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Submission to the Joint Standing Committee on Treaties Inquiry into the Anti-Counterfeiting Trade Agreement

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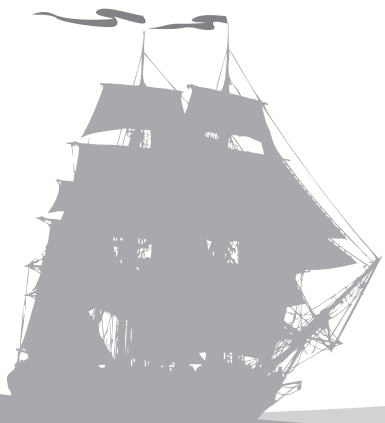

Summary

This submission examines the Anti-Counterfeiting Trade Agreement (ACTA) in detail as well as in greater socio-economic and political contexts. Particular attention has been paid to the circumstances from which the Agreement emerged – the lack of transparency in the drafting process, the backdrop of severe “anti-piracy” legislation being tabled in the United States, and the significant objections that other nations have toward ACTA. Each individual Article of the Agreement that Pirate Party Australia has objection to has been reproduced and followed by the rationale behind the objection. Finally, there is an overall statement regarding the entire Agreement, and a conclusion of this submission.

Introduction

Pirate Party Australia strongly believes that the Anti-Counterfeiting Trade Agreement (ACTA) should be rejected. The drafting of the Agreement deliberately excluded many key stakeholders, including consumer representatives and negotiators from developing countries. As a result, the Agreement is seriously unbalanced and will impose undue restrictions on a range of products and activities from generic medicines in third world countries, to legislating against software that can be used to break electronic rights management (ERM), regardless of possible legitimate uses.

Pirate Party Australia is part of a global movement that has formed to defend civil liberties and consumers interests, particularly – but not exclusively – limited to the digital environment. First formed in Sweden in 2006 and now established in over 50 countries, we have members elected to the European Parliament, as well as parliamentary representatives in Germany and local representatives elsewhere.

The Internet, and technology more broadly, is having a major impact upon all aspects of society. Any product that can be digitised now has a reproduction cost nearing zero. Before the Internet, people required access to industrial-scale production facilities to reach a wide audience. Now all that is needed are the tools to produce your work and an Internet connection, from which you can reach a global audience. Measures like ACTA and the recently defeated SOPA (Stop Online Piracy Act) in the US are attempts at legislating to keep outdated industrial models of intellectual property production viable in the Information Age – regardless of the cost to citizens' privacy, civil liberties, or the desire to be able to legally share.

Secrecy of Negotiations

Perhaps the most troubling aspect throughout the development of ACTA has been the opaque and clandestine nature of the entire process. Whilst the Department of Foreign Affairs and Trade has stated that a certain level of confidentiality is required for trade negotiations, and while there is some ground to perhaps enable a certain degree of secrecy where complex issues may warrant negotiations in confidence, there is no conceivable rationale for the level of secrecy that the Department has maintained for what is essentially a copyright treaty. The exclusionary approach by the Department – the sheer lack of public participation in an area of law that has such potentially large public interest issues – is especially troubling for the Australian democratic process, particularly where earlier leaked drafts contained especially draconian provisions. The secretive process directly contradicts the Declaration of Open Government that has placed primacy on principles of informing, engaging and participation.[1]

This secrecy has not been restricted to our own institutions, with complaints of pressures to ensure secrecy, circumvent parliamentary scrutiny and minimise public scrutiny and involvement to as large an extent as is possible. This is perhaps best evidenced by the resignation of the former EU Rapporteur for ACTA, Kader Arif, denouncing the process of excluding civil society, parliamentary oversight and its general lack of transparency,[2] given the wide ranging implications for access to generic medicines, its expansion of intermediary liability and possible implications for all citizens.

[1] http://agimo.govspace.gov.au/2010/07/16/declaration-of-open-government/

[2] http://www.numerama.com/magazine/21424-acta-demissionnaire-kader-arif-denonce-une-mascarade.html [In French] ; http://translate.google.com/translate?sl=fr&tl=en&js=n&prev=_t&hl=en&ie=UTF-8&layout=2&eotf=1&u=http%3A%2F%2Fwww.numerama.com%2Fmagazine%2F21424-acta-demissionnaire-kader-arif-denonce-une-mascarade.html&act=url

The inclusion of these provisions seem to have stemmed from the exclusionary approach and the undue influence of belligerent corporate interests in the negotiation and preparatory process – corporations that disingenuously conflate issues like file-sharing and copyright infringement with counterfeiting. In fact, the Australian Government at this very moment seems to have a habit of excluding consumer and public interest in all facets of legislative and regulatory development where corporate interests contradict the legitimate and positive culture of information, knowledge and culture sharing. It was only due to whistle-blowers and the increasingly aware non-governmental, civil liberties and consumer groups across the world, that these provisions were discouraged and largely removed from the final ACTA text.

The information provided to the Australian public prior to the release of the draft text very late in the process did not extend beyond a single web page on the Department's website. To this date, neither the website, nor the Department has released submissions made to it by stakeholders, industry and consumer groups regarding the negotiation of the Agreement, even though these documents have been petitioned for, and access rejected, under the *Freedom of Information Act* (*1982).* It was only after requests were made under the Act by this organisation that representatives were granted access to Department officials.[3]

Concerns about Draconian Legislation in the US

Considering the recent Stop Online Piracy Act (SOPA) and PROTECT IP Act (PIPA) that have appeared in the United States' legislature, and subsequent consumer and industry condemnation (including voluntary blackouts and similar protests by the likes of Wikipedia and Google), the championing of ACTA by the United States is a possible warning sign as to its ability to genuinely protect the rights of consumers as well as the information technology industry.

International Objections

Whilst the government claims the Agreement is to protect Australian jobs relying on intellectual property rights (IPR) enforcement[4], Wikileaks' repository of US diplomatic cables quotes the Japanese negotiators contradicting this position:

> *The intent of the agreement is to address the IPR problems of third-nations such as China, Russia, and Brazil, not to negotiate the different interests of like-minded countries. The new agreement could serve as a yardstick for measuring the market economy status of countries such as China and Russia.*[5]

The Indian Government is working to actively oppose ACTA due to the threat to generic medicines which India relies on for its own citizens' healthcare, and which are exported to many developing countries.[6] Brazil too opposes the Agreement because of the threat to generic medicines being seized in-transit. They rightly refuse to recognise the legitimacy of an agreement negotiated by an exclusive cabal of like-minded countries, which only recognises the interests of patent holders and not their

[3] http://blog.serkowski.net/2010/02/acta-dfat-and-foi/

[4] http://www.aph.gov.au/house/committee/jsct/21november2011/treaties/anti_counterfeiting_nia.pdf

[5] http://wikileaks.ch/cable/2006/07/06TOKYO4025.html#par6

[6] http://articles.economictimes.indiatimes.com/2010-05-29/news/27599709

obligations to society.[7] Enforcing patent restrictions on generic medicines will have dire health consequences in developing nations. Considering the targets of the Agreement are countries excluded from the negotiations, this makes the secrecy and exclusionary nature of the negotiations particularly diabolical.

There is a particular concern that the purpose of ACTA is to create a 'Coalition of the Willing'; that is to say, ACTA is a deliberate circumvention of established international forums that aim to create strict enforcement regimes that protect the interests of developed nations and their 'intellectual property' at the expense of more constructive approaches that would see benefit for the developing world. Australia has already had imposed upon it expansive and unbalanced legislative changes through the Australia United States Free Trade Agreement (AUSFTA) due to the abject failure of the Department of Foreign Affairs and Trade to mitigate those demands during those negotiations. This failure has led to criticisms from the Productivity Commission which has indicated in a December 2010 Report[8] that Australia should seek to exclude intellectual property provisions within bilateral and regional trade agreements, unless those changes can be justified by economic assessment, which must include the impact of the Agreement on consumers in both Australia and other countries.

Specific Articles of Concern

Article 6: General Obligations with Respect to Enforcement

> 2. Procedures adopted, maintained, or applied to implement the provisions of this Chapter shall be fair and equitable, and shall provide for the rights of all participants subject to such procedures to be appropriately protected. These procedures shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.[9]

ACTA does not make mention of the cultural rights of participants, such as those laid out in the United Nations International Covenant on Economic, Social and Cultural Rights (UNICESC), Article 15:

> *1. The States Parties to the present covenant recognize the right of everyone:*
> *1. To take part in cultural life;*
> *2. To enjoy the benefits of scientific progress and its applications';*
> *3. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*[10]

This outcome is not surprising considering the exclusion of civil society. When corporate interests are given free reign to draw up an agreement, the interests of consumers are not going to be protected in the slightest. While authors have the right "to benefit from the protection of the moral and material interests" of their work, UNICESC does not grant rights for the rigid enforcement of intellectual property, merely the right to receive attribution (moral interests) and payment (material interests) that results. As 'non-commercial intellectual property infringement' does not in general remove attribution, nor does it involve payment, the "right of everyone…to take part in cultural life" should be upheld

[7] http://www.estadao.com.br/estadaodehoje/20101007/not_imp621618,0.php [In Portuguese] ; http://translate.google.com/translate?js=n&prev=_t&hl=en&ie=UTF-8&layout=2&eotf=1&sl=auto&tl=en&u=http%3A%2F%2Fwww.estadao.com.br%2Festadaodehoje%2F20101007%2Fnot_imp621618%2C0.php

[8] http://www.pc.gov.au/projects/study/trade-agreements/report

[9] Anti-Counterfeiting Trade Agreement, Article 6, Paragraph 2.

[10] United Nations International Covenant on Economic, Social and Cultural Rights, Article 15.

above all other considerations. Harsh patent restrictions also inhibit or prevent many people, particularly in developing nations, from being able to "...enjoy the benefits of scientific progress and its applications." (See Article 16)

Article 9: Damages

> 1. Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority to order the infringer who, knowingly or with reasonable grounds to know, engaged in infringing activity to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement. In determining the amount of damages for infringement of intellectual property rights, a Party's judicial authorities shall have the authority to consider, *inter alia,* any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price.[11]
>
> 2. At least in cases of copyright or related rights infringement and trademark counterfeiting, each Party shall provide that, in civil judicial proceedings, its judicial authorities have the authority to order the infringer to pay the right holder the infringer's profits that are attributable to the infringement. A Party may presume those profits to be the amount of damages referred to in paragraph 1.[12]

"Adequate" compensation for non-commercial infringements is not universally agreed upon. As the UK Intellectual Property Office (IPO) demonstrates:

> *Subtle differences in methodology can lead to differences of outcome. For example, the impact of [intellectual property] infringement can be assumed to be the sum of the impact each individual infringer has. Many studies however calculate impacts on the basis of multiplying the mean number of infringers by the mean impact of infringement; that represents an assumption about the population of infringers which may, in fact, not be valid in all cases, and where it is, it can bias the results up or down depending on modelling choices.*[13]

The UK IPO tested various methodologies and found that the results varied wildly, ranging from £6 to £451 per offence.[14] Therefore, it is also implausible to expect a rights holder to submit an appropriate "legitimate measure of value" for copyright infringement, as their methodologies have been shown to produce figures that would not be arrived at by using other equally legitimate methods.

Furthermore, the IPO acknowledges that infringers, at least on a non-commercial level, could ascribe "essentially no value"[15] to the goods they infringe. In the digital environment, the ability to duplicate works at near to no cost means that the market price is not determined by what the retailer or rights holder asks for it, but what the consumer is willing to pay for it. If infringing consumers had no intention of purchasing the work, then they cannot feasibly be responsible for "lost profits," and "presumptions for determining the amount of damages sufficient to compensate the right holder for the harm caused" would rely on proving malicious intent – that is, proof of the intention of deliberate denial of profit for self-gain.

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[11] Anti-Counterfeiting Trade Agreement, Article 9, paragraph 1.

[12] Anti-Counterfeiting Trade Agreement, Article 9, paragraph 2.

[13] http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf

[14] ibid., endnote 6.

[15] ibid.

Article 11: Information Related to Infringement

> Without prejudice to its law governing privilege, the protection of confidentiality of information sources, or the processing of personal data, each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority, upon a justified request of the right holder, to order the infringer or, in the alternative, the alleged infringer, to provide to the right holder or to the judicial authorities, at least for the purpose of collecting evidence, relevant information as provided for in its applicable laws and regulations that the infringer or alleged infringer possesses or controls. Such information may include information regarding any person involved in any aspect of the infringement or alleged infringement and regarding the means of production or the channels of distribution of the infringing or allegedly infringing goods or services, including the identification of third persons alleged to be involved in the production and distribution of such goods or services and of their channels of distribution.[16]

This article provides for personal information on "any person involved in any aspect of the infringement or alleged infringement," and is far reaching enough to raise serious concerns regarding the invasion of privacy. Those concerns are:

- Infringement need not be confirmed, merely alleged;
- An infringer need not be confirmed, merely alleged;
- "Any aspect of the infringement" is an undefined and blanket expression;
- Channels of distribution may include legitimate service providers;
- Third persons need not be confirmed, merely alleged.

These generalisations are open to abuse and will likely lead to false accusations resulting in a systematic invasion of privacy. The lack of definition allows information to be sought on persons employed by, or operating Internet service providers, shipping companies and telecommunications companies, regardless of whether any deliberate involvement in infringement has been proven.

Further, this places ISPs, Google, Facebook et al under liability for what their users do with their services. This fundamentally destabilises the user-generated nature of the Internet because all activity will need to be manually verified by the content service provider to mitigate the risk of prosecution. Facebook, which relies on users being able to share media in real time, would require literally millions of staff to monitor the network, making the business unprofitable.

Article 16: Border Measures

> 1. Each Party shall adopt or maintain procedures with respect to import and export shipments under which:
>
> (a) its customs authorities may act upon their own initiative to suspend the release of suspect goods; and
>
> (b) where appropriate, a right holder may request its competent authorities to suspend the release of suspect goods.[17]
>
> 2. A Party may adopt or maintain procedures with respect to suspect in-transit goods or in other situations where the goods are under customs control under which:

[16] Anti-Counterfeiting Trade Agreement, Article 11.

[17] Anti-Counterfeiting Trade Agreement, Article 16, paragraph 1.

(a) its customs authorities may act upon their own initiative to suspend the release of, or to detain, suspect goods; and

(b) where appropriate, a right holder may request its competent authorities to suspend the release of, or to detain, suspect goods.[18]

These provisions will allow generic medicines to be seized by customs officers, not only whilst travelling to or from the signatory country, but also any goods in transit. This is particularly problematic for developing countries and their reliance on generic medicines to treat diseases. A study commissioned by the Greens European Parliamentary representatives indicates that this Agreement will have a negative impact on global health outcomes and may conflict with human rights obligations under international treaties.[19]

The Department of Homeland Security have also raised objections regarding these measures. They believe that customs officials would be burdened with the requirement to carry out 'intellectual property right' (IPR) enforcement which is detrimental to national security and have requested amendments to the Agreement, relieving customs officials of any signatory country from carrying out IPR enforcement at the detriment of national security.[20]

Article 23: Criminal Offences

1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale. For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage.[21]

The broadness of the statement "acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage" does not adequately differentiate between commercial and non-commercial scales. ACTA contains no adequate definition or example of "direct or indirect economic or commercial advantage," and therefore no clear definition of "commercial scale." No appropriate safeguards or methodologies to differentiate between commercial and non-commercial infringement are included.

Article 24: Penalties

For offences specified in paragraphs 1, 2, and 4 of Article 23 (Criminal Offences), each Party shall provide penalties that include imprisonment as well as monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistently with the level of penalties applied for crimes of a corresponding gravity.[22]

This article raises the questions of how "corresponding gravity" is to be judged, and by whom?

Article 27: Enforcement in the Digital Environment

5. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights in, and

[18] Anti-Counterfeiting Trade Agreement, Article 16, paragraph 2.

[19] http://rfc.act-on-acta.eu/access-to-medicines

[20] http://keionline.org/sites/default/files/steward_baker_schwab_7aug2008.pdf

[21] Anti-Counterfeiting Trade Agreement, Article 23, paragraph 1.

[22] Anti-Counterfeiting Trade Agreement, Article 24.

that restrict acts in respect of, their works, performances, and phonograms, which are not authorized by the authors, the performers or the producers of phonograms concerned or permitted by law.[23]

6. In order to provide the adequate legal protection and effective legal remedies referred to in paragraph 5, each Party shall provide protection at least against:

(a) to the extent provided by its law:

(i) the unauthorized circumvention of an effective technological measure carried out knowingly or with reasonable grounds to know; and

(ii) the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure; and

(b) the manufacture, importation, or distribution of a device or product, including computer programs, or provision of a service that:

(i) is primarily designed or produced for the purpose of circumventing an effective technological measure; or

(ii) has only a limited commercially significant purpose other than circumventing an effective technological measure.[24]

7. To protect electronic rights management information, each Party shall provide adequate legal protection and effective legal remedies against any person knowingly performing without authority any of the following acts knowing, or with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related rights:

(a) to remove or alter any electronic rights management information;

(b) to distribute, import for distribution, broadcast, communicate, or make available to the public copies of works, performances, or phonograms, knowing that electronic rights management information has been removed or altered without authority.[25]

While electronic rights management (ERM) does, to a limited extent, reduce the ease with which copyrighted material can be duplicated without authorisation, it makes it incredibly difficult for 'legitimate' customers to make backup copies. Circumventing ERM to make personal-use backups is a grey area under ACTA. It might be argued that the right of the consumer to create a single backup copy takes precedent, but in that case there would be no legal means by which to create a duplicate. ERM creates resentment from 'legitimate' customers whose rights are eroded, while at the same time does not curb intellectual property infringement of any kind. It would be preferable for all ERM implementations to be removed from the digital environment.

[23] Anti-Counterfeiting Trade Agreement, Article 27, paragraph 5.

[24] Anti-Counterfeiting Trade Agreement, Article 27, paragraph 6.

[25] Anti-Counterfeiting Trade Agreement, Article 27, paragraph 7.

The nature of digitised information means these restrictions limit a consumer's access to legitimately purchased material. Something purchased on one device would by law not be accessible on other devices. ERM protected goods are never purchased in a traditional sense, as ownership is denied as the purchaser never gains control over the material, merely a restricted license to access it.

Article 28: Enforcement Expertise, Information, and Domestic Coordination

> 4. Each Party shall endeavour to promote, where appropriate, the establishment and maintenance of formal or informal mechanisms, such as advisory groups, whereby its competent authorities may receive the views of right holders and other relevant stakeholders.[26]

Consumers must be viewed as "relevant stakeholders." Considering the former Attorney-General's consumer exclusion in the 23rd September 2011 "Industry roundtable to address online copyright infringement," there are considerable doubts as to whether consumers and their representative groups will, under ACTA, be given the opportunity to engage "competent authorities" on all aspects of intellectual property that they feel concerned about.

Article 31: Public Awareness

> Each Party shall, as appropriate, promote the adoption of measures to enhance public awareness of the importance of respecting intellectual property rights and the detrimental effects of intellectual property rights infringement.[27]

ACTA does not provide any rationale for the statement "detrimental effects of intellectual property rights infringement." It would be desirable if the Parties involved would commission and publish an independent study into the said "detrimental effects," that is not influenced by lobbyists or rights holders. So far, no evidence has been tabled that proves non-commercial intellectual property infringement is capable of causing any significant damage to rights holders, apart from their own statistics. The amount of works being produced on a yearly basis, coupled with the fact that copyright now lasts significantly longer than in the past, means that it is simply not possible for fulfilling cultural participation to occur with a finite budget. There is too much culture available for consumption than can actually be bought.

Article 36: The ACTA Committee

> 4. All decisions of the Committee shall be taken by consensus, except as the Committee may otherwise decide by consensus. The Committee shall be deemed to have acted by consensus on a matter submitted for its consideration, if no Party present at the meeting when the decision is taken formally objects to the proposed decision. English shall be the working language of the Committee and the documents supporting its work shall be in the English language.[28]

This paragraph allows proposed changes to ACTA provided no Party at the meeting formally objects. This is a concern as it allows, in theory, binding changes to domestic laws with no democratic oversight. The high level of secrecy surrounding ACTA mentioned earlier would likely continue, further excluding the voice of the electorates in negotiating possible future changes to the Agreement.

[26] Anti-Counterfeiting Trade Agreement, Article 28, paragraph 4.

[27] Anti-Counterfeiting Trade Agreement, Article 31.

[28] Anti-Counterfeiting Trade Agreement, Article 36, paragraph 4.

General Concerns with the Text

The text imposes many requirements, while insisting that they not create "barriers to legitimate trade"[29] or "legitimate activity"[30], must have "safeguards against…abuse"[31] and "preserve fundamental principles such as freedom of expression, fair process, and privacy"[32]. In the context, this would seem to be an impossible task, given how difficult it is to differentiate legitimate and lawful activity from infringing activity.

The general implication of "commercial scale" in the context of this Agreement, previously highlighted when discussing Article 27, seems to not require any threshold for financial benefit (direct or indirect), but any benefit, such as not having to pay for something, could arguably be considered a financial benefit. Therefore, all intellectual property infringement could be argued to be on a "commercial scale".

Criminal enforcement is required for "aiding and abetting", which has the potential to be broad enough to cover merely linking to a place where infringing content could be obtained. Consider, for example, a site such as Wired.co.uk incidentally linking to – or mentioning – a website with infringing content. Given the "aiding and abetting" provisions, and the poorly defined "commercial scale", they could find themselves facing criminal liability. Media mogul Rupert Murdoch recently accused the most popular Internet search engine, Google, for linking to infringing sites, calling Google a "piracy leader…who streams movies free [and] sells [advertising] around them."[33] Clearly there needs to be greater definition for "commercial infringement" and limitations placed on what could be considered "aiding and abetting", when such influential people can denounce one of the most widely used contemporary technological tools.

[29] Anti-Counterfeiting Trade Agreement, Preamble, Articles 6 (1), 13, 27 (2) and (4).

[30] Anti-Counterfeiting Trade Agreement, Article 27 (2) and (4).

[31] Anti-Counterfeiting Trade Agreement, Articles 6 (1), 12 (4), 18.

[32] Anti-Counterfeiting Trade Agreement, Article 27, (2) (3) and (4).

[33] http://www.bbc.co.uk/news/technology-16574977

Conclusion

The negotiations for ACTA were held in secret and excluded representatives of key stakeholders, particularly IT and consumer groups. This secrecy continues to this date, with submissions and other information regarding the Department of Foreign Affairs and Trade's involvement in the negotiations remaining secret. Movie and music industry groups and representatives were granted exclusive access to draw up an agreement protecting their vested interests, with little to no regard to privacy or detriment to consumers and the public interest.

This process of exclusion, opacity and protection of belligerent industries' interests can only lead to one conclusion — the trade agreement is illegitimate and should be rejected on this reason alone. To accept this agreement is to condone the undemocratic process in which it was forged. The Australian government is elected to serve the Australian people, not the interests of multi-national media and pharmaceutical executives.

We implore the Committee to demand that before any approval is granted to ACTA, that studies and economic assessments are first commissioned on the effectiveness and benefit of stricter enforcement and expansion of intermediary liability that was institutionalised by the AUSFTA and will only be further entrenched by the signing of ACTA. It is legislative negligence and a complete disregard for evidence based policy development to do otherwise. Industry based research has been shown to be completely untrustworthy, manufactured to elicit legislative change by deception.

Those engaged in business on the Internet will be unduly harmed by many provisions in this document, threatening at least as many jobs as it is purported to save from old industries, and considering the rapid growth of the online world, it will have even greater impact upon the prospects for employment for generations to come.

Despite assurances in the National Interest Analysis[34] that no new legislative measures would be required to conform to the Agreement, the measures proposed go far beyond our current legal environment, or at least create an environment that encourages an expansion of current enforcement frameworks to the detriment of consumers and the public interest.

[34] http://www.aph.gov.au/house/committee/jsct/21november2011/treaties/anti_counterfeiting_nia.pdf