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# ACTA: The Anti-Counterfeiting Trade Agreement

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In 2006 the United States approached Canada with a proposal for a multilateral trade agreement for the managing of intellectual property rights violations called ACTA. The following year the US, EU, Japan, Canada, and Switzerland meet in Geneva to discuss whether or not to move forward on the agreement, and in October 2007, with the addition of South Korea, Mexico, and New Zealand announced that talks would go forward. A preliminary meeting was held with the principals to decide the basic chapters of the agreement, and a schedule for the talks was presented. Thus far seven rounds of talks have taken place with the eighth scheduled for April 14, 2010; a ninth and final round scheduled for June 2010 (Geist).

The ACTA has been extremely controversial for a number of reasons, but the primary issue has been one of transparency. The talks have taken place in secret, as is standard practice with trade negotiations. But, ACTA is different than most trade agreements, in that it requires laws to be implemented in the signing countries concerning civil and criminal penalties and enforcement. It is essentially policy laundering, the use of the trade agreement to implement policy that would otherwise be unpopular and likely not make it through congress. The current negotiating states include the United States, Japan, Switzerland, the twenty seven states of the EU, Canada, New Zealand, Mexico, Australia, Singapore, and South Korea (Geist) (Shaw, 2008).

The current international standards were negotiated in the mid-nineties as part of the WTO Uruguay rounds and implemented through the Agreement on Trade-Related Aspects of

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Intellectual Property Rights (TRIPS). As it was negotiated prior to many technical advances, it is certainly out of date, but it seems that the current negotiations should be done in the open so the American people have the opportunity to discuss it with the representatives. The U.S. Trade Representatives gives good reasons for the need for ACTA, but does not address transparency other than saying that this is standard practice for trade agreements (Geist) (Shaw, 2008).

Included in their reasoning is their statement that “the proliferation of counterfeit and pirated goods in international trade poses an ever-increasing threat to the sustainable development of the world economy” (USTR, 2009). While it is true that large scale counterfeiting is a problem in many countries, ACTA also allows organizations such as the RIAA and the MPAA to request enforcement proceedings to be taken up against individuals minimally violating IPR over the internet. Theoretically, they could request this for any individual for downloading a single song improperly. They go on to say “trade in these goods causes significant financial losses for the right holders and legitimate business”. This can be true, dependent on the magnitude of the violation, but again, allows for overkill.

Recently a draft of ACTA from January 18, 2010, was leaked on the internet, and it does in fact contain many requirements for the passing of laws in the signing countries. ACTA mandates that countries put into place various constructs for implementing both civil and criminal enforcement measures and penalties as well as providing new authority to border security. What follows is an outline of the various portions of the draft.

## Civil Enforcement

This section essentially states that the signing parties MUST provide mechanisms through which civil proceedings can be taken against suspected violations of IPR by a right holder. It also establishes guidelines for assessing damages. The statement that damages can be determined through a “legitimate measure of value submitted by the right holder” (Software patents wiki) is a sort of “name your own price” clause allowing a right holder to set the value themselves. Other remedies also include the confiscation of any goods that may have been used in infringement on a right holder and its disposal or destruction at the expense of the infringer. In addition to this the civil enforcement section stipulates that a suspected infringer is required to surrender to the court any items used the infringement, which could include a person computer, as well as provide information about any other person or persons involved in the production or distribution of the IPR. This essentially means that if you share files on the internet with friends, you have to report them if you get caught. In additional, if a person or persons are found to be at fault, all legal fees of the right holder will be paid by the infringer. This allows for a right holder with deep pockets to essentially price out someone who cannot afford good representation.

## Border Measures

ACTA includes several sections on the strengthening of the authority of border and customs officials. Included in this as an ability to seize items at the border when either they suspect infringement, or a right holder makes a request. This means that a right holder can by-pass the courts and go directly to customs agents with a request for seizure. This seems contrary to current U.S. law which tends to require warrants for search and seizure. Admittedly, this is likely to be used in only few cases and only in serious cases of suspected counterfeiting. The right holder is required to provide sufficient cause for the seizure, although the definition of sufficient cause is unclear in the document. ACTA also stipulates that the storage of any seized items will be at the expense of the defendant and that the items will be held

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for not less than one year, or the period the relevant article is under copyright, whichever is shorter.

Likely this means that any confiscated items will be held for one year (Software patents wiki).

## **Criminal Enforcement**

The ACTA includes requirements for the signing parties to implement criminal penalties for infringing on intellectual property rights. Both copyright violation for financial gain or not will be subject to criminal penalties. The signing parties must provide penalties that include imprisonment and fines “sufficiently high to provide a deterrent”. In addition to criminal charges, an infringer may also be subject to civil suit, essentially a doubling of fines (Software patents wiki).

## **Special Measures**

There are a few special notes included in the agreement which have some effect; especially on Internet based copyright violation. The agreement includes any copyright infringement by means of the Internet, which on some level contradicts anti-counterfeiting, as that involves digital copying of intellectual property rights rather than physically creating counterfeits. The agreement also stipulates that any enforcement can include third parties, which may include your internet service provider (ISP). In addition there is much debate in the draft about the imposing of a requirement on ISPs or other storage site, such as rapid share to monitor their servers for any IPR violation. Finally, any devices or software for the circumvention of digital rights management or for the copying of any IPR may in itself be considered an offence (Software patents wiki).

## **Enforcement Practices**

The agreement requires that all signing parties develop the expertise needed for enforcement if they do not currently have it. This may include training border officials to spot any infringement and understand the rules imposed by ACTA in what their responsibilities are. It also requires that information be shared

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across international lines. Much of the section on practices involves the communication of information to aid in combatting counterfeiting and copyright infringement and the training of officials (Software patents wiki).

## **The New Zealand Round**

The week of April 12 begins the latest round of talks on ACTA in Wellington, New Zealand. The US Trade Representative has released a statement concerning the transparency issues they have therein. Basically the United States standpoint is that the document is incomplete and that the disagreements over wording need to be resolved before it is released to the public (USTR, 2010). The truth is, though, that there is no need to complete the document before public discussion can take place. The wording, while there are disagreements, is complete enough for people to understand what the basis is for the agreement, and also shows the standpoints of the various participating countries, which is useful information for the public in those countries for debate. The USTR has also stated they want to nail down the “scope” of the agreement before it is release. It is unclear what the USTR means by this, but perhaps with more leaks it may become clear (USTR, 2010).

## **PublicACTA**

As the New Zealand round began the counter-conference, PublicACTA has also begun, with lectures and protests concerning ACTA, Michael Geist giving the keynote. The participants have submitted what they have dubbed the “Wellington Declaration” to those participating in the ACTA talks (PublicACTA, 2010). The document includes a number of demands and principles. They request that the nature of the Internet, including its openness not be changed by the implementation of this agreement. They state that the use of the World Intellectual Property Organization (WIPO), the current organization for the multilateral negotiation of intellectual property agreements is a better approach and has in place a “public, inclusive and transparent” process for doing so. In addition they call for more transparency in

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the negotiation of ACTA, impact analysis, and wider participation in the discussions including input from “sectors such as Education, Health Care, Arts & Culture and Information Technology, NGOs, and consumer rights groups” (PublicACTA, 2010). It is unclear whether any action at all will be taken on these matters by the negotiating parties, especially as the United States has worked hard to keep the talks secret.

In addition to these suggestions, the “Wellington Declaration” also makes suggestions for specific topics for discussion in the New Zealand round. These include demands that any civil proceedings under ACTA “must not override or supplant domestic civil procedures” and suggests that ACTA ensure that those accused of infringement have the benefit of consumer protections, safeguards and access to due process. The document also demands that access to the Internet is fundamental and that there be “no disconnection, account suspension, or limitation of service for copyright or trademark infringement” (PublicACTA, 2010).

Finally, concerning damages, the document demands that any damages be determined only by competent legal authorities, must be proportionate to the intent and the harm, unlike some of the major settlements that have been awarded in US courts. Concerning criminal liability it suggests that a high bar be set for criminal cases and that the agreement “must not attempt to reframe personal use and private acts to fit a definition of ‘commercial’ infringement” (PublicACTA, 2010).

## **Enactment**

As the Office of the United States Trade Representative is part of the Executive branch of government and as such enactment of trade agreements is done through the Office of the President. This has the effect of allowing the agreement to be enacted through executive order even though the actual implementation of the agreement has to be done through Congress. Once the agreement is finally completed, the final round taking place in June of 2010, President Obama has pledged to sign it

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(Goldsmith & Lessig, 2010). After that it is the responsibility of the Congress to create the necessary rules and laws to abide by it. Lawrence Lessig and Jack Goldsmith suggest that using “sole executive agreement” for passing of a trade agreement as far reaching as ACTA far exceeds existing precedent (Goldsmith & Lessig, 2010). Certain portions of the act, according to them, including the civil enforcement portions, could override state law and perhaps even federal law. They suggest that if the President proceeds in this manner that any implementation of ACTA will almost certainly be challenged in court. They also suggest that the fact that these negotiations have taken place in secret have already violated Obama’s pledge for more transparency in government.

## Conclusion

While the negotiations over ACTA are still in progress, the draft shows the direction of the talks even while the precise language is still under debate. While it is important to protect the intellectual property of companies and individuals, the fact that this agreement is being negotiated in secret and may be approved with no public discussion is, it seems, a violation of the very nature of the process of making law in the United States. Add to that the difficulty of implementation and the violation of States rights on some level. While even governments involved in the negotiations have called for greater transparency, even demanded it, the United States has remained steadfast in its demand for secrecy. Even some in Congress here have called for greater transparency, yet the Obama administration and the Office of the United States Trade representative have refused, all the while claiming transparency that did not materialize. It will be interesting to see how the talks continue and whether or not the leaks will as well. The leaks are, at this point, the only source of concrete information.

## Bibliography

Geist, M. (n.d.). *ACTA Posts*. Retrieved April 14, 2010, from Michael Geist Blog:  
[http://www.michaelgeist.ca/index.php?option=com\\_tags&task=view&tag=acta&Itemid=408](http://www.michaelgeist.ca/index.php?option=com_tags&task=view&tag=acta&Itemid=408)



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Goldsmith, J., & Lessig, L. (2010, March 26). *Anti-counterfeiting agreement raises constitutional concerns*. Retrieved April 14, 2010, from The Washington Post: <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html>

PublicACTA. (2010, April 11). *The Wellington Declaration*. Retrieved April 14, 2010, from PublicACTA: <http://publicacta.org.nz/wellington-declaration/>

Shaw, A. (2008, April). *The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it)*. Retrieved April 14, 2010, from Knowledge Ecology Studies: <http://www.keystudies.org/ojs/index.php/kes/article/view/34/59>

Software patents wiki. (n.d.). *201001 acta.pdf as text*. Retrieved April 14, 2010, from End Software Patents: [http://en.swpat.org/wiki/201001\\_acta.pdf\\_as\\_text](http://en.swpat.org/wiki/201001_acta.pdf_as_text)

USTR. (2009, November 6). *The Anti-Counterfeiting Trade Agreement - Summary of Key Elements Under Discussion*. Retrieved April 14, 2010, from Office of the United States Trade Representative: [http://www.ustr.gov/webfm\\_send/1479](http://www.ustr.gov/webfm_send/1479)

USTR. (2010, April 11). *State of Upcoming ACTA Negotiating Round in New Zealand*. Retrieved April 14, 2010, from Office of the United States Trade Representative: <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/office-us-trade-representative-releases-statement-up>

USTR. (2010, February 2). *The USTR Releases State of ACTA Negotiating Partners on Recent ACTA Negotiations*. Retrieved April 14, 2010, from Office of the United States Trade Representative: <http://www.ustr.gov/about-us/press-office/press-releases/2010/february/-office-us-trade-representative-releases-statement>