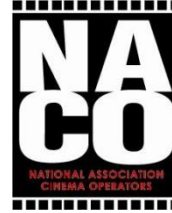


SUBMISSION NO. 15
TT on 21 November 2011



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14 February 2012

The Secretary of the Committee
Joint Standing Committee on Treaties
Parliament of Australia

Dear Committee Members

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

The Australian Federation Against Copyright Theft (AFACT), the Australian Home Entertainment Distributors Association (AHEDA), the National Association of Cinema Operators (NACO), and the Screen Producers Association of Australia (SPAA) are grateful for the opportunity to provide this submission in response to the ratification by Australia of the Anti-Counterfeiting Trade Agreement (**ACTA, the Agreement**) on 1 October 2011.

Australian Federation Against Copyright Theft

AFACT was established in 2004 to protect the film and television industry, retailers and movie fans from the adverse impact of copyright theft in Australia. AFACT works closely with industry, government and law enforcement authorities to achieve its aims.

AFACT acts on behalf of the 50,000 Australians directly impacted by copyright or intellectual property (IP) theft including independent cinemas, video rental stores and film and television producers across the country.

AFACT members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

Australian Home Entertainment Distributors Association

The AHEDA represents the \$1.3 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its

members on issues that affect the industry as a whole such as: intellectual property theft and enforcement; classification; media access; technology challenges; copyright; and media convergence. AHEDA currently has 12 members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment, Hopscotch Entertainment, Fremantle Media Australia and Anchor Bay Home Entertainment.

National Association of Cinema Operators

NACO is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, this year in its 66th year.

NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, Reading Cinemas Pty Ltd as well as the prominent independent exhibitors Dendy Cinemas, Grand Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners representing over 100 cinema screens.

Screen Producers Association of Australia

SPAA is the peak industry body representing, advocating and promoting the business and commercial agendas of the independent screen production industry in Australia. Our members are at the core of all SPAA activities and include television, feature film, animation, documentary, TV commercial and digital production companies as well as services and facilities providers such as post-production, digital effects, casting, finance, distribution and legal companies.

1. Our Submission

AFACT/AHEDA/NACO/SPAA support the ratification of the Agreement as a critical tool in Australia's capacity to:

- (a) protect our entertainment and creative industries from global content theft and counterfeit crime; and
- (b) bring others in the region into line with Australian legislative and enforcement standards through addressing copyright infringement in our region.

We emphasise that:

- (a) no new legislative measures are required in Australia as a result of the ratification of ACTA because ACTA obligations on signatories are 'directly aligned with Australian IP enforcement standards' and 'entirely consistent' with Australian law¹;
- (b) benefits will flow to Australian rights holders and the Australian economy generally because ACTA will 'internationalise existing Australian standards of IP enforcement' by allowing Australian rights holders the

¹National Interest Analysis [2011] ATNIA 31, Anti – Counterfeiting Trade Agreement done at Tokyo on 1 October 2011 [2011] ATNIF 22, see clauses 11 and 13, 29 and 30 of ACTA.

benefits of wider adoption overseas of the standards applied to IP enforcement in Australia² resulting in increased protection from global content theft; and

(c) protections enabled by ACTA will assist Australian copyright owners to grow and prosper domestically and to drive export earnings over time.

2. Why ACTA is necessary

2.1 International cooperation

IP infringement is a worldwide problem. Digital content theft is rampant, notably in many of the ACTA negotiating partner countries which are developed markets where broadband infrastructure has spread rapidly. IP crime costs the world economy US\$200 billion each year.³ The increasingly borderless nature of our world requires a global strategy whereby all relevant actors play a responsible role and cooperate with one another to ensure effective enforcement of copyright infringement.

Australia cannot enforce its copyright standards on the rest of the world but becoming a signatory to the Anti-Counterfeiting Trade Agreement, an Agreement in line with our current copyright protections, goes some way to achieving this goal. Ratification better equips Australia to defeat intellectual property crime at its source through the practical application of uniform enforcement laws and with the cooperation of enforcement agencies in the Asia Pacific and beyond. Irrespective of the willingness or ability of all global or regional nations to become signatories, Australia can work to improve and benchmark the practical and effective protection of Australia's borders and economy.

2.2 Benefits to Australians

Australia's current framework for protecting intellectual property is comprehensive, and because of this no changes to Australian legislation are required to ensure implementation of the Agreement. The only impacts of ratification are positive effects for the Australian economy. The International Property Rights Index 2011 Report found that there is a direct correlation between economic development and robust intellectual property rights. Australia is becoming increasingly reliant on our IP sector which contributes a greater percentage of GDP to our economy year on year. A 2011 Access Economics report found that in 2009-10 the film and television industry in Australia contributed \$6.1 billion to the economy – a rise of 5.1% since 2006-7 and a greater contribution than that of the aviation industry.

As a result of becoming a signatory to the Agreement our entertainment and creative industries are better protected. The relevant industries are insulated from the undermining effect of counterfeit and pirated products diverting consumers from legitimate versions. Exposure to potentially sub-standard or dangerous

² National Interest Analysis above n clause 8.

³ Australian Federal Police website <<http://www.afp.gov.au/policing/ip-crime.aspx>> accessed 9 February 2012

products, such as fake medicines, is minimised. Australia's IP-intensive imports are protected and incentives to innovation are maintained.

3. Myths surrounding ACTA

In addition to our submission, we would like to address two main criticisms regarding the ACTA negotiations and the affect of ACTA on the rights of IP users.

3.1 ACTA negotiations were secretive and discouraged public involvement

Our understanding of the negotiation process does not accord with this criticism.

Internationally, the ACTA negotiations were conducted in the usual manner of an international agreement. DFAT has multiple Free Trade Agreements under current negotiation which are all undertaken, like ACTA, by way of government to government negotiations. Such agreements are not negotiated in public, and there are clear rules on how the European Parliament is to be informed of trade negotiations which were carefully adhered to.

Domestically, the draft ACTA text was released for public comment on 22 April 2010, and updates on the negotiations were posted on the DFAT website and through its RSS feed. Throughout the negotiation process the Australian Government undertook extensive public consultation, and received submissions which informed the Government's negotiating position.

3.2 ACTA erodes fundamental rights of IP users

We view ACTA as complementary to the right of users not erosive.

The text of ACTA contains the enforcement rights necessary for it to be an effective agreement while incorporating flexible language and important safeguards so as to strike a fair balance between all stakeholders' rights and interests. Safeguards and exceptions under Australian law and TRIPS Agreement are preserved.

For example, Article 6.2 requires that any enforcement procedures adopted must be fair and equitable and provide for the rights of all participants to be appropriately protected. Article 12.4 requires any applicant party seeking provisional measures to provide evidence to satisfy judicial authorities with sufficient certainty that their rights are being infringed, and to provide security to protect the defendant and prevent abuse. Similar protections with respect to border restrictions are found in Articles 17.1 and 18. Article 27 contains protections for fundamental principles like freedom of expression, fair process and privacy in the enforcement of rights in the digital environment.

Case Studies in support

In illustration of our argument regarding the detrimental effects of intellectual property infringement we set out in the Annexure a topical example of digital theft, the Megaupload case, and the results of recent research and surveys.

4. Conclusion

The benefits of Australia becoming a signatory to ACTA are many. Most importantly, protections enabled by ACTA will assist Australian copyright owners to grow and prosper domestically and to drive export earnings over time. Due to the fact that our legal framework will not be altered, costs surrounding enforcement of IP rights will decrease and generally, Australians will avoid the dangerous side effects of counterfeit products.

The notion that ACTA was a secretive agreement is not borne out by the facts, and the Agreement is drafted in such a way that fears regarding a rights imbalance in favour of IP rights-holders are unfounded.

On behalf of its Australian film and television industry members, we thank the Federal Government for the opportunity to contribute to the public consultation process as part of the Joint Standing Committee on Treaty's review of ACTA. We look forward to a positive outcome for all stakeholders involved.

Yours faithfully

Neil Gane

Michael Hawkins

Simon Bush

Geoff Brown

Managing Director

**Australian
Federation Against
Copyright Theft**

Executive Director

**National Association
of Cinema Operators
Australasia**

Chief Executive Officer

**Australian Home
Entertainment
Distributors Association**

Executive Director

**Screen Producers
Association of Australia**

ANNEXURE
ACTA SUBMISSION - EVIDENCE IN SUPPORT

In support of its submission, AFACT has set out some research into the reach, consequences and costs of intellectual property infringement.

a) Megaupload

Megaupload was a large online storage hub with more than 1,150 servers located in the United States, the Netherlands and New Zealand which allowed users to indiscriminately upload content to their vast network. The US based servers alone stored more than 25 petabytes of data. The provision of a rewards scheme for users who uploaded (in Megaupload's words) 'popular content', which was then accessed by other internet users via Megaupload or one of the alternative access methods such as Megavideo (which allowed streaming of video files) resulted in vast quantities of infringing material being placed and accessed on the Megaupload servers.

Premium users paid \$10 per month for unlimited access and faster download of the Megaupload and Megavideo services. The owners of Megaupload claimed that they had 150 Million registered users, 50 Million daily visits to the site and purported to have 4% of daily internet traffic. On the 14th October 2011, Megaupload.com was ranked the 135th most visited website by Australians according to Internet traffic statistics group, Alexa.com.

Following an investigation initiated by the FBI and US Department of Justice, a series of search warrant operations were executed on the 19th January 2012 in New Zealand, US, Netherlands, UK, Hong Kong and Canada in relation to criminal copyright infringement and copyright charges against the owner and operators of the 'Mega' series of web sites.⁴

After the January raids, the US Department of Justice estimated that the Megaupload site had caused more than \$500 Million worth of damage to copyright owners.⁵ In the site's 7 year life span, law enforcement estimates that Megaupload has made over \$150 million from user subscriptions and a further \$25 million from advertising revenue.

As of this date, Schmitz has been denied bail pending extradition proceedings.

Schmitz and the exploits of Megaupload represent today's reality of commercial scale infringement of copyrighted film and television content.

b) IPSOS and Oxford Economics Study

There is current research measuring the effects of copyright infringement of movies in Australia.

⁴ Department of Justice Press Release: <http://www.justice.gov/opa/pr/2012/January/12-crm-074.html>

⁵ Mega' Indictment: <http://www.scribd.com/doc/78786408/Mega-Indictment>

In February 2011, IPSOS and Oxford Economics released a study on behalf of AFACT entitled "***Economic Consequences of Movie Piracy in Australia***"⁶.

The key findings indicated the scale of harm caused by copyright infringement of movies to the Australian economy in the 12 months to July 2010 which was:-

- \$1.37 billion in revenue was lost across the entire Australian economy;
- 6,100 jobs were forgone across the entire economy;
- tax losses to movie theft amounted to \$193 million; and
- Direct consumer spending losses to the movie industry (including cinema owners, local distributors, producers and retailers) amounted to \$575 million.

The damage copyright infringement of movies does to the Australian economy illustrates where benefits can flow from ACTA where wider adoption overseas of the standards applied to IP enforcement in Australia will enable increased protection from global content theft.

c) Online technology enabling digital theft

Envisional Ltd, a UK company, was commissioned by NBC Universal to analyse bandwidth usage across the Internet with the specific aim of assessing how much of that usage infringed copyright. Its report⁷ dated January 2011 provides the results of that analysis (**Envisional Report**).

The Envisional Report looked at a variety of the technologies used and estimated that:-

- 23.7% of global traffic was infringing (this estimate excluded all pornography as it was unable to clearly confirm its infringing status);
- BitTorrent specifically accounted for half - 11.4% - of the amount of infringing global traffic. Of this nearly two thirds was estimated to be content shared illegally (again this was not any pornographic content);
- Cyberlocker traffic (traffic to and from online file storage providers) accounted for 7% of all Internet traffic (of which 73% was copyrighted content being downloaded illegally);
- Video Streaming traffic (the fastest growing area of the internet according to the Report) accounted for 27% of all Internet traffic of which 5% was copyrighted content streamed illegally; and
- Other peer-to-peer and file sharing networks made up 7 % of all Internet traffic.

⁶<http://www.afact.org.au/pressreleases/pdf/IPSOS%20Economic%20Consequences%20of%20Movie%20Piracy%20-%20Australia.pdf>

⁷ Envisional Ltd, ***Technical report: An Estimate of Infringing Use of the Internet***, January 2011 located at http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf

The Envisional Report illustrates the types of technology used on the Internet, internationally and the trends in content usage highlighting current levels of copyright infringement and the extent to which intellectual property rights are being infringed on an international basis.