

Anti-Counterfeiting Trade Agreement: Protection of Traditional Knowledge

Purpose

This report seeks to clarify the purpose and objectives of the proposed plurilateral Anti-Counterfeiting Trade Agreement, and also outlines the Ministry of Economic Development's Intellectual Property and Traditional Knowledge Work Programme which provides a process to address a number of the issues relating to the protection of mātauranga Māori domestically and traditional knowledge/traditional cultural expressions internationally (for example in the World Intellectual Property Organisation). This report also recommends that the attached amended Cabinet paper be signed. The paper has been amended to acknowledge and reply to concerns regarding traditional knowledge and traditional cultural expressions.

Date:	7 May 2008	Priority:	Medium
Security Level:	In Confidence	File Number:	P/025/PR005/002

Action Sought

	Action Sought	Deadline
Minister of Customs	<p>We recommend you:</p> <p>1. Note that at this stage of the ACTA negotiations and MED's work programme, officials do not consider ACTA to be an appropriate instrument to deal with the creation of protective mechanisms for traditional knowledge and traditional cultural expressions.</p> <p>2. Agree to sign the attached Cabinet paper,</p> <p><i>Deleted under s 9(2)(j) and s 9(2)(g)(i)</i></p>	14 May 2008
Associate Minister of Commerce	<p>We recommend you:</p> <p>1. Note that at this stage of the ACTA negotiations and MED's work programme, officials do not consider ACTA to be an appropriate instrument to deal with the creation of protective mechanisms for traditional knowledge and traditional cultural expressions.</p>	14 May 2008

	2. Agree to sign the attached Cabinet paper, <i>Deleted under s9(2)(j) and s9(2)(g)(i) of OIA</i>	
Minister of Trade	We recommend you: 1. Note that at this stage of the ACTA negotiations and MED's work programme, officials do not consider ACTA to be an appropriate instrument to deal with the creation of protective mechanisms for traditional knowledge and traditional cultural expressions. <i>Deleted under s9(2)(j) and s9(2)(g)(i) of OIA</i>	14 May 2008
Minister of Commerce	This report is for noting.	
Minister of Foreign Affairs	This report is for noting.	

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Purpose of Report

1. This report clarifies the purpose and objectives of the proposed plurilateral Anti-Counterfeiting Trade Agreement and also explains the Ministry of Economic Development's Intellectual Property and Traditional Knowledge Work Programme which provides a process to address a number of the issues relating to the protection of mātauranga Māori domestically and traditional knowledge/traditional cultural expressions internationally (for example in the World Intellectual Property Organisation). This report also recommends that the attached amended Cabinet paper be signed. Deleted under s9(2)(j) and s9(2)(g)(i) of OIA

Analysis

Background

2. In response to the growing trade in counterfeit goods and pirated copyright protected works, Japan and the US, Deleted under s6(a) of OIA, have developed a proposal for a plurilateral Anti-Counterfeiting Trade Agreement ("ACTA"). A number of like minded countries, including Deleted under s6(a) of OIA, have been invited to join in the development of ACTA. Our briefing of 25 March 2008 recommended you sign a Cabinet paper seeking a mandate for officials to participate in the formal negotiations towards the development of ACTA.
3. Deleted under s9(2)(g)(i) and s9(2)(j) of the OIA

Purpose of ACTA

4. The co-sponsors of ACTA are proposing to establish an international commitment to strong protection for intellectual property rights that will go further than those commitments required under the WTO TRIPS Agreement. It is intended that ACTA will set a common standard for IPR enforcement (the "legal framework") in matters such as criminal enforcement, border protection measures, civil enforcement; and measures related to optical disc piracy, internet distribution and circumvention of technology protection measures. ACTA would also establish mechanisms for international cooperation between enforcement authorities and establish enforcement best practices. These objectives are outlined in paragraphs 10 and 11 of the attached Cabinet paper.
5. Deleted under s 6(a) and s 9(2)(j) of the OIA

ACTA and Traditional Knowledge

6. The Ministry of Economic Development has developed and is currently nearing the end of the first phase of its Intellectual Property and Traditional Knowledge Work Programme ("work programme"). The work programme is described in further detail at paragraphs 13 to 16 of this report. It includes officials participating in the particular international fora, such as WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which is specifically tasked with addressing issues relating to traditional knowledge and traditional cultural expressions at the broadest level.
7. Officials recognise that protective mechanisms to prevent misappropriation and misuse of traditional knowledge and traditional cultural expressions are necessary and required. The importation and exportation of unauthorised copies of traditional cultural expressions is a dimension of the policy work that the work programme will address. New Zealand does not yet have a domestic policy nor a legal framework that specifically provides for the protection of use of mātauranga Māori from misappropriation and misuse.
8. In order for any protective mechanisms to be enforced, those mechanisms must first be created, developed and agreed upon by Māori as the holders of traditional knowledge. New Zealand's negotiating position at this time therefore could not be guided by our domestic policy setting. We are also awaiting the recommendations from the Waitangi Tribunal's report on WAI 262 and do not wish to pre-empt the outcome of its findings.

9. At this stage of the ACTA negotiations and MED's work programme, we do not consider ACTA to be an appropriate instrument to deal with the creation of protective mechanisms for traditional knowledge and traditional cultural expressions. In the absence of international protection mechanisms for traditional knowledge and traditional cultural expressions a discussion on any potential enforcement measures in the context of ACTA would be premature.
10. ACTA has not been seen by the co-sponsors or New Zealand officials as an instrument that sets out minimum standards in regards to the different types of intellectual property rights that are to be protected. It does not create new intellectual property rights, it only looks at creating standard measures for enforcement. Any attempt to broaden the scope of ACTA is likely to trigger a negative response from other participating countries because broadening the scope of the negotiations runs contrary to the narrow and specialised focus already agreed amongst ACTA participants.
11. We anticipate that once mechanisms for the protection of traditional knowledge and traditional cultural expressions are developed and agreed upon, ACTA may provide a useful framework upon which to base international cooperation over the enforcement of such protections.
12. Where ACTA is likely to be of assistance currently is with addressing trade in items that have made unauthorised use of traditional cultural expressions such as and including particular kōwhaiwhai designs, that are protected by copyright as original works of art, or form part of a registered trade mark. However, copyright can still belong to non-traditional knowledge holders if they are the "creator" of such works. This point is emphasised in paragraph 29 of the attached Cabinet paper.
13. Deleted under s 9(2)(g)(i) and s 9(2)(j) of the OIA

Traditional Knowledge Work Programme

14. There are three stages to this work programme:
- Stage One - capacity building, engagement and information sharing;
 - Stage Two - problem definition (what problems exist in New Zealand surrounding the relationship between intellectual property and traditional knowledge?); and
 - Stage Three - development of options and consultation (to be followed by the standard policy process).

15. The objective of Stage One has been to build the capacity of Māori communities or organisations (and these may include whānau, hapū, iwi, commercial entities or other types of organisations) to understand the opportunities and risks associated with the intellectual property system for traditional knowledge and traditional knowledge holders. At the same time, we were also concerned to raise the awareness of officials as to how the intellectual property system may impact on traditional knowledge, and the wider non-intellectual property issues surrounding traditional knowledge. We are currently nearing the end of Stage One. The Ministry has developed and completed a number of projects to achieve these objectives.
16. Stage Two of the work programme will involve identifying any problems associated with the intellectual property rights/traditional knowledge interface in the New Zealand context. This stage will begin with the development and release of a discussion document providing background to intellectual property rights and traditional knowledge issues and seeking submissions on potential problems and preliminary views on a problem definition. Feedback will also be sought on the appropriate policy process to address issues identified and the direction New Zealand should be taking in international processes concerning intellectual property rights and traditional knowledge. During this phase we anticipate that WAI 262 will have been reported on.
17. Stage Three will involve the confirmation of a problem definition and development of a menu of options to address traditional knowledge issues, based on submissions and information obtained to date. The issues raised in submissions are very likely to straddle a range of policy areas including intellectual property, cultural heritage policy, conservation and environmental concerns, access to genetic resources and benefit sharing and international standards on these matters. As well as input from Māori stakeholders, MED will be encouraging an interdepartmental and across-government response. Consultation on the draft problem definition and options would follow in the form of further discussion materials or community based engagement where this would be useful. Policy recommendations would conclude this process.

Other Information

18. We have had confirmation from the co-sponsors that the first formal negotiation meeting is to be held in Geneva, Switzerland on 3-4 June. Paragraphs 31 and 35 of the attached Cabinet paper have been updated to reflect this new information.
19. This paper was prepared in consultation with the New Zealand Customs Service, the Ministry of Foreign Affairs and Trade and Te Puni Kōkiri.

Recommended Action

We recommend you:

20. Note that at this stage of the ACTA negotiations and MED's work programme, officials do not consider ACTA to be an appropriate instrument to deal with the creation of protective mechanisms for traditional knowledge and traditional cultural expressions.
21. Agree to sign the attached Cabinet paper, which has been amended to acknowledge and reply to concerns regarding traditional knowledge and traditional cultural expressions.

agree/disagree

Deleted in accordance with s 9(2)(a) of the OI.

Hon Nanaia Mahuta
Minister of Customs

Hon Judith Tizard
Associate Minister of Commerce

Hon Phil Goff
Minister of Trade

The Chair
CABINET EXTERNAL RELATIONS AND DEFENCE COMMITTEE

ANTI-COUNTERFEITING TRADE AGREEMENT

PROPOSAL

- 1 This paper outlines a Japanese and US initiative to develop a plurilateral Anti-Counterfeiting Trade Agreement and seeks Cabinet's approval for officials to participate in formal negotiations in its development.

EXECUTIVE SUMMARY

- 2 The trade in goods bearing a counterfeited trade mark and pirated copyright works ("counterfeit goods") is a growing global problem to which New Zealand is not immune. Not only is trade in such goods increasing, the nature of the trade is changing with the development of technology. Enforcement measures and resources therefore need to be continually reviewed and global cooperation is essential if enforcement efforts are to be effective.
- 3 In response to the growing problem of counterfeit goods Japan and the US, ~~Deleted: S 6(a) of the OIA~~ have developed a proposal for a plurilateral Anti-Counterfeiting Trade Agreement ("ACTA"). It is proposed that ACTA would set a common standard for Intellectual Property Rights ("IPR") enforcement (i.e. the legal framework that participants would be required to provide to facilitate enforcement activity). It would also set up mechanisms for international cooperation and establish enforcement best practice. The co-sponsors of ACTA hope that it will become a de facto international standard, with other countries joining as consensus grows in favour of strong IPR enforcement.
- 4 The co-sponsors have invited New Zealand and a number of our leading trading partners, ~~Deleted under S 6(a) of OIA~~, to join in the development of ACTA. ~~Deleted in accordance with S 6(b)(i) of the OIA~~ New Zealand has the opportunity now to participate in drafting these standards, so that they reflect, as far as possible, our interests as a net importer of goods protected by IP. In addition, New Zealand's participation would send a positive signal, domestically and internationally, about the Government's commitment to the protection of intellectual property rights.

- 5 This paper therefore seeks approval for officials to participate in formal negotiations on the development of ACTA, which are scheduled to commence on or about 26 May 2008. Once negotiations conclude we will submit a further report with a recommendation on whether or not New Zealand should accede to ACTA. This paper also seeks agreement for officials to undertake consultation with stakeholders concerning specific matters that should be the focus of ACTA.

BACKGROUND

- 6 The trade in counterfeit goods has become a global problem. The 2007 OECD report "The Economic Impact of Counterfeiting and Piracy" indicated that up to USD 200 billion of internationally traded products could have been counterfeited or pirated in 2005. This figure did not include counterfeit goods and pirated works that are produced and consumed domestically; nor did it include non-tangible pirated digital works being distributed worldwide via the internet.
- 7 The sale of counterfeit goods deprives business of legitimate earnings and undermines investment in producing quality goods. Counterfeit goods also mislead and deceive consumers as to the source and quality of goods as well as potentially exposing them to significant health and safety risks from shoddy products. Counterfeit medicines pose a particularly acute risk for consumers. Furthermore, counterfeiting and piracy are providing an easy revenue stream for organised crime and terrorist groups.
- 8 Developing countries, and ~~Deleted: s 6(a) OIA~~, are often singled out as the major sources of counterfeiting and piracy. While counterfeit goods and pirated works are readily consumed in developing countries, counterfeiters and pirates target markets in developed countries to maximise returns. Counterfeiters and pirates will go to extreme lengths to try and mislead and deceive consumers and authorities as to the true source of their goods. Not only do they falsify relevant trade documents, but will also route counterfeit goods through numerous countries in order to ensure that the counterfeit goods reach their target markets in developed countries.
- 9 Internationally, the debate on counterfeiting and piracy divides along "North - South" lines. ~~Deleted under s 6(a) of OIA.~~

, however, argue that while enforcement may be important, it is a low priority nationally when compared to other development needs. Consequently, little progress has been made in relevant multilateral fora such as the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO) on IP enforcement issues.

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Deleted under s 6(a) of the OIA

It would also set up mechanisms for international cooperation and establish enforcement best practice. A copy of a discussion paper concerning the proposed scope of ACTA, which has been provided to us by Japanese and US officials, is attached as appendix A.

11 It is proposed that the agreement would commit countries to ensuring that their domestic regimes meet the certain standards, in matters such as:

- Criminal enforcement (e.g. sanctions, penalties and authority to seize and destroy IPR infringing goods);
- Border protection measures (e.g. customs authorities to suspend the importation, export or trans-shipment of suspect goods);
- Civil enforcement (e.g. damages, reasonable legal fees and costs); and
- Measures related to optical disc piracy, internet distribution and circumvention of technology protection measures.

12 ACTA, and in particular the legal framework proposed, has the potential to provide greater clarity on the enforcement of copyright and trade marks rights than currently exists in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other treaties under the auspices of WIPO and the World Customs Organization.

13 The co-sponsors of ACTA see it as desirable to create a new plurilateral standard, which they hope will become a de facto international standard, with other countries joining as consensus grows in favour of strong IPR enforcement.

14 Deleted in accordance with s 6(b)(i) of the OIA,
and s 6(a) of OIA

have already confirmed that they have negotiating mandates. Deleted in accordance with s 6(b)(i) of the OIA

Over the longer term, the co-sponsors hope other countries will participate in the ACTA process as standards of IPR enforcement improve in those countries.

15 The co-sponsors consider that by including a limited number of likeminded countries, who currently provide a high standard of IPR enforcement, negotiation of ACTA would be relatively straight forward and would result in participating countries readily signing up to ACTA.

- 16 New Zealand officials have participated in an initial pre-negotiation meeting of invited parties on 4 October 2007 in Geneva, as well as follow-up meetings in December 2007, and January and March 2008.

COMMENT

- 17 We consider that, on balance, it is in New Zealand's interest to participate in negotiations towards the development of ACTA. New Zealand already has strong IPR enforcement measures, with substantial penalties and terms of imprisonment for persons convicted of trafficking in counterfeit goods. Recently, Cabinet has agreed to build on existing enforcement measures in the Copyright Act 1994 and the Trade Marks Act 2002 by empowering the Ministry of Economic Development (MED) to undertake enforcement action against counterfeiters and pirates (EDC Min (06) 22/16 and CAB Min (06) 46/6 refer). More recently Cabinet also agreed to empower the New Zealand Customs Service (Customs) to undertake enforcement action against the importers of counterfeit goods (EDC Min (07) 24/7 and CAB Min (07) 39/5 refer). A Bill to provide both MED and Customs with warranted and limited warrantless search and seizure powers under both Acts is being finalised for introduction.
- 18 Globally the trade in counterfeit goods is not only on the rise, but also changing in nature with the development of technology. Enforcement measures and resources therefore need to be continually reviewed and global cooperation is essential if enforcement efforts are to be effective.

- 19 Paragraphs 19-22 deleted in accordance with s 9(2)(g)(i) of the OIA

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Paragraphs 23-27 deleted in accordance
with 59(2)(g)(i) of the OIA

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- 28 Compared to other developed countries New Zealand's location and small economy means we face only limited problems internationally with counterfeiting and piracy. Yet New Zealand is not immune.

Deleted under s6(a) of OIA

- 29 Another area of concern is protection of use of mātauranga Māori from misappropriation and misuse. For example, the unauthorised use of traditional knowledge and traditional cultural expressions such as, and including, particular kowhaiwhai designs. ACTA is likely to be useful for addressing trade in items that have made unauthorised use of traditional cultural expressions that are original artworks protected by copyright. Following the development of other mechanisms for protecting traditional knowledge and cultural expressions, ACTA may provide a useful framework upon which to base international cooperation over the enforcement of such protection.

- 30 *Deleted in accordance with s9(2)(g)(i) of the OIA*

- 31 *Deleted under s9(2)(j) & s6(a) of OIA.* The first formal negotiation meeting is scheduled to commence in Geneva, Switzerland on 3 June. We anticipate that negotiation meetings will be held on a regular basis through the remainder of the year to meet the December 2008 objective.

- 32 We therefore seek approval for officials to participate in formal negotiations in the development of ACTA. Participation in the formal negotiations, however, will not commit New Zealand to joining ACTA. We propose that on completion of the formal negotiations, when the nature and scope of ACTA is finalised, we present a further paper recommending whether New Zealand should sign the agreement.

- 33 We also seek approval for officials to consult with stakeholders in order to identify specific matters that should be the focus of the agreement. It is proposed that the Fact Sheet about ACTA which has been published on MED's website, and attached as appendix B, would be used as a basis for this consultation.

CONSULTATION

- 34 The Commerce Commission; the Department of Internal Affairs; the Ministry of Consumer Affairs; the Ministry for Culture and Heritage; the Ministry of Health, the Ministry of Justice; the New Zealand Police; Te Puni Kōkiri; and the Treasury have been consulted in the development of this paper. The Department of the Prime Minister and Cabinet has been informed.

FISCAL IMPLICATIONS

- 35 There would be no fiscal implications arising from participation in the ACTA negotiations. Participation in the June 2003 negotiation meeting by officials from the Ministry of Economic Development (MED), Ministry of Foreign Affairs and Trade (MFAT) and New Zealand Customs Services (Customs) would be met from within existing baselines. Both MED and Customs will seek funding from the contestable interagency pools allocated in the 2005 Budget under the GIF (Global Connectedness) for supporting negotiation and implementation of trade agreements to cover their costs for attending negotiation meetings during the 2008/09 fiscal year.
- 36 If a decision was taken to join ACTA, there may be some fiscal implications arising from implementation of New Zealand's obligations. The precise nature and size of the fiscal implications will not be known until the development of ACTA is concluded.

HUMAN RIGHTS

- 37 There are no human rights implications arising from participation in the negotiations for ACTA.

LEGISLATIVE IMPLICATIONS

- 38 There would be no legislative implications from participation in the ACTA negotiations. Minor amendments to the enforcement measures contained in the Copyright and Trade Marks Act may be required should a decision be taken to join ACTA following conclusion of negotiations.

REGULATORY IMPACT ANALYSIS

- 39 Participation in the ACTA negotiations does not involve any regulatory change. If a decision was made to accede to ACTA after negotiations are completed a regulatory impact and compliance cost statement would be provided for any necessary changes to the Copyright and Trade Marks Acts arising from accession.

PUBLICITY

- 40 Should Cabinet approve this proposal, a media statement announcing the decision to participate in the formal negotiations for ACTA will be issued. This Cabinet paper will be published on the Ministry of Economic Development website, subject to any necessary deletions justified in accordance with the Official Information Act 1982.

RECOMMENDATIONS

41 It is recommended that the Committee:

- 1 Note that globally the trade in counterfeit goods and pirated works is not only on the rise, but also changing in nature with the development of technology and therefore enforcement measures need to be continually reviewed and global cooperation is essential if enforcement efforts are to be effective;
- 2 Note that Japan and the US, in partnership with the EU, Canada and Switzerland, have developed a proposal for a plurilateral Anti-Counterfeiting Trade Agreement ("ACTA"), which is intended to:
 - 2.1 establish a commitment to strong protection for intellectual property rights, and in particular trade marks and copyright rights, through a common standard (i.e. legal framework) for intellectual property rights enforcement;
 - 2.2 set up mechanisms for international cooperation; and
 - 2.3 establish enforcement best practices;
- 3 Note that New Zealand has been invited to participate in the development of ACTA;
- 4 Agree to officials from the Ministry of Economic Development, Ministry of Foreign Affairs and New Zealand Customs Services participating in negotiations concerning the development of ACTA;
- 5 Agree to officials undertaking consultation with stakeholders concerning specific matters that should be the focus of ACTA;
- 6 Note that we will report on the outcome of the ACTA negotiations after they are completed with a recommendation regarding accession to ACTA;

- 7 Note that this Cabinet paper will be published on the Ministry of Economic Development website, subject to any necessary deletions justified in accordance with the Official Information Act 1982.

Hon Judith Tizard
Associate Minister of Commerce

Hon Nanaia Mahuta
Minister of Customs

Date signed:

Date signed:

Hon Phil Goff
Minister of Trade

Date signed

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Appendix A: Discussion Paper on a Possible
Anti-Counterfeiting Trade Agreement

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of the OIA

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Appendix B: Information Sheet on the Anti-Counterfeiting Trade Agreement

The proliferation of infringements of intellectual property rights ("IPR") particularly in the context of counterfeiting and piracy poses an ever-increasing threat to the sustainable development of the world economy. The consequences of such IPR infringements include (1) depriving legitimate businesses and their workers of income; (2) discouraging innovation and creativity; (3) threatening consumer health and safety; (4) providing an easy source of revenue for organized crime; and (5) loss of tax revenue.

Goal: Establish, among nations committed to strong IPR protection, a common standard for IPR enforcement to combat global infringements of IPR particularly in the context of counterfeiting and piracy that addresses today's challenges, in terms of increasing international cooperation, strengthening the framework of practices that contribute to effective enforcement of IPRs, and strengthening relevant IPR enforcement measures themselves.

Provisions:

- *International Cooperation:* Cooperation among the parties is a key component of the agreement – including sharing of information and cooperation between our law enforcement authorities, including Customs and other relevant agencies. Areas for possible provisions include:
 - Capacity building and technical assistance in improving enforcement; and
 - International cooperation among enforcement agencies.
- *Enforcement Practices:* It is necessary to establish enforcement practices that promote strong intellectual property protection in coordination with right holders and trading partners. Such "best practices" would support the application of the relevant legal tools, as outlined by the Legal Framework. Areas for possible provisions include:
 - Formal or informal public/private advisory groups;
 - Fostering of specialized intellectual property expertise within law enforcement structures to ensure effective handling of IPR cases; and
 - Measures for raising consumer public awareness about the importance of IPR protection and the detrimental effects of IPR infringements.

- Legal Framework: It is critical to have a strong and modern legal framework so that law enforcement agencies, the judiciary, and private citizens have the most up-to-date tools necessary to effectively bring counterfeiters and pirates to justice. Areas for possible provisions include:

- Criminal enforcement;
 - Border measures;
 - Civil enforcement;
 - Optical disc piracy; and
 - Internet distribution and information technology.
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