

Photo 1

2009 Consumers International IP Watch List

This is the inaugural edition of the Consumers International IP Watch List, a survey that examines the intellectual property (IP) laws and enforcement practices of a range of countries, from the perspective of the world's only global consumer advocacy body, Consumers International (CI).

This first IP Watch List focuses on copyright, because of all of the forms of monopoly right that are commonly described as intellectual property, it is copyright that has the most immediate impact on consumers' access to knowledge, and thereby on their educational, cultural and developmental opportunities.

The intent of this IP Watch List is to assess how well the copyright laws and enforcement policies of the surveyed countries support the interests of consumers, by allowing them fair access to the fruits of their society's culture and science. The results of the survey will illustrate that strong copyright laws, enforced rigidly, can seriously harm the interests of consumers.

This survey finds that what is more important than a strong copyright system, is a fair copyright system; one that balances the economic interests of rights holders with the compelling economic, social and cultural interests of consumers. As will be seen, such systems can be found in amongst countries that one might not expect.

Highlights of the 2009 Consumers International IP Watch List

The 2009 Consumers International IP Watch List covers sixteen countries from around the world (with more planned for coverage in the next edition in 2010). The results will be presented in more detail below, but a few highlights stand out.

First, the list of countries that best support the interests of consumers is dominated by large Asian economies; but they are in odd company with the United States, which has regularly criticised those same countries for failing to adequately protect and enforce intellectual property rights. Together, this group accounts for almost half the world's population, and over a quarter of its nominal GDP.¹

The countries whose copyright regimes most disregard the interests of consumers are also an odd grouping. Ironically the worst, by far, is the country in which copyright law first developed in the sixteenth century: the United Kingdom. It is joined by a number of developing and transition economies, whose outdated copyright laws fail to take advantage of all of the flexibilities that international law allows them to benefit local consumers. Regrettably this is characteristic of the copyright laws of many developing countries, as Consumers International has previously found.²

Also highlighted in this year's IP Watch List is that in three areas covered by the survey, no countries adequately took account of consumers' interests:

Best rated countries	Worst rated countries
1. India	1. United Kingdom
2. South Korea	2. Thailand
3. China (PRC)	3. Argentina
4. United States	4. Brazil
5. Indonesia	5. Chile

- **Freedom to access and use by content creators.** One of the hallmarks of the Internet age is that consumers are no longer passive consumers of information and entertainment, but rather vital contributors to its production through blogs, online videos, wiki entries, mashups, remixes and more.

None of the countries surveyed adequately supported consumers' interests in expressing their creativity in such forms, which include the expectation of being able to make reasonable use of the resources of their surrounding culture in their own works.

- **Freedom to share and transfer.** Similarly, consumers have an interest in being able to access information and entertainment in a variety of ways, including purchasing it at a fair price, renting it, and downloading non-commercial content freely – as well as sharing such content with their peers.



None of the jurisdictions in this year's IP Watch List took adequate measures in domestic law and policy to respect these interests, for example by fostering the development of a vibrant ecosystem of public domain and freely-licensed material.

- **Administration and enforcement.** One of the greatest concerns to consumers is that copyright law is being enforced in ever more intrusive ways, including the use of Technological Protection Measures (TPM) such as copy protection devices, and by enlisting Internet Service Providers (ISPs) to suspend the Internet accounts of those who share files.

None of the countries surveyed this year took adequate measures to ensure that due process will continue to be observed in copyright enforcement, and that new enforcement measures will maintain consumers' abilities to exercise their rights of fair use or fair dealing.

Best practices

On a more positive note, a number of best practices also emerged, illustrating innovative measures that countries can take to balance the interests of consumers with the expectations of copyright owners. Here are three examples taken from this year's IP Watch List country reports:

- When copyright material is protected by a TPM, no judge – in fact, no human being at all – determines whether or not the restrictions enforced by the TPM conform to copyright law. For example, when a consumer attempts to copy a documentary film protected with the Macrovision copy protection scheme, their equipment does not care that they are attempting to make the copy for educational purposes that would amount to fair dealing in their jurisdiction – it simply refuses to make the copy. Worse, in many countries the consumer cannot circumvent that restriction without breaking the law.
- In Spain, the law compensates for this limitation, by requiring the holders of rights in works protected by TPM to provide consumers the means to enjoy those works for purposes that the law permits. Whilst not a complete solution – it may require the consumer to take the rights holder to court to enforce his or her rights – it is a commendable attempt to redress the unfairness of TPM for consumers, that more countries around the world could follow.
- The main reason why the United States is placed highly in the 2009 Consumers International IP Watch List as a country that supports the interests of consumers is that its copyright law includes a broad exception for the "fair use" of copyright material.
- In most other jurisdictions, piecemeal exceptions exist for the use of copyright material for particular purposes such as research, criticism and reporting current news. In contrast, a broad fair use exception allows copyright material to be used for any purpose, so long as it satisfies a balancing test that includes factors such as whether the use is commercial or non-commercial, and its effect on the market for the copyrighted work.
- In 2007, Israel introduced a broad fair use exception into its own copyright law; a welcome development for Israeli consumers, who now have access to copyright materials for a broad range of fair uses, including novel uses than no legislature could be expected to foresee.
- Unfortunately, Israel has drawn criticism for this from a US-based copyright owners' lobby group, which asserts that Israeli consumers are not entitled to the same flexibilities as US consumers because Israel lacks the same "carefully-honed jurisprudence" as the US, and thereby "risks creating gaps in protection".³ Consumers International rejects this hypocritical slight on the capacity of the Israeli judiciary, and holds up this provision of Israeli law as a best practice that other countries should also consider.
- In 2006, Australia reformed its Copyright Act to include new provisions to legalise the common practices of time, space and format-shifting of copyright material. An example of time-shifting is the recording of a television broadcast to watch at a more convenient time. Space-shifting includes making a copy of a music CD for personal purposes, so that a user can listen to the music they have purchased both at home and in their car. Format-shifting is similar, but involves, for example, copying the music from a CD to an MP3 player such as an iPod.
- These are eminently reasonable amendments that have modernised Australian copyright law to recognise practices that form a part of many consumers' everyday lives, and which do no harm whatever to the economic interests of rights holders. This best practice example is one that other countries should seriously consider introducing into their own copyright laws.



Photo 2



Development of the Consumers International IP Watch List



The genesis of the Consumers International IP Watch List can be traced to discussions in 2005 amongst the founders of what has become known as the Access to Knowledge (or A2K) movement, who took the view that a consumer-focused survey of global copyright laws and practices was needed.

Three years later, a number of these leaders came together to form an expert advisory group to develop the criteria to form the basis for the Consumers International IP Watch List. These criteria, which were finalised in January 2009, included over sixty questions on national copyright laws and enforcement practices, falling into the following categories:

1. Legal background
2. Scope and duration of copyright
3. Freedom to access and use
 - (a) By home users
 - (b) For education
 - (c) Online
 - (d) By content creators
 - (e) By the press
 - (f) By libraries
 - (g) By disabled users
 - (h) In public affairs
4. Freedom to share and transfer
5. Administration and enforcement

The expert advisory group weighted each of the questions to account for its relative importance to consumers, and reports were then completed for sixteen countries in a collaborative effort by CI's members and partners worldwide.

A response to the USTR Special 301 Report

The original motivation behind the development of the Consumers International IP Watch List was to respond to the one-sided analysis of the state of global intellectual property protection embodied in a similar list: the Special 301 Report that is issued each year by the office of the United States Trade Representative (USTR).

The Special 301 Report is a global survey, conducted pursuant to section 182 of the Trade Act of 1974 of the United States, that takes the nature of a "report card," rating other countries on how closely to they adhere to the USTR's standards of protection and enforcement of intellectual property law. Those countries that the USTR considers to fail its standards most egregiously are highlighted on a "Priority Watch List".

The USTR's standards are not based on the treaty obligations of the countries concerned. For example, in 2008 Israel was condemned for failing to accede to the WIPO Internet treaties,⁴ Thailand chastened for issuing compulsory licences for patented pharmaceuticals, and Mexico urged to criminalise camcording in movie theatres – none of which were legal obligations of those countries.

In fact ironically, the benchmark of intellectual property protection that the USTR urges upon other countries even exceeds that applicable in the United States, where consumers enjoy a fairly liberal policy of fair use of copyright materials, as well as constitutional guarantees that most of its trading partners lack.

In consequence of condemnation and pressure from the United States both through the Special 301 Report and through bilateral channels, consumers particularly in developing countries have suffered as those countries have been forced to abridge provisions of their domestic law that had been passed for consumers' benefit.

Why are flexibilities in copyright law important?

To take just one example, for two decades the law of the Philippines provided: "Whenever the price of any textbook or reference book duly prescribed by the curriculum ... has become so exorbitant as to be detrimental to the national interest ... such book or other written material may be reprinted by the government or by a printer," on terms which included the payment of royalties to the copyright owner.⁵

In 1997, this provision, which represented a balance between the national interest of the citizens of the



Photo 3

A symptom of the larger problem is that rights holders hold undue influence over US policy makers to the detriment of consumers.

Challenging powerful rights holder interests

Why then has the USTR disregarded these developments in pushing through its Special 301 Report for uniformly strong global protection of the interests of rights holders, and ignoring provisions and innovations that could benefit consumers? Largely this can be attributed to the influence of lobby groups representing rights holders, who advocate in their written submissions to the USTR for levels of intellectual property protection that, if adopted worldwide, would severely damage consumer interests.¹⁰

This is a symptom of the larger problem that rights holders hold undue influence over US policy makers to the detriment of consumers. As just one recent example, in a snub to consumers who had been barred from the closed-door negotiations over a new Anti-Counterfeiting Trade Agreement (ACTA), the world's largest and richest industry lobby group,¹¹ the United States Chamber of Commerce, was permitted to host an exclusive luncheon for delegates during the Washington DC round of negotiations in July 2008.

United States policy makers are not alone amongst developed countries in privileging the interests of rights holders over consumers. During 2008 negotiations at the World Intellectual Property Organization (WIPO) over the development of copyright flexibilities for the blind, France sought to foreclose further consideration of a proposal brought by the World Blind Union (WBU) for the introduction of uniform global copyright limitations and exceptions for the benefit of vision-impaired users.

Neither is the USTR Special 301 Report the only annual national survey of copyright laws and enforcement practices that betrays partiality to the interests of rights holders. Two private surveys, the Global Intellectual Property Index (GIPI)¹² and the International Property Rights Index (IPRI),¹³ do the same. Thus it comes as no surprise that the three countries ranked lowest in the GIPI – China, Russia and India – also feature in the Special 301 Report's Priority Watch List,¹⁴ and amongst the countries common to the GIPI and the IP index of the IPRI, those same three are ranked lowest again.¹⁵

It is in this context that Consumers International considers its IP Watch List as having a vital role in contributing a note of balance from a consumer perspective into global debates on intellectual property law reform and enforcement, which are currently dominated by powerful rights holder interests.

Philippines and the economic interest of rights holders, was repealed. As even the Special 301 Report acknowledges, the result has not been to the benefit of rights holders. Rather, the copying of textbooks has simply been driven underground and become a "pirate" activity.

Thus it is often the case that by "strengthening" intellectual property law and enforcement, heedless of the interests of consumers or of national circumstances, consumers and rights holders alike suffer harm. In contrast, the introduction of flexibilities into copyright law, including exceptions and limitations for personal use of copyright material, along with provisions that promote the development of the public domain, benefit not only consumers, but society as a whole.

For example, a 2009 report from the Netherlands found that file sharing, partly in reliance on the personal use exception in Dutch law, has had strongly positive economic implications for welfare in the Netherlands over the short and long terms, substantially outweighing the loss of revenue by rights holders.⁶

Similarly, studies have found the economic value of the public domain,⁷ and of the "fair use" exception in American copyright law, to be extremely high – in the latter case, contributing an incredible \$4.5 trillion to the US economy in annual revenue.⁸ In fact, there is a case that the monopoly rights granted to copyright and patent owners actually harm rather than fostering economic growth.⁹

Copyright flexibilities, together with innovative non-commercial licensing models, can also spur the production of new content, driven by users rather than by multinational corporations, as found in the burgeoning digital ecosystem of mashups, remixes and user-generated content that is transforming cultural expression as we know it.



Results of the 2009 Consumers International IP Watch List

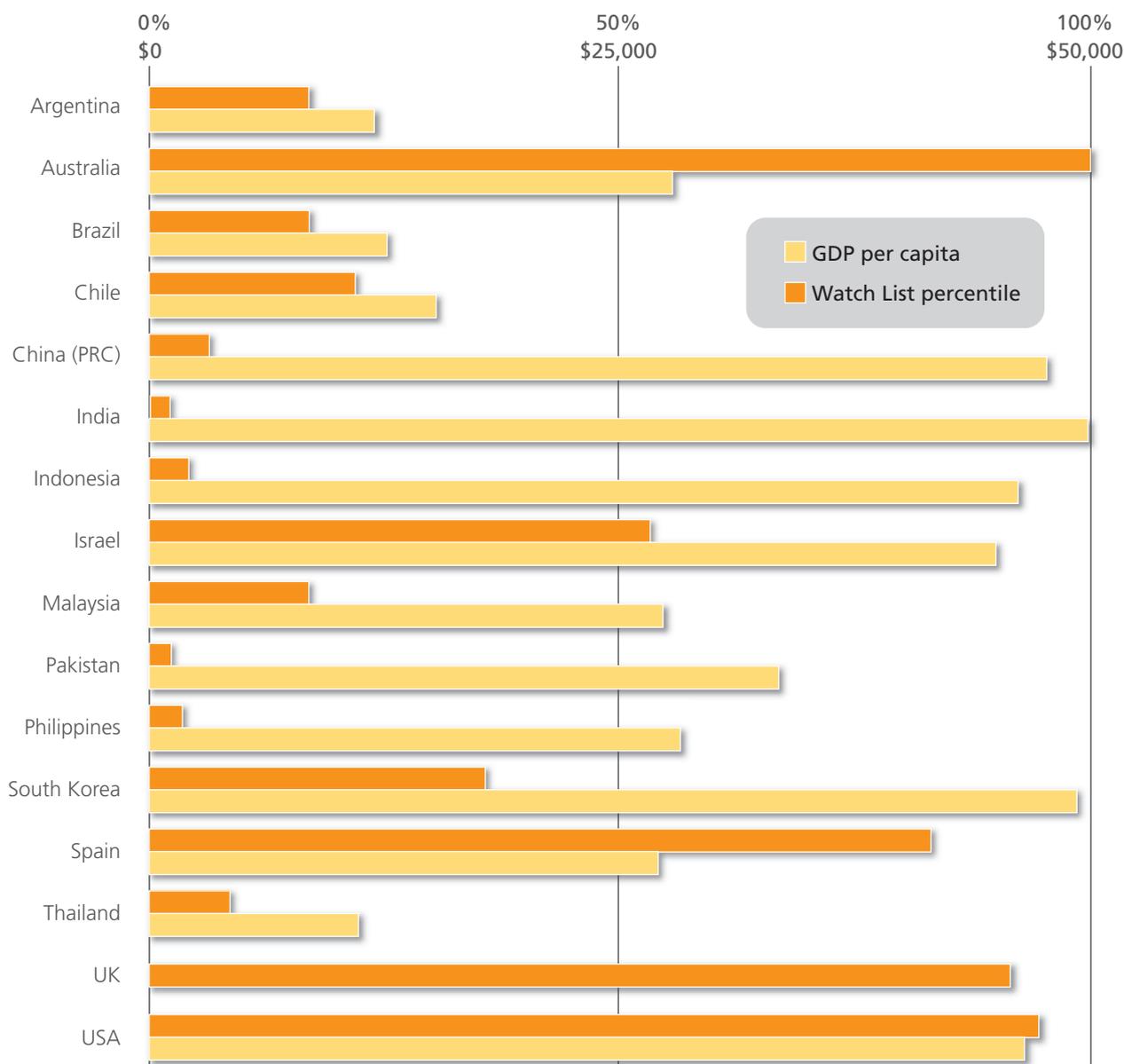
The complete results of the Consumers International IP Watch List are the country reports that have been completed for sixteen countries. For brevity, these are not included in this summary report, but are presented in full on the Web site of Consumers International's A2K Network at <http://A2Knetwork.org/watchlist>.

The appendix to this report summarises the findings of this year's survey. For each of the dozen categories of questions covered in the survey,¹⁶ the weighted answers for each country were used to construct a global report card. Like many report cards, the results rates from "A" to "D" how well the country in question observes consumers' interests in

its national copyright law and enforcement practices – or assigns an "F" if the country abjectly fails to observe those interests. An overall rating for each country is also provided.

This year's results, as highlighted above, are both interesting and instructive. They clearly show that a country's level of development is not a major factor in determining how well its copyright regime supports the interests of consumers. This is illustrated by the graph below, which plots the nominal GDP per capita of each of the sixteen countries against their percentile ranking on the 2009 IP Watch List.¹⁷

The results also show that respecting the interests of copyright owners and those of consumers need not be mutually exclusive objectives. The United States itself is the clearest example of this, being at the same time a forceful protector of intellectual property rights, but also a country in which consumers enjoy relatively broad rights to access and use copyright material.





Conclusion

Our hope is that this inaugural Consumers International IP Watch List will serve to offer a useful and timely counterbalance to the contention of multinational rights-holders, as promulgated in the Special 301 report and its ilk, that anything less than the highest levels of copyright protection is to be associated with piracy and criminality.

Consumers International strongly denounces this notion, and maintains instead that a balanced copyright regime in which the importance of copyright flexibilities and of the

maintenance of a vibrant public domain are upheld, is the ideal to which all countries should strive.

In short, equity should not be confused for weakness. Quite the contrary, in fact; any country that can maintain a balanced copyright regime, against the lobbying of powerful multinational media and publishing interest groups, and the censure of other governments that have been captured by those groups, has demonstrated its strength and deserves to be held up as an example of global best practice. That is what the Consumers International's IP Watch List seeks to do.

Appendix

	Scope and duration of copyright	Freedom to access and use								Freedom to share and transfer	Admin and enforcement	Overall
		By home	For education	Online	By content creators	By the press	By libraries	In disabled users	In public affairs			
Maximum	20.75	12.75	14.25	21	21	14	11.5	3.5	10	19.25	31.5	64.25
Argentina	C	F	F	D	D	D	F	C	B	C	C	F
Australia	D	C	B	B	B	C	B	C	D	D	D	C
Brazil	F	D	F	D	C	B	F	A	A	C	D	F
Chile	D	C	D	B	D	C	F	F	F	C	C	D
China (PRC)	A	A	A	B	C	B	C	C	A	D	D	A
India	B	B	B	B	B	B	D	C	B	C	B	A
Indonesia	D	A	A	B	D	A	A	A	A	D	D	A
Israel	D	D	B	A	C	A	A	F	A	B	C	B
Malaysia	D	C	A	D	C	B	B	C	D	C	D	C
Pakistan	A	C	A	F	F	A	C	F	A	D	C	C
Philippines	D	C	C	B	D	A	B	F	A	D	D	C
South Korea	C	A	A	A	C	A	A	A	B	C	D	A
Spain	D	B	F	A	C	B	D	C	A	F	C	C
Thailand	D	A	B	F	D	B	D	F	D	F	D	F
UK	C	F	F	B	D	D	B	A	F	F	F	F
USA	B	C	C	A	B	C	A	A	A	C	C	A

"A" to "D" rates how well the country in question observes consumers' interests in its national copyright law and enforcement practices. "F" is assigned if the country abjectly fails to observe those interests. An overall rating for each country is also provided.



About Consumers International

Consumers International (CI) is the only independent global campaigning voice for consumers. With over 220 member organisations in 115 countries, we are building a powerful international consumer movement to help protect and empower consumers everywhere. For more information, visit www.consumersinternational.org.

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Endnotes

- ¹ Statistics from the 2008 CIA World Factbook, available from <https://www.cia.gov/library/publications/download/download-2008/factbooka.zip>
- ² Consumers International. *Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws*. Consumers International, Kuala Lumpur, 2006, available from <http://a2knetwork.org/sites/default/files/a2k-report.pdf>
- ³ International Intellectual Property Alliance. *Israel – 2009 Special 301 Report on Copyright Protection and Enforcement, 2009*, available at <http://www.iipa.com/rbc/2009/2009SPEC301ISRAEL.pdf>
- ⁴ That is, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty
- ⁵ Presidential Decree 1203 of 1977, available from http://www.lawphil.net/statutes/presdecs/pd1977/pd_1203_1977.html
- ⁶ A. Huygen, P. Rutten, S. Huveneers, S. Limonard, J. Poort, J. Leenheer, K. Janssen, N. van Eijk, and N. Helberger. *Economic and Cultural Effects of File Sharing on Music, Film and Games*, 2009, available from http://www.tno.nl/content.cfm?context=markten&content=publicatie&laag1=182&laag2=1&item_id=473
- ⁷ R. Pollock. *The Value of the Public Domain*, 2006, available from http://www.rufuspollock.org/economics/papers/value_of_public_domain.ippr.pdf
- ⁸ T. Rogers and A. Szamoszegi. *Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use*, 2007, available from <http://www.cclanet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf>
- ⁹ M. Boldrin and D. K. Levine. *Against Intellectual Monopoly*. Cambridge University Press, New York, 2008
- ¹⁰ Most notably the Pharmaceutical Research and Manufacturers of America (PhRMA) and International Intellectual Property Alliance (IIPA), whose submissions in 2008 ran to a total length of over 800 pages
- ¹¹ During the decade 1998 to 2008 it expended over USD\$460 billion, more than twice as much as the second-ranked lobbyist, according to data from the Center for Responsive Politics (available from <http://www.opensecrets.org/lobby/top.php?indexType=s>, last accessed 4 March 2009)
- ¹² Taylor Wessig. *Global Intellectual Property Index*, 2008, available from http://www.taylorwessing.com/ipindex/register.php?file=Global_IP_Index_-_Report.pdf
- ¹³ A. C. Dedigama. *International Property Rights Index 2009 Report*. Property Rights Alliance, Washington, DC, 2009, available from http://internationalpropertyrightsindex.org/atr_Final1.pdf
- ¹⁴ The USTR Priority Watch List does not include a strict ranking of countries, but China and Russia are listed first, with the other countries following in alphabetical order
- ¹⁵ Save that Mexico and Brazil are ranked below India – however those countries both also rank in the Special 301 Report, and the latter was included in the Priority Watch List until 2007
- ¹⁶ See “Development of the Consumers International IP Watch List” above. The appendix does not summarise the answers given in the “Legal background” category, nor the quantum of damages specified in answers in the “Administration and enforcement” category
- ¹⁷ Statistics from the 2008 CIA World Factbook, above footnote 1
- ¹⁸ Especially Chris Murray (Consumers Union), Gwen Hinze (Electronic Frontiers Foundation), Manon Ress (Knowledge Ecology International) and Michael Geist (University of Ottawa) for their contributions as expert advisors. We also acknowledge the support of Lawrence Liang (Alternative Law Forum), Prudence Adler (Association of Research Libraries), Sunil Abraham (Centre for Internet and Society), Catalina del Rio (Consumers International), Gene Kimmelman and Joel Kelsey (Consumers Union), Jill Johnstone (Consumer Focus), Eddan Katz (Electronic Frontiers Foundation), Markham Erickson (Holch & Erickson), Chaitali Sinha (IDRC), Sisule Musungu (IQSensato), Jamie Love, Malini Aisola and Thirukumaran Balasubramaniam (Knowledge Ecology International), Michelle Childs (Médecins sans Frontières), Jonathan Band (policybandwidth), Sherwin Siy and Rashmi Rangnath (Public Knowledge) and Anne-Catherine Lorrain and Julian Knott (TACD), along with any others whom we have accidentally omitted to mention.