

***Proposal for a Plurilateral
Anti-Counterfeiting Trade Agreement
(ACTA)***

**Submission of the
Australian Digital Alliance**

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Submitted by email: IP@dfat.gov.au

1. Introduction

This submission is made on behalf of the Australian Digital Alliance (ADA).

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans across various sectors, all members are united by the common theme that intellectual property laws must strike a balance between providing appropriate incentives for creativity against reasonable and equitable access to knowledge.

The ADA thanks the Department of Foreign Affairs and Trade (DFAT) for the opportunity to comment on the Discussion Paper on an International Proposal for a Plurilateral Anti Counterfeiting Trade Agreement (ACTA) (the **Discussion Paper**).

Since the proposed agreement is still in its early stages, we note that the Discussion Paper is still quite general as to the content of the treaty. Our comments are therefore quite general in nature. Should DFAT choose to participate in the treaty negotiations, the ADA looks forward to the opportunity to comment further.

We set our comments and recommendations out below.

2. Content of the ACTA

The stated aim of the ACTA is to provide a new, higher benchmark for intellectual property rights enforcement.

The Discussion Paper suggests the possible areas for inclusion are criminal enforcement, border measures, civil enforcement, CD & DVD disc piracy and internet distribution & information technology. The ADA strongly agrees with the view taken in the Discussion Paper that these are areas where Australia already has schemes and legislation that deal with these issues. We also agree that in the case of CD and DVD piracy it is only countries that have far higher rates of CD and DVD piracy which arguably need to introduce specific laws aimed at these media. As the Discussion Paper notes, Australia has been recognised by the OECD as having a fairly low incidence of intellectual property rights infringement.

The ADA therefore strongly believes that Australia's laws have a sufficient deterrent effect and therefore are not in need of further border measures or stronger intellectual property civil and criminal enforcement. We also agree with the suggestion in the Discussion Paper that any proposal to strengthen Australia's already strong enforcement provisions should include extensive consultation.

The suggestion that the treaty may also consider internet distribution and information technology is quite vague, and it is unclear what the possible scope of these

provisions might be. Added to this, the WIPO Copyright Treaty¹ already deals sufficiently with issues of digital piracy. To negotiate another treaty purporting to deal with the same issues seems unnecessary and is likely to cause confusion.

In a general sense, the ADA believes that Australia currently has a very high standard of protection for intellectual property rights holders, including intellectual property enforcement provisions. We have also made extensive recent changes to laws relating to enforcement, which should be allowed a reasonable period of operation before any further changes are made. The overarching belief of ADA members is in the need to strike a balance between providing incentives for innovation and providing equitable access to knowledge. In many respects Australian law is currently weighted heavily in favour of intellectual property rights holders, to the detriment of consumers and public sector groups such as libraries and cultural institutions. By way of example, the recent changes to the *Copyright Act (Cth) 1968* extended the term of copyright by 20 years, introduced further offences for breaking digital locks (even in cases where the locks are tied to access rather than prevention of infringement), have introduced strict liability offences and a new copyright infringement notice scheme. In broad terms, ADA does not see any need for a “higher benchmark” for intellectual property rights and rights enforcement. In fact, the ADA believes that it would be of far greater benefit to Australia to focus energies on the development of a multilateral treaty on Access to Knowledge.

On the same issue of maintaining balance between protection of rights against appropriate access, the ADA strongly believes that in any negotiations relating to intellectual property, existing exceptions that allow access to and use of material need to be preserved and a new treaty must not impinge upon these exceptions.

3. Australia’s Involvement in the Treaty Negotiation

As we have already discussed, Australia has comprehensive laws dealing with the types of issues proposed for the treaty. Many of the countries currently participating in negotiations for this treaty are in a similar situation. There are also existing international treaties already dealing with these intellectual property issues.

Another issue to be considered is that entering into the ACTA could act to entrench our current intellectual property laws, and make reform and amendment more difficult. It is important for Australia to retain the power to amend laws, as needed, especially in the area of intellectual property where technological developments have often lead to a need for significant changes to the law.

For these reasons, ADA does not believe Australia should enter into the ACTA.

However, the ADA believes that whether or not it appears the treaty is necessary or desirable for Australia, it would be very valuable for Australia to take part in the negotiations.

¹ *World Intellectual Property Organisation Copyright Treaty* 20 December 1996.
<http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html>.

We see the countries involved at this stage include Canada, Japan, the Republic of Korea, Mexico, New Zealand, the European Union, the United States and Switzerland. US Trade Representative Susan Schwab has remarked, of the ACTA: “We hope and believe that others will join over time, marking an emerging consensus on stronger IP enforcement.”² This comment suggests that the US at least will seek to recruit more signatories to the ACTA, illustrating that this agreement has the potential to affect many more countries, and have a wide influence on standards of intellectual property. By participating in the negotiation, Australia can have a direct impact on the direction that intellectual property law takes in an international setting.

The ADA therefore recommends that Australia take part in the negotiations. In so participating, Australia should:

1. Ensure that the agreement recognises the right of individual countries to shape their own domestic IP and technology policies, and preserves sufficient discretion for signatories to do so;
2. Promote the inclusion of text which recognises the right of countries to impose limits on IP rights, including the right of IP owners to enforce copyright, patent and/or trade mark, for important public policy purposes such as the promotion of education, the promotion of innovation, and the protection of the legitimate interests of consumers;
3. Avoid locking in the particular constellation of Australian IP enforcement laws, at a time when many of those laws are too new for us to have any idea how they will operate in practice;
4. Ensure the treaty is clear in its targeting of genuine ‘piracy and counterfeiting’ – rather than seeking to place *all* enforcement under that title.

We further recommend that throughout the progress of negotiations, and prior to deciding whether or not to become a signatory to the Treaty, Australia engage in extensive open consultations. In particular, the ADA sees it as essential that a broad section of interests are consulted, including consumer and public sector groups, as well as intellectual property enforcement groups.

The ADA thanks the Department of Foreign Affairs and Trade for the opportunity comment on the proposed involvement of Australia in the ACTA.

Please contact us should you have any further queries or would like further information.

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² Schwab, Susan. “Anti-Counterfeiting Trade Agreement (ACTA)” 23 October 2007. <http://www.ustr.gov/assets/Document_Library/Transcripts/2007/October/asset_upload_file110_13428.pdf>.