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**DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE  
PUBLIC CONSULTATIONS RESPONSES ON THE PROPOSED ANTI-  
COUNTERFEITING TRADE AGREEMENT (ACTA)**

**OVERVIEW**

Following the announcement of Canada's participation in preliminary discussions with several countries<sup>1</sup> on the proposed Anti-Counterfeiting Trade Agreement (ACTA), the Department of Foreign Affairs and International Trade (DFAIT) launched public consultations, on April 1, 2008, to solicit feedback on Canada's involvement in formal negotiations. Respondents were provided with the Anti-Counterfeiting Trade Agreement Fact Sheet, as well as the October 23, 2007 News Release on the Agreement (Annexes 1 and 2), which served in many cases as the basis of their comments and views.

Consultations ran until April 30, 2008, during which time DFAIT received a total of 31 responses, 17 of which were provided by individual citizens. 13 from Canadian business associations, such as the Canadian Intellectual Property Association and one response from a Canadian academic research institute specializing in Internet policy (see Annex 3 for a list of respondents).

**s.20(1)(b)**

Generally, the issues raised by stakeholders fell into two broad categories:

- 1) General concerns and views on the negotiation of the Agreement; and
- 2) Views on the broad areas to be addressed by the Agreement, as enumerated in the Anti-Counterfeiting Trade Agreement Fact Sheet.

In the former category, stakeholders have expressed a variety of concerns, including transparency, the impact of ACTA negotiations on ongoing domestic copyright reform, as well as on other multilateral IP agreements and negotiations. With respect to items listed in the Anti-Counterfeiting Trade Agreement Fact Sheet, stakeholders provided substantial input on various issues that they would and would not like addressed under each section of the Agreement.

On the whole, consultation responses received from Canadian business associations were largely supportive of Canada's involvement, while those responses received from individual Canadian citizens were generally critical of Canada's role in the formal negotiation of ACTA. Regardless, those critical of Canada's involvement nonetheless provided constructive input on Canada's participation in the negotiating process, as well as suggestions on the issues that ACTA, in their views, should and should not address. At the same time, a number of industry responses provided constructive suggestions on the various issues that they would like to be addressed, as well as anecdotal information on experiences with counterfeiting and piracy, to underline their requests for substantive enforcement provisions.

What follows is a summary of the various issues raised by stakeholders, as well as their requests under each of these issues. Further information on the nature of these requests and concerns can be found in Annex 4 of this document.

Please note that each "bullet point" under each of the following issues represents a request or recommendation made by one or more stakeholder. For privacy reasons, please note that the various requests/recommendations made under each issue are not attributed to specific stakeholders. A full list of stakeholders can be found in Annex 3.

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<sup>1</sup> DFAIT has officially announced the involvement of the United States, Mexico, the European Union, Switzerland, Japan, New Zealand, and other countries, in ACTA negotiations.



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**1) GENERAL VIEWS AND REQUESTS MADE REGARDING ACTA NEGOTIATIONS (BY  
ISSUE)**

***Transparency***

- The Government of Canada should insist on full public disclosure of ACTA negotiations.
- ACTA discussions should formalize a process for the involvement of civil society.
- The motivations for entering into the Agreement should be clarified and made publicly available.
- Definitions for "counterfeiting", "piracy", "theft" and "IP crime" should be clearly defined.

***Perceived "exclusion" of developing countries from the negotiating process***

- Developing countries should be invited to participate in the negotiation of ACTA.

***Counterfeiting and piracy are already dealt with in other multilateral fora***

- The Government of Canada should provide the general Canadian public with evidence that another treaty on this issue is required.
- It is encouraged that, rather than negotiating ACTA, existing treaties be amended.

***Evidence of the need for ACTA***

- Policymakers should provide evidence about the size and scope of the counterfeiting problem, evidence that the current legal frameworks are unable to address the problem, and support for the claim that the proposed provision will improve anti-counterfeiting activities.
- ACTA should not impose resource commitments in the absence of sound evidence that the commitment is warranted.
- Issues to be dealt with under ACTA should be based on empirical evidence and Canada's own innovation and creativity environment.

***Impact on the ongoing domestic copyright reform process***

- The Government of Canada should clarify its position on copyright prior to negotiating with other countries on the issue.
- ACTA negotiations "should not serve as a vehicle for domestic legislative reform".

***Scope of the Agreement***

- ACTA should focus on enforcement of existing intellectual property rights rather than creating substantive obligations.
- Canada should support a "narrow" ACTA that targets the most harmful conduct from counterfeiting.
- ACTA should prioritize health and safety concerns, such as counterfeit pharmaceuticals, electrical products.
- Criminal and civil provisions under ACTA should target large scale commercial operations, such as organized crime, rather than non-commercial infringement.



- ACTA should focus on the protection of the public domain and individual rights, such as creator and user rights.

***Substantive IP protection***

- ACTA should not undermine existing fair use/fair dealing exemptions on copyrighted materials.
- ACTA should not alter existing Canadian legislation on competition policy.
- Obligations under ACTA should not require the extension of duration of copyright protection.
- Obligations under ACTA should not require an extension of patent term regulations.

***Further consultation on ACTA***

- Encourage further consultation with civil society groups and the broader public, creator groups, user communities, rights-holders, and intermediaries.
- Encourage consultation with developing countries.

***Pace of ACTA negotiations***

- Policymakers should take into account the implications of altering the existing balance between stakeholder interests before the completion of formal ACTA negotiations.

***Alternatives to ACTA negotiations in their current form***

- Rather than negotiating the ACTA, the Government of Canada should collect reliable data on counterfeiting and piracy, and conduct balanced and transparent analysis of the economic and public policy implications of any potential action to address these issues.
- ACTA negotiations should be moved to a traditional venue for addressing international IP standards, such as WIPO.



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**2) VIEWS ON THE BROAD AREAS TO BE ADDRESSED BY THE AGREEMENT (AS  
ENUMERATED IN THE ACTA FACT SHEET)**

**INTERNATIONAL COOPERATION**

***International cooperation among law enforcement authorities***

- Request for the development of high-level standards on cross-border cooperation on investigation and enforcement of IP-related crimes.
- Provisions on formal intelligence-sharing and cooperation amongst customs authorities and other law enforcement authorities within countries, between Parties to ACTA, and between customs authorities and rights holders.
- Establishment of a forum for coordination between Parties to ACTA.
- Provisions on the standardization of data collection and analysis, based on internationally-accepted methodologies.
- Requested that all IP enforcement officials access to databases.
- Information sharing between law enforcement authorities should not undermine the protection of privacy under existing Canadian law.
- Another stakeholder has requested that privacy should be taken into account to the extent that this does not impede enforcement.

***Capacity building and technical assistance in improving enforcement***

- Request for provisions on capacity building and technical assistance among enforcement agencies.

**ENFORCEMENT PRACTICES**

***Formal or informal public/private advisory groups***

- Request for the establishment of advisory groups at both the domestic and international level.
- Ensure that advisory groups are representative of the broad spectrum of IP interests, including rights holders, intermediaries, and consumers.
- Ensure that advisory groups are "balanced", accountable and transparent.

***Fostering specialized IP expertise within law enforcement structures to ensure effective handling of IPR cases***

- Request for continuing education and training opportunities for enforcement personnel including police, customs officers, prosecutors and judges.

***Measures for raising consumer public awareness about the importance of IPR protection and the detrimental effects of IPR infringements***

- ACTA partners should promote broad based IP education and awareness on particular problems associated with IP crime.
- Public awareness should be directed not only at consumers, but "to all individuals involved in the purchasing and distribution of products".



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- Public awareness should take into account the exclusivity of IPR, as well as exceptions and limitations to these rights.
- Ensure that campaigns raise public awareness regarding fair use/fair dealing rights.
- Request for international cooperation between Parties to ACTA on awareness measures for the public, enforcement officials, and IPR holders worldwide.
- ACTA should provide flexibility to individual governments on the types of information presented in consumer awareness campaigns.

#### ***Other enforcement practices***

- Request for the establishment of best practices for enforcement.

### **LEGAL FRAMEWORKS**

#### ***Criminal enforcement***

- Increase criminal penalties for counterfeiting and piracy.
- Another stakeholder has requested that ACTA should not increase criminal penalties for "counterfeiting and copyright".
- Request for the criminalization and "significant penalty" for the intentional manufacture, reproduction, distribution, importation and exportation or sale of counterfeit products.
- Request for the criminalization of "knowingly facilitating" these processes.
- Request for the criminalization of the intentional possession of counterfeit goods for the purpose of sale.
- Request for an amendment to section 408 of the *Criminal Code* "concerning the intent component of 'passing off' provisions" on counterfeit trademarks.
- Request for provisions stipulating trademark counterfeiting as a criminal offence under the *Trade-marks Act*.
- Request for the removal of the *Copyright Act* from the list of excluded acts under proceeds of crime legislation.
- Request for the establishment of an IP Crime Task Force at the domestic level.

#### ***Border measures***

- Request for provisions providing for the disclosure to rights owners/RCMP of information concerning importer and source of counterfeit products
- Request for the provision of samples to rights holders for the purposes of determining whether detained goods are counterfeit.
- Request for provisions granting authority to "peace officers" to seize counterfeit and pirated goods, with all seizures to be reported to the appropriate enforcement authorities.
- Another stakeholder has requested that provisions under the Agreement do not vest "police-type" search and seizure measures in private sector organizations.



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- Provide customs authorities with *ex officio* powers to target, detain, seize and destroy counterfeit and pirated goods, as well as circumvention devices.
- Provide customs authorities with *ex officio* powers to seize and destroy products confirmed to be counterfeit *at the request of IP owners*.
- Request for the establishment of a centralized recordation system for trademarks and copyrights.
- Prohibition of the importation of counterfeit products under customs legislation.
- Legal authority for customs officials to enforce IPRs for goods under customs supervision or control.
- In contrast to some of the requests made for *ex officio* powers for customs officials, one stakeholder has also requested that the enforcement of IPR must not preclude, replace or assume the *domestic* adjudication and interpretation of the scope and limits of IPRs, at the judicial level.
- Similarly, a number of stakeholders have requested that any enforcement measures involving search and seizure are subject to due process rights.

**Civil enforcement**

- Request for provisions on summary proceedings for copyright and trademarks.
- Request for provisions on statutory damages for civil offenses.
- By contrast, another stakeholder has requested that ACTA not include provisions on statutory damages.
- Another stakeholder has requested provisions lowering statutory damages for cases of non commercial infringement.
- Request for provisions on the personal liability of directors and officers of corporate counterfeiters, and shareholder liability in the case of shell companies.
- Request that interim interlocutory injunctions, including the presumption of irreparable harm in counterfeiting cases, be made available.
- Request that the jurisdiction of the prosecution of IPR infringement be identified as the Federal Court and provincial superior courts.
- Request any new penalties preserve all due process rights.

**Optical disc piracy**

- Request that no distinction be made between penalties for commercial and non-commercial infringement.

**Internet distribution and information technology**

- Request for the implementation of the WIPO Internet treaties (WIPO Copyright Treaty, and WIPO Performances and Phonograms Treaty).
- Another stakeholder has requested the implementation of the WIPO Internet treaties prior to ACTA negotiations.
- Inclusion of specific anti-piracy provisions dealing with digital piracy and marketing of counterfeit and pirated hard goods over the internet.



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- By contrast, another stakeholder has requested that ACTA should be "technologically neutral", and not create differential obligations between digital and physical counterfeit goods.
- A number of stakeholders have requested provisions prohibiting acts of circumvention, trafficking in circumvention devices, as well as deterrent criminal and civil remedies against those engaged in the provision of services and tools that circumvent TPMs.
- Several other stakeholders have requested that ACTA not include provisions on TPMs, and/or provisions prohibiting the trade in technologies that facilitate the circumvention of TPMs.
- Another stakeholder has requested that provisions on TPMs should be 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.
- Several stakeholders have requested that provisions under ACTA should not target consumer activity such as time-shifting, media-shifting, and/or format shifting.
- Another stakeholder has requested that DRM be made illegal or regulated.
- Several stakeholders have requested provisions under ACTA allowing for private copying.
- Another stakeholder has requested the removal of the private copying levy.
- Several stakeholders have requested provisions dealing with transparency of the Internet and ISP responsibilities.
- These stakeholders have also requested provisions providing incentives for ISPs to cooperate with rights holders when informed of infringing activity.
- Mechanisms for the disclosure of repeat infringement information to rights holders, as well as mechanisms to enable the termination of Internet access for repeat infringers, have also been requested.
- However, another group of stakeholders has requested that obligations under ACTA should not shift liability onto ISPs.
- Similarly, a number of stakeholders have requested that ACTA not include remedies for repeat infringement (i.e. termination of Internet access).
- Several stakeholders have requested that ACTA not include provisions allowing ISPs or law enforcement officials to examine data transfers without a warrant.
- One stakeholder has also requested that provisions under ACTA should not replace Canada's Existing "Notice and Notice Regime" for ISPs with a "Notice and Take Down Regime".