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ACTA

The Anti-Counterfeiting Trade Agreement



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What is ACTA?

A “plurilateral” agreement with new, stricter legal and enforcement standards in the sharing of informational goods (Shaw, 2008).

Extends far beyond current WTO **Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)** standards (Shaw 2008).

Could include “sweeping” provisions to **criminalize** information use practices currently **allowed** in the United States (Shaw 2008).

Could include obligation of states, law enforcement officials, and private firms (**including** ISPs) to intrude on the privacy of infringers, without sufficient legal due process (Shaw 2008).

While there are only a handful of countries involved in the negotiation process, Shaw (2008) also suggests that it is likely that signing countries would work to impose terms on developing countries.

States negotiating ACTA today include only the US, Japan, Switzerland, the EU (27 states), Canada, New Zealand, Mexico, Australia, Singapore, and South Korea

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Timeline of ACTA, Pt. 1.

October 2006: Canada gets proposal from US. Circulated for Comment.

February 2007: US, EU, Japan, Canada, and Switzerland meet in Geneva.

October 2007: Original principals plus South Korea, México, and New Zealand announce that talks will go forward.

March 2008: Preliminary meeting on ACTA with principals. Define basic chapters of agreement.

June 2008: First round of negotiations in Geneva. Added countries include Australia, Morocco, the UAE, the European Commission (EC), and the EU Presidency (Slovenia). The meeting is chaired by the USTR. Canada submits papers on “institutional arrangements”, per chapter 4, calling for an oversight council, examining implementation issues, best practices, etc.

July 2008: Second round of negotiations held in Washington. Singapore is added to the group. The EU Presidency has moved to France.

October 2008: Third round held in Tokyo.

Timeline of ACTA Pt. 2

November 2008: Canada calls for better transparency on negotiations.

December 2008: Fourth round of negotiations in Paris. Canada provides draft for chapter 4, the Institutional Arrangements chapter. US presents paper on Internet copyright provisions, liability for ISPs, legal protection of DRM, and speaks to damage awards, and liability for “hosting or storing content”, read “file sharing” and how the US approach is reflected in the provisions in the agreement as this moment.

July 2009: Fifth round held in Rabat, Morocco. Discussion includes international cooperation, enforcement, and institutional issues.

November 2009: Sixth round held in Seoul, Korea. Focus is on criminality and Internet enforcement.

January 2010: Seventh round of talks held in Guadalajara, Mexico

April 2010: Eighth round starts next week.

ACTA is Secret

Negotiated in Secret, but what are the details? What can we know?

Much of the information we know about ACTA is only because of leaks. Who are the people ensuring that this is talked about publically?

Michael Geist, Canada Research Chair of Internet and E-commerce Law at the University of Ottawa.

Aaron Shaw, Knowledge Economy Studies at Knowledge Economy International.

The Electronic Frontier Foundation (EFF).

John Bergmayer and others at Public Knowledge, "a Washington DC based public interest group working to defend your rights in the emerging digital culture". I was referred to him by Gigi Sohn.

It turns out that there are also people in the various trade negotiation teams including those from the Canada, some of the EU countries, and New Zealand that also have issues with the lack of the transparency of the talks involved in this soon to be "agreement" who have leaked information.

What have we heard? Official Reasons. Why we must do this.

“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).

“Trade in these goods causes significant financial losses for the right holders and legitimate businesses” (USTR 2009).

“Expertise, innovation, quality, and creativity are the main factors for success in knowledge-based economies” (USTR 2009).

“Adequate protection and enforcement of intellectual property rights is a key condition for nurturing those factors” (USTR 2009).

“However, it is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation” (USTR, 2009) (note that after four years of work on ACTA, the details are still secret, early stages aside).

What does the USTR say the objectives are?

“The ACTA initiative aims to establish international standards for enforcing intellectual property rights in order to fight more efficiently the growing problem of counterfeiting and piracy. In particular, the ACTA is intended to establish, among the signatories, agreed standards for the enforcement of intellectual property rights that address today’s challenges by increasing international cooperation, strengthening the framework of practices that contribute to effective enforcement of intellectual property rights, and strengthening relevant enforcement measures” (USTR 2009).

The Players

Who get's to input on the agreement?

The USTR

The Members of the trade negotiation contingents of the participating entities.

The MPAA

The RIAA

A First! 1/18/10 Draft Leaked

Leaked on 3/24/10::::

What was leaked? A full draft with comments from the parties.

This is amazing because the public hadn't seen this much of what was in the agreement before.

Who leaked it? We don't know.

What is in this draft? The Chapters

Chapter 1: Initial Provisions and Definitions. This chapter is still very limited. It doesn't include the definition of "infringer" nor "offender".

Chapter 2: Legal Framework For Enforcement of Intellectual Property Rights

Defines the obligations of the signing parties to implement and/or create the agencies need to enforce the ideas put forth in this "trade" agreement. Includes structures defining the damages the "right" holders can impose, regardless of original of creator.

Chapter 3: International Cooperation

Chapter 4: Enforcement Practices

Chapter 5: Institutional Arrangements

Chapter 6: Final Provisions...

Civil Enforcement

“Each party **must** provide procedures concerning the enforcement of any IPR.

“Each party shall provide that its judicial authorities shall have the authority to issue an order to a party to desist from infringement”

Damages: Civil

- I. The offender must pay damages adequate to compensate for the **injury** suffered by the right holder. This is abstract and allows for very large settlements.
- II. Any profits gained by the infringer.
- III. The right holder can determine the measure of value of the infringement, either market value, suggested retail, or any "legitimate" measure submitted by the right holder. This essentially says that the right holder can name their price.

OR,

- I. The right holder can use pre-established damage awards, or
- II. Presumptions of the value of said infringements.

Damages: Civil

The loser in the case will be responsible for the other parties legal fees. This allows “right holders” with deep pockets to hire the best (and most expensive) lawyers against a defendant with limited resources.

Any materials and implements used in the infringement are subject to confiscation and disposal. If you uploaded a file that infringes on someone's copyright as determined by the court, your computer will be disposed of at your expense.

The EU, Canada, and NZ feel that the judicial authority can take into account the “need for proportionality between the seriousness of the infringement and the remedies”. The US does not agree with this.

The accused (that’s just accused) of infringement are required to provide the identification of any person or persons involved, or any third parties that might have aided in the production and/or distribution of the infringing goods or services. I call this the snitch rule. Plus, as it requires that a party is merely accused, this requirement is also a self-incrimination clause.

Border Measures

The US would like that the right holders can request of “competent authorities” that they suspend release of goods carried by **suspected** infringers.

Said confiscated goods will be released, regardless of determination of illegal activity after **NOT LESS** than one year after confiscation or the period the relevant article is protected by copyright, whichever is shorter.

The act stipulates the each parties customs entities can act on their own initiative.

The cost of storage of confiscated item will not be laid upon the right holder.

When a custom agent suspects that a person or persons has violated IPR, they shall provide that information and information about that person or persons to the IPR holder.

Criminal Enforcement

Each party shall provide for criminal procedures and penalties to be applied “at least” in willful trademark counterfeiting.

The offenses considered criminal might include:

- I. Significant willful copyright violation that have no direct or indirect motivation of financial gain, and
- II. Willful copyright or related rights infringement for purposes of commercial advantage or financial gain.

This means that even if you aren't copy things for financial gain, you are subject to criminal penalties

Each party shall provide penalties that include imprisonment and monetary fines sufficiently high to provide a deterrent to future acts of infringement.

Special Measures

Enforcement measures include any copyright infringement by means of the Internet.

Enforcement measures may include third parties (such as your ISP).

The requirement of the monitoring of copyrighted materials stored on the servers of an ISP or other storage site, is hotly debated.

Manufacturing devices or software for the circumvention of DRM or the copying of IPR may be considered an offense. (Some of this is already in the WIPO copyright treaty).

Enforcement Practices

Each party shall develop the expertise needed for enforcement

Each party shall work independently and together to promote collection and analysis of data needed for enforcement.

Each party shall adopt and maintain appropriate measures for better identifying and targeting for inspection at the border of possible infringement.

So far the agreement appears not to include a three strikes clause where by one could lose their access to the Internet

Next Steps

Next round of talks in New Zealand next week.

Final round of talks start June 7th, location undisclosed.

Ratification

President Obama has said he will sign it into law as executive order.

No vote on new legal provisions negotiated in secret.

Lawrence Lessig believes it will be found unconstitutional if it becomes law in this manner rather than the standard debate on ratification in congress.



The End