into account privacy rights but does not act as an impediment to enforcement.

We also fully support ACTA including provisions fostering specialized intellectual property expertise within law enforcement structures. Canada is exemplary of the need for such provisions since a major impediment to effective criminal enforcement in Canada is the lack of prosecutors having experience in IP enforcement. Further, while there is expertise in at least the RCMP, benefits could certainly be realized by ensuring expertise in all agencies and courts involved in enforcement against IP crime. At the least regular continuing education opportunities should be provided for enforcement personnel including police and customs officers, as well as prosecutors and judges.

Finally, it is believed that provisions dealing with raising public awareness are extremely important. In order to foster a true understanding of the issues, promoting broad based IP education as well as raising awareness in the context of the particular problems associated with IP crime is advisable. Best practices in the areas should be examined, and consideration given to practices now being implemented in some countries (such as Mexico) where IP education is being included at a curriculum level in schools. Further, as noted above, raising awareness and education should be directed not only to consumers, but also to all individuals involved in the purchasing and distribution of products. For instances, consideration could be given to providing a mechanism for international symposiums on counterfeit product detection and best practices for exercising due diligence by purchasers, shippers and carriers.

C) Legal Framework

Dealing with shortfalls in the current legal frameworks in the member countries under ACTA should also be a primary aim in negotiating the agreement. While the WTO TRIPS agreement provides a broad framework, it does not include sufficient detail regarding minimum standards, and legal frameworks set up by members have not provided an effective deterrent to the activity or, in our submission, in some cases complied with the spirit of the agreement. The situation in Canada is exemplary. While the Government of Canada has recognized the need for reform, the fact is that Canada's laws have not been updated to address the current reality of trade in counterfeit and pirated products. However, with the current studies that have been undertaken by the government and industry in Canada, we are in a good position to assess best practices and to promote adoption of effective and well balanced provisions dealing therewith through ACTA.

Briefly dealing with civil and criminal enforcement measures, it is generally recognized that civil procedures are generally not effective in addressing criminal activities. Further, absent truly deterrent measures, criminal enforcement will have little impact on the problem. The cost of pursuing these matters through the

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courts, whether on the civil or the criminal side raises impediments to effective enforcement by either government or industry in the absence of legal frameworks specifically designed to deter the activities. For instance, on the criminal side, insuring that penalties imposed are more than a minor cost of doing business to counterfeiters and pirates and taking away the perception that the activity is effectively “risk free” is imperative if criminal enforcement strategies are going to be effective. Similarly, on the civil side, providing procedures adapted to minimize the cost of pursuing counterfeiters and pirates while maintaining judicial standards, for instance by providing for summary proceedings and statutory damages, is necessary to allow rights holders to pursue matters with a reasonable expectation of return commensurate in scope with the damage being caused. Otherwise, the likelihood of civil enforcement having any significant impact on IP crime is low.

With respect to optical disc piracy, again we agree that there is a real and urgent need for provisions dealing with issues raised by the advent of optical disc technology that allows significant volume manufacturing of counterfeit and pirated products virtually anywhere (due to the availability of devices capable of burning hundreds if not thousands of optical disc copies in a single day in a very small room. Provisions should be directed to ensuring that, at the least, provisions and frameworks for dealing with “manufacture” of counterfeit and pirated products are applied equally to scenarios where manufacturing is taking place using optical disc burners, whether in someone house, the back of their store or otherwise, as they are to more conventional manufacturing activities.

As noted above, we have placed emphasis on border measures and Internet and information technology issues. Those issues are briefly discussed in the following two sections of these comments.

Border Measures

It is virtually impossible to effectively deal with imported counterfeit and pirated products once they have been disbursed into the marketplace. Stopping the products at the source would be most effective, but this requires the cooperation of foreign governments. This can be highly problematic when dealing with major source countries around the world whose economies are dependent on counterfeiting and piracy. The second most effective means is to stop the imported counterfeit and pirated products at the border.

The World Customs Organization (WCO) recognizes the critical role that customs authorities can play in interdicting goods that infringe intellectual property rights. The WCO has also recognized that “only by granting certain powers and measures that go beyond the minimum requirement set forth in the TRIPs

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Agreement, Governments can provide an effective and efficient level of IPR protection and enforcement at their borders.”¹

There are essentially two types of border enforcement systems that have been developed by countries for purposes of complying with their obligations under Section 4 of TRIPS (Special Measures Related to Border Measures). These are referred to as recordation systems and notification systems.² Under a recordation system, rights holders record their intellectual property rights with customs authorities and customs officers monitor for and detain or suspend the release of suspected infringing imports. Under a notification system, the onus is on the rights holder to notify the customs authorities of each shipment of suspected counterfeit or pirated goods and request the intervention of the customs authorities by obtaining a judicial or administrative order. Notification systems, such as the system adopted in Canada, do not work in practice as right holders simply do not have access to the information that would allow them to identify specific shipments of counterfeit or pirated goods. Recordation systems, such as those that exist in the United States and the European Union, are far more effective when properly implemented with adequate resources.

The WCO Model Legislation,³ in noting that in some countries applications for intervention by customs authorities to detain or suspend the release of counterfeit or pirated goods, are dealt with by the courts states that:

However, practical experience has shown that authorising customs to deal with this task ensures that the applications are processed in a fair and effective manner without unnecessarily burdening the courts. Naturally the decisions by the customs should be subject to a judicial review by administrative or civil courts.⁴

The WCO Model Legislation recommends a centralized recordation system that would allow applications for IPR enforcement action to be submitted directly to the customs authorities,⁵ as well as *ex officio* powers for customs authorities:

Customs’ powers to act *ex officio* are a key feature of an effective border enforcement regime. In the vast majority of cases Customs officers are the only ones to know when and which allegedly infringing goods are

¹ World Customs Organization, Model Provisions for National Legislation to Implement Fair and Effective Border Measures Consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (“WCO Model Legislation”) at 1, available at <http://www.wcoipr.org/wcoipr/gfx/ModelLawfinal.doc>.

² Michael Blakeney ed., BORDER CONTROL OF INTELLECTUAL PROPERTY RIGHTS, Sweet & Maxwell (2002), at E.C.-3, footnote 1, referred to in National Law Center for Inter-American Free Trade, Transshipment and Other Threats to the Enforcement of Intellectual Property Rights in Canada and Mexico: Introduction (May 30, 2003), at 10, footnote 24.

³

⁴ WCO Model Legislation, Article 9.

⁵ WCO Model Legislation, Article 1 and notes 1.01 and 1.04 thereto.

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transported. Therefore, unless Customs are empowered and obliged to act on their own to stop suspected shipments at the borders, the border measures will remain ineffective.⁶

In addition to the Model Legislation, the WCO has more recently developed Provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE)⁷ to promote improved border enforcement of intellectual property rights.

In the case of border measures, the signatories to ACTA should build on the existing provisions of TRIPs by agreeing to implement the best practices and standards developed by the WCO. Specifically, under ACTA, the member countries should agree to:

1. Implement a centralized recordation system that would allow applications for enforcement action to be submitted directly to the customs authorities without need for intervention by an administrative or judicial tribunal;
2. Implement legislation giving customs authorities a clear mandate to target, detain, seize and destroy counterfeit and pirated goods, as well as circumvention devices or protection defeating devices, either on their own initiative (*ex officio* authority) or in response to an application by a rights holder;
3. Implement legislation giving customs authorities the legal authority to enforce IPRs whenever the goods are under customs supervision or control, including goods that are being exported or are in transit or being transshipped;
4. Expand the scope of authority of customs authorities to enforce IPRs in addition to trademarks and copyrights;
5. Implement provisions for the disclosure of information and the provision of samples to rights holders for the purposes of determining whether detained goods are counterfeit and to enable rights holders to exercise their civil remedies;
6. Introduce administrative fines for the importation, exportation, etc. of counterfeit and pirated goods, at a sufficiently high level to act as an effective deterrent;

⁶ WCO Model Legislation, Note 9.01 to Article 9.

⁷

http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Enforcement/SECURE_E.pdf

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7. Use computer-based risk assessment and targeting tools to detect shipments posing an IPR-related risk;
8. Formalize intelligence sharing and cooperation amongst customs authorities and other law enforcement authorities within countries, and amongst the member countries; and
9. Formalize cooperative arrangements between customs authorities and rights holders to improve IPR enforcement.

Internet and Information Technology Issues

The virtual marketplace created by the Internet and information technology raises serious issues with respect to enforcing against counterfeiting and piracy. We discuss two aspects of the problem in what follows.

Firstly, the Internet provides a virtually anonymous market for purveyors of counterfeit and pirated hard goods. Auction sites, password protect peer to peer marketing sites and various other means for virtual marketing, purchase and sale of counterfeit and pirated goods exist and cause significant problems to rights holders trying to identify the source of infringing products. Provisions dealing with transparency of the Internet, Internet service provider (ISP) responsibilities and clarifying jurisdictional issues in respect of enforcement should be pursued.

As the government is no doubt aware, work has been undertaken and is ongoing by numerous organizations to try and arrive at best practices for dealing with Internet marketing, but no regime has yet been found to effectively deal with the distribution of counterfeit and pirated products using the Internet virtual marketplace. A practical issue that has to be addressed is the fact that the distinction between distributor and retailer becomes blurred on the Internet with a resultant significant increase in the number of small packages of counterfeit and pirated products being shipped internationally. Considering novel provisions adapted to deal with issues of anonymity and changing shipping and financial transaction practices resulting from the advent of the Internet would certainly be commendable in the context of negotiation of the ACTA agreement.

The Internet and digital technology also raises the issue of digital piracy. The ease with which perfect copies of digital copyright works may be made and transferred worldwide, combined with the apparent lack of recognition or respect for intellectual property by some Internet “consumers” is causing massive damage to industries worldwide.

In Canada, the RCMP has called digital piracy “the crime of the 21st century”.⁸ With increasing broadband speed, compression technology and online anonymity,

⁸ Royal Canadian Mounted Police, *Assessment of Commercial Scale Criminal Copyright Piracy and Trade-mark Counterfeiting in Canada*, 2000.

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the Internet is fast becoming the global focal point for the black market. A UNESCO report on the subject concluded that “online piracy is growing far faster than piracy in the physical world” and, therefore, “policy and government resolve” must be brought to bear to address the issue.⁹

While the impact of online piracy has been felt all over the world, the situation is particularly dire in Canada due to a combination of outdated legislation, high broadband penetration and lack of consumer education. For instance, the RCMP has found that there is an “ever-growing use of the Internet for IP crime” and that the problem will “escalate” in “upcoming years” due to the fact that “software, music and movie piracy are easy, low risk activities”.¹⁰ The low regard for IPR on the Internet in Canada is exemplified by a 2005 study found that Canada had the highest level of peer-to-peer downloading among OECD countries per capita.¹¹ The situation has become so bad that recently the Quebec Superior Court has described unauthorized file sharing in Canada as an “endemic problem”.¹²

Not surprisingly, the combined effect of online and physical piracy on Canadian industries has been substantial. To cite just a few examples:

the annual loss to the Canadian economy due to software piracy in 2006 is estimated at \$890 million;¹³

the annual loss to the Canadian economy due to film piracy in 2005 is estimated at \$225 million;¹⁴ and,

Canadian music retail revenues have shrunk by 47% since 1999 (the year Napster appeared), an over \$600 million dollar decline in annual sale amounts.¹⁵

⁹ Darrell Panethiere, *The Persistence of Piracy: The Consequences for Creativity, for Culture, and for Sustainable Development*, UNESCO Report, 2005.

¹⁰ RCMP, *Project SHAM: A Strategic intelligence assessment of Intellectual Property Crime in Canada*, 2004 and *Assessment of commercial scale criminal copyright piracy and trade-mark counterfeiting in Canada*, 2000.

¹¹ OECD, *Working Party on the Information Economy – Digital Broadband Content: Music*, December, 2005.

¹² *Deja Musique Inc. et al. v. Sebastien Brulotte et. al*, Quebec Superior Court, November 23, 2007. Also see: Canadian Anti-Counterfeiting Network, *Report on Piracy and Counterfeiting in Canada: Road Map for Change*, 2007. Polling indicates that Canadians do not view piracy of software, movies and music as seriously as either stealing office supplies or keeping incorrect change from store clerks.

¹³ Canadian Alliance Against Software Theft, Press Release, May 15, 2007.

¹⁴ Canadian Motion Picture Distributors Association, *Beyond Borders: An Agenda to Combat Film Piracy In Canada*, 2006.

¹⁵ Canadian Recording Industry Association statistics. Also see various econometric studies, for example, Stan Liebowitz, “File Sharing: Creative Destruction or Just Plain Destruction?”, *Journal of Law and Economics*, Vol. XLIX, April 2006:

[The economic evidence in this article] supports the current findings from almost all econometric studies that have been undertaken to date, including those in this issue - file-sharing has brought significant harm to the recording industry. ... Furthermore, analysis of the various possible alternative explanations for the decline in CD sales fails to find

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In this environment of widespread piracy and counterfeiting, Canada's innovative performance is dismal. The Conference Board of Canada, for example, has given our country a "D" in innovation.¹⁶ Even the Federal Government has acknowledged that Canada stands "near the bottom of the world's leading economies" and there is "an innovation gap [that] separates Canada from leading OECD countries".¹⁷

While other developed countries have modernized their IP crime laws and implemented WIPO Internet treaties to curtail online piracy and counterfeiting, Canada has remained inactive.¹⁸ This has had a grave effect on Canada's economic performance, innovative capacity, creative output and international reputation.

Accordingly, while we certainly commend pursuing provisions dealing with Internet distribution and information technology through the ACTA agreement, as noted at the outset we feel that it is important that Canada lead in the negotiations by both its words and its actions. In the case of the Internet and information technology, we, therefore, strongly recommend that Canada immediately establish a "strong and modern legal framework" to "deal effectively with counterfeiting and piracy" in the area of Internet distribution and information technology as outlined in the ACTA proposed negotiated terms. At a minimum, such a "strong and modern legal framework" would include the immediate implementation of the WIPO Internet treaties.

Conclusion

Negotiating an effective agreement addressing enforcement of intellectual property rights and IP crime focusing on the three areas identified in the ACTA fact sheet will be a significant endeavor. However, our organization fully supports and agrees with Canada joining in the negotiations and is willing to assist in any way possible to help arrive at an agreement providing for best

any viable candidates. ... This conclusion ... should not be much of a surprise. Common sense is, or should be, the handmaiden of economic analysis. When given the choice of free and convenient high-quality copies versus purchasing originals, is it really a surprise that a significant number of individuals will choose to substitute the free copy for the purchase?

¹⁶ Conference Board of Canada, *How Canada Performs: A Report Card on Canada*, June 2007.

¹⁷ Government of Canada, *Achieving Excellence: Investing in People, Knowledge and Opportunity*,

[http://innovation.gc.ca/gol/innovation/site.nsf/vDownload/MenuPDF_e/\\$file/NationalAnalysis.PDF](http://innovation.gc.ca/gol/innovation/site.nsf/vDownload/MenuPDF_e/$file/NationalAnalysis.PDF); Canada's Innovation Strategy, Treasury Board of Canada, *Canada's Performance Report*, 2006.

¹⁸ Despite numerous government and parliamentary declarations that online marketplace integrity is urgently needed, see, for example: Heritage Committee, *Interim Report on Copyright Reform*, May 2004; Standing Committee on Industry, Science and Technology, *Counterfeiting and Piracy Are Theft*, June 2007; *Government Response to the Eighth Report of the Standing Committee on Industry, Science and Technology*, September 2007.

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practices under all three pillars. We would appreciate being kept informed and given an opportunity to provide comments as details of the proposed provisions of the agreement take form. In short, we look forward to working with the Government of Canada in trying to address through the proposed ACTA treaty the international problem of trade in counterfeit, pirated and infringing products, a problem that we view to be one of the most serious assaults ever encountered on our market system and the existing international rules regarding fair competition and trade.

Yours very truly,

CANADIAN ANTI-COUNTERFEITING NETWORK

Doug Geralde
Chairman of CACN

ABOUT CACN

The Canadian Anti-Counterfeiting Network (CACN) is a non-profit coalition of stakeholders that have united in the fight against product counterfeiting and copyright piracy in Canada and internationally. Members include broad-based organizations and companies from a range of industries as well as law firms representing intellectual property rights holders. CACN's mission is to significantly reduce and ultimately eliminate the manufacture, importation, distribution and sale of counterfeit products in Canada and abroad through public education, training of law enforcement, and lobbying for legislative change and increased resources. CACN can be found online at www.cacn.ca.

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