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Submission to DFAIT
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Submission on the proposed anti-counterfeiting trade agreement

Prepared by the innovation partnership for DFAIT

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Submission on the proposed anti-counterfeiting trade agreement

The Innovation Partnership (TIP) would like to thank the Government of Canada for the opportunity to submit comments regarding the proposed Anti-Counterfeiting Trade Agreement (ACTA). TIP is an independent, not-for-profit organization located in Montreal, Canada. Its mission is to enhance understanding, use and management of intellectual property policies that foster innovation, improve research capacity and increase access to new products. In the last year,

TIP has provided policy advice on the use of intellectual property policies and dissemination of innovation to Health Canada, Industry Canada, UNITAID, the Organization for Economic Cooperation and Development and the Canadian Breast Cancer Foundation. TIP works closely with the Centre for Intellectual Property Policy at McGill University to help translate cutting-edge social science and legal research into concrete policy.

The proposed ACTA has the potential to substantially impact intellectual property owners' rights, users' rights and innovation. Consulting key stakeholders throughout the negotiation process – including industry, local creative communities, universities and nonprofit organizations as well as relevant provincial and federal government departments – will ensure that the issues that matter to Canadians are identified and that the ACTA responds to these concerns. As one stakeholder, TIP brings an independent, unbiased understanding of how to design intellectual property systems – made up of laws, policies and practices – to achieve desired outcomes.

At this preliminary stage, TIP suggests that throughout the negotiation process, Canada must ensure that:

- The purpose and terms used in the proposed ACTA are clearly defined;
- Policy be governed by well-founded empirical research on how counterfeiting and piracy affect the gamut of Canadian stakeholders; and
- Canada maintains and preserves its dynamic innovative and creative environment without altering priorities solely to accommodate external pressures.

1. Clearly defining the purpose and terms used in the proposed ACTA

Based on DFAIT's Fact Sheet and News Release regarding the ACTA, it appears that the mandate of the proposed ACTA is to increase enforcement of intellectual property (IP) law so as to combat counterfeit and piracy trade through, for example, international cooperation and best practices for enforcement. The goal is to lessen industry losses from piracy and counterfeiting. TIP notes, however, that there still remains uncertainty as to the scope of the ACTA within stakeholder communities. Consequently, it is important that terms and motivations be clarified and made publicly available. This will ensure the identification of important stakeholders and allow for a more effective consultation process.

In determining the purpose of the ACTA, Canada must approach the negotiations with a clear definition of what the proposed Agreement covers. Terms such as "counterfeiting" and "piracy" and the related concepts of "theft" and "IP crime" must be clearly defined as they are often used interchangeably and cover a wide and vague range of activities.

In clarifying the purpose of ACTA, one must remember that intellectual property law is a policy tool to encourage the production and distribution of creative and innovative goods. It is not designed for – and is rather poor at – the protection of human health and safety. To the extent that ACTA deals with health and safety, therefore, it should not do so through extending IP rights nor their enforcement but through existing

health and safety laws and their better enforcement. Piracy is not a health or safety issue and it would confuse IP law to introduce such a notion into it.

As the Supreme Court of Canada emphasized,¹ intellectual property statutes represent a balance between the rights of creators and those of users in order to create a dynamic creative and innovative environment. Thus, the Supreme Court stated that it is as important to recognize creators' rights as it is to recognize their limited nature.

Keeping this basic principle in mind, Canada should be mindful that any changes made to the enforcement of IP rights is balanced with an equal protection of existing limitations such as fair dealing and research exceptions. This is especially important given the diverse set of companies, individuals and communities that produce and disseminate new creative and innovative products. Further, any added enforcement measures should not interfere with the plethora of existing complementary mechanisms used to increase innovation and creativity including open source works, Creative Commons, patent clearinghouses and patent pools.

2. Identifying issues based on empirical research:

To the extent that ACTA attempts to deal with counterfeiting through IP law, Canada must proceed carefully. While Canada may wish to consider better enforcement of trade-marks, counterfeiting is not appropriately controlled through patent or copyright law. Infringements of copyright and patent constitute piracy – not, except in limited ways, counterfeiting – and are appropriately dealt with through the private enforcement of existing copyright and patent laws.

In particular, Canada should be extremely reticent to impose criminal sanctions on IP infringement as IP is a regulatory tool, not a penal one. The cure may be far worse than the disease as imposing criminal sanctions threatens to chill innovation and knowledge sharing far more than either piracy or counterfeiting. As a result, Canada must consider carefully why and how this Agreement fits within existing legislative frameworks and the domestic innovation and creativity environment. This can only be achieved through a thorough understanding, based on empirical evidence, of the impact of proposed changes on creativity and innovation in Canada.

The needed empirical evidence is, however, currently lacking. In its *Eight Report: Counterfeiting and Piracy of Intellectual Property*, the Standing Committee on Industry, Science and Technology indicated that losses from software piracy exceeded C\$730 million in 2005, resulting in 32,000 job losses and C\$345 million in tax losses. It also reports that annual consumer spending loss in Canada due to film piracy in 2005 was approximately C\$270 million, while the loss of tax revenues due to film piracy in Canada in 2005 was approximately C\$41 million.

However, there is an absence of explanation as to how these numbers were calculated and which data sources were used to support them. Further, the relationship between job losses and software piracy were not explained. More seriously, this data only addresses two industries, proprietary software and high-production film, but does not consider other vibrant Canadian industries such as independent film, music, fashion and open source software. In these circumstances, relying on limited, uncertain data provides a dangerous foundation for policy development.

Changing the law to respond to such speculative concerns could very well cause more harm than good to the entire set of industries and communities that innovate and create across Canada. What is needed before action is taken is a clear understanding, not only based on economic models but on understanding how industry and communities actually create and disseminate new creative and innovative products and services.

3. Canadian Priorities

Based on this empirical evidence, Canada must approach the negotiations with a well developed stance regarding its priorities and needs. It must make sure that Canadian resources are not used to counteract

¹ *Théberge v. Galerie d'Art du Petit Champlain inc.* [2002] 2 S.C.R. 336; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

weak law enforcement in other countries and that scarce national law enforcement resources are not being mobilized to protect civil wrongs. While complying with international obligations, Canadian law must respond to domestic needs and not only external pressure in order to preserve our distinct Canadian identity.

At this preliminary stage, TIP suggests that Canada focus on the following:

- a. Commissioning empirical studies to ensure that the needs of creative and innovative communities, whether for-profit or non-profit, are addressed;
- b. Conduct ongoing consultation processes with key audiences and stakeholders;
- c. Ensuring that enforcement of IP extends not only to creator rights but also preserves user rights; and
- d. Clearly separates issues of health and safety from those of IP law and IP enforcement so as not to inadvertently handcuff Canadian businesses and communities.

TIP would be pleased to provide further analysis on the above-mentioned issues throughout the negotiation process and is available at any time for clarification of any of the issues raised in this submission.



Our Mission

TIP's mission is to enhance how governments, industry and NGOs worldwide understand, use and manage intellectual property policies that foster innovation, improve research capacity and increase access to new products.

To achieve its mission, TIP offers the following services to public and private entities:

- Advising
 - Training
 - Facilitating public consultations and dialogue
 - Mediation
-

Unique approach to intellectual property systems

An Empirical Method

TIP's approach is based on an in-depth, seven-year study of how intellectual property systems work in the real world. This expertise enables TIP to provide innovative and targeted results that make a difference on the ground.

A Diverse Team

TIP believes that a diversity of backgrounds, disciplines and experience is necessary to understand intellectual property systems. TIP's team of experts reflects this diversity and is therefore in a unique position to address your specific needs.

Independent and Transparent Governance

TIP is independent and non-partial. As well, TIP designs its operations and governance to be open to the scrutiny of stakeholders, funding organizations and the public at large.

A Commitment to Helping the Underserved

TIP is committed to helping underserved communities around the world improve their understanding, use, and management of intellectual property policies. TIP reinvests a minimum of 10% of its revenues in projects that benefit such communities.

Management

Richard Gold, President

Richard Gold is an expert in innovation, patent law and policy, and is also a professor at McGill University's Faculty of Law where he was founding Director of the Centre for Intellectual Property Policy. Richard frequently provides advice to international organizations (WHO, UNITAID, WIPO, OECD), governments and institutions on the strategic use of intellectual property rights. Richard also has substantial practical experience in technology and corporate law at a top tier Toronto law firm where he worked prior to entering academia. All in all, he brings a rich blend of practical, policy and academic experience to innovation strategy.

Elisa Henry, VP Administration and Finance

Elisa Henry is a French lawyer who holds Master of Laws degrees from both Université Paris II and McGill University. After practicing in the field of intellectual property and information technology law, she returned to McGill in 2003 to run the newly created Centre for Intellectual Property Policy. Elisa has extensive experience in managing large-scale projects (such as the Intellectual Property Modeling Group), budgets, events and research teams. She is at ease coordinating complex initiatives across multiple disciplines and many time zones.

Tal Srulovicz, VP Development

Tal Srulovicz is an Ontario lawyer and a graduate of the science and legal programs at McGill University. After practicing in the field of labour and employment law for two years, she returned to McGill in 2005 to work at the Centre for Intellectual Property Policy in project development. Prior to her career in law, Tal gained extensive experience working in the non-profit sector, with a particular focus on project development, fundraising and communications.