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April 30, 2008

Brief to Foreign Affairs and International Trade Canada on the Anti-Counterfeiting Trade Agreement

The Canadian Library Association (CLA) welcomes the opportunity to present a brief to the Government of Canada in regards to the Anti-Counterfeiting Trade Agreement (ACTA). CLA represents the interests of approximately 57,000 library staff and thousands of libraries of all kinds across Canada on a range of public policy issues. But more importantly, libraries and librarians speak on behalf of our users: millions of students, educators, scholars, researchers, lifelong learners, business library users, recreational readers, from children to seniors. Library users are the Canadian public. Libraries work with and provide copyrighted material to our users. Like all Canadians we want to ensure that the public safety is maintained and that Canadians are protected from shoddily manufactured counterfeit items. At the same time, we also want to ensure that there are no unintended consequences from ACTA that could negatively affect the free speech of Canadians or that limit fair dealing and other legitimate exceptions to the *Copyright Act*.

Notice and Notice vs. Notice and Take Down

It is quite possible that ACTA proponents may propose that a Notice and Take Down Regime be incorporated into the agreement. Currently in Canada, Internet Service Providers (ISPs) operate under a Notice and Notice Regime. An ISP receives a notice that a user of its service is alleged to have infringed copyright. The ISP passes that notice onto its user and the ISP is then required to track what the user does with the copyrighted material. At that point it is up to the person or organization alleging copyright infringement to take someone to court. At no point does the ISP attempt to decide whether the accused is guilty or innocent. It is important to note that in Canada, that ISPs are not just telephone and cable companies. Frequently school boards, colleges and universities, and sometimes public libraries serve as ISPs.

In a Notice and Take Down regime, after an ISP receives a notice of alleged copyright infringement, it is up to the ISP to take down the infringing website or service within a certain number of days. The alleged copyright infringer is treated as guilty until proven innocent. To put material back up on the web, the accused person or organization would need to sue the accusing organization or individual in court. In the United States, scientologists have used notice and takedown to shut down websites that oppose scientology. In Australia, mining companies have used notice and takedown to shut down websites opposed to mining. Notice and Take Down puts ISPs in the uncomfortable position of enforcing an opinion of copyright infringement without adequate information.

Proponents advocate Notice and Take Down as a way of stopping copyright infringement, but abusers of Notice and Take Down have found it to be an ideal way of shutting down dissenting websites. The benefits of Notice and Take Down are hugely outweighed by the cost to freedom of speech and the right to dissent on the Internet.

Technical Protection Measures (TPMs)

TPMs are digital locks that are used to lock down copyrighted information. ACTA negotiations need to ensure that any legal protection of technological protection measures (TPMs) should be specifically limited to acts of copyright infringement, should not include device prohibitions, and should not impinge on the exercise of fair dealing or other user rights. Ebooks with TPMs often prevent researchers from printing off a chapter of a book, something that would be commonly accepted as fair dealing in print. Likewise, TPMs can prevent libraries from providing a fair dealing copy of a chapter of a book to another library via interlibrary loan. The 2006 UK Gower Review notes the following issues with digital rights management (DRM) which are the mostly commonly used technical protection measures.

- *Technical protections can enable restrictions that go beyond protecting content to price discrimination in different EU markets.*
- *DRMs can prevent uses permitted under fair dealing exceptions and DRM tools do not necessarily expire when copyright expires.*
- *DRMs can damage users' computers and can put limits on what users can and can't do with the products.*

Currently under section 30.1 of the *Copyright Act*, libraries, museums and archives have the right to make copies of entire copyrighted works for the preservation and maintenance of their collections. For example section 30.1 allows for making a copy to migrate from an obsolete format to a format that is still in use. Libraries have migrated material on beta videocassettes to DVDs under the provisions of section 30.1. If TPMs are legally protected beyond copyright infringement, this will prevent libraries, museums and archives from migrating obsolete digital collections to new formats that researchers can actually use in the future.

Increasingly library collections are migrating from print to digital formats. *Canadian Association of Research Libraries* (CARL) statistics show that in 2005/06, that the average percentage of digital expenditures per CARL member libraries was 46% of the collections budget. CARL membership includes the largest university libraries in Canada. Canadian libraries, especially those in universities, are rapidly moving from print to digital collections. Library users will increasingly depend primarily on digital collections in the future. Canada risks putting the knowledge that Canadians need behind digital locks, if TPMs are given legal protection beyond the bare minimum necessary in the WIPO treaties.

We also need to recognize that all members of Canadian society need to have access to the new knowledge economy. A knowledge economy that excludes some members results in a society that is less fair and less competitive than other societies. Changes to the *Copyright Act* need to ensure that the perceptually disabled have the same ability to access content as other Canadians. Section 32 of the *Copyright Act* allows individuals and nonprofit organizations to assist the perceptually disabled to convert copyrighted material to alternate formats. As we move to an increasingly digital knowledge economy, we again need to ensure that digital locks (TPMs) don't block the perceptually disabled from the knowledge that they need.

CLA recommends that the Government of Canada have the following negotiating stance in regards to ACTA and that it be willing to walk away from any final treaty that goes against the principles below.

- Ensure that ISP liability extends to a Notice and Notice system of notification of copyright infringement, not Notice and Take Down. The courts should decide who is and is not infringing copyright, rather than putting ISPs in the awkward position of requiring them to enforce any accusation of copyright infringement.
- Ensure that any legal protection of technological protection measures should be specifically limited to acts of infringement, should not include device prohibitions, and should not impinge on the exercise of fair dealing or other user rights.
- Recognize that exceptions for print-disabled individuals must ensure that these individuals have the same ability as others to access content.

CLA would be happy to further discuss ACTA. Please contact our Executive Director, Don Butcher at 613-232-9625 ext. 306 or dbutcher@cla.ca to arrange for further information or discussion of these important issues.