

Cite as: Shaw, Aaron, "The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it)," *KEStudies*, Vol. 2 (2008).

## **The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it)**

Aaron Shaw  
April 2008

In mid-February 2008, the Office of the United States Trade Representative (USTR) issued a request for public comments on the proposed "Anti-Counterfeiting Trade Agreement" (ACTA). However, with the exception of a handful of press releases, information about the proposal itself remains scarce. Mainstream media outlets have printed USTR officials' talking points about the importance of winning "the fight against fakes," but have failed to analyze either the origins or the nature of the ACTA in any detail. What is ACTA? Where did it come from? How would it affect the trade and governance of the knowledge-based economy? In what follows, I provide preliminary answers to these questions and argue that ACTA would impose a narrow trade agenda at the expense of global cooperation and evidence-based policies.

ACTA is a proposed "plurilateral" agreement that would apply new, stricter legal and enforcement standards to the trade in informational goods. These new standards would extend far beyond those required by the WTO TRIPS Agreement. In addition, some of the proposals for the ACTA include sweeping provisions to criminalize information use practices currently allowed under U.S., European, and international law. In these proposals, the agreement would be obligate states, law enforcement officials, and private firms to intrude on the privacy of "alleged" infringers without sufficient legal due process.<sup>1</sup> A small coalition of powerful states support ACTA, led by the trade representatives of the United States, Japan, Switzerland and the 27 member states of the European Union, represented by the European Commission. These states have also invited representatives from Canada, New Zealand, Mexico, Australia and South Korea to participate in the negotiations. Although ACTA remains in pre-negotiation stages, the

signatories would likely seek to impose the terms of the agreement onto developing countries in subsequent bilateral negotiations.

While the USTR has emerged as the loudest voice supporting ACTA in the global arena, the roots of the proposal appear to lie elsewhere. A Discussion Paper published by the Australian Department of Foreign Affairs and Trade indicates that the idea first emerged in the 2004 Global Congress on Combating Counterfeiting.<sup>2</sup> Hosted by the World Customs Organization and Interpol in Geneva, the Congress was sponsored by the Global Business Leader's Alliance Against Counterfeiting (GBLAAC), an interest group representing some of the world's largest multinational copyright and trademark owners.<sup>3</sup> The following July, during the 2005 G8 summit in Gleneagles, Japanese representatives suggested that member states create stricter regulations and enforcement provisions to combat "piracy and counterfeiting." The publication of a post-G8 statement entitled "Reducing IPR Piracy and Counterfeiting Through More Effective Enforcement" marked the first official step towards what would become ACTA.<sup>4</sup> After Gleneagles, the ACTA supporters tried to promote their agenda in a number of multilateral governance institutions, engaging in a tactic known as "forum shifting." Not surprisingly, the idea of expensive new enforcement measures and rigid legal restraints did not interest middle and low-income countries.

In recent years, wealthy states and multinationals that support restrictive knowledge regimes have found themselves on the defensive in the WTO and other global governance institutions. The G22 (together with numerous non-governmental organizations and activists) has drawn attention to the issues of access to protected inventions and works; the "flexibilities" in the agreements to provide limitations and exceptions to intellectual property rights; as well as the ability to implement obligations under domestic legal traditions. Similarly, in the World Intellectual Property Organization (WIPO), support for a new Development Agenda has reduced the influence of G8 representatives over their less affluent peers.

At the World Customs Organization (WCO), the G8 managed to open negotiations over a set of provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE). A draft of SECURE released on the WCO website suggests that the standards could create a precedent for expanded enforcement against trademark and copyright infringement.<sup>5</sup> However, the WCO lacks the authority to set or enforce policies that

contradict the WTO. Thus, even if the current version of SECURE survives negotiations, it may hold little more than symbolic value.

Having failed to achieve their aims through multilateralism, the ACTA supporters returned to Japan's original plan. Less than two weeks after the WIPO General Assembly voted to create a permanent Committee on Development and Intellectual Property, the USTR and the European Commission announced their intent to open ACTA negotiations before the end of the year. They promptly extended invitations to a short list of trading partners and corporate lobby groups to participate in consultations and negotiations. Instead of merely shifting the debate from one forum to another, the ACTA supporters now seek to create an entirely new layer of global governance.

So why is ACTA such a big deal? If signed, the agreement would constitute a diplomatic putsch by a handful of wealthy states and corporations against the rest of the world. Already, it signals an overt and troubling rejection of multilateralism. The so-called “plurilateral” approach represents an outdated model of international treaty-making whereby the unelected representatives of Northern states and a few corporate lobbyists dictate the rules of global markets. Such arrangements were commonplace during the 1990s under the neo-liberal “Washington Consensus” and prior to the Doha Round of negotiations in the WTO. Today, however, this kind of blatant disregard for global consensus and the needs of developing regions poses a threat to the world's prosperity, security and health.

ACTA would create unduly harsh legal standards that do not reflect contemporary principles of democratic government, free market exchange, or civil liberties. Even though the precise terms of ACTA remain undecided, the negotiants' preliminary documents reveal many troubling aspects of the proposed agreement.<sup>6</sup> For example, ACTA advocates intend to further criminalize non-commercial copyright and trademark infringements. They also aim to reinforce so-called “Digital Rights Management” (DRM) technologies that currently prevent the personal, legal reproduction of optical discs like DVDs and trample on “fair use” rights. In addition, rights owner lobby groups want the agreement to undermine legal safeguards that protect Internet Service Providers (ISPs) from liability for the actions of their subscribers. It would also facilitate privacy violations by trademark and copyright holders against private citizens suspected of infringement

activities without any guarantee of legal due process.

All of these provisions threaten to reach far beyond existing U.S. and E.U. legal norms without any mandate from the appropriate, elected legislative bodies that govern them.<sup>7</sup> As such, the trade officials involved in ACTA negotiations demonstrate a surprising disregard for their own countries' democratic political processes and public welfare. They also threaten to overturn the existing balance of rights and regulations established through global governance institutions.

The ACTA supporters justify these harsh encroachments on the rights of their citizens, private companies, and fellow states in the interests of international cooperation, law enforcement, and modernization.<sup>8</sup> They also claim to be acting in the interests of public health and safety. However, their radical attempt to curtail vital liberties, access to information, and incentives to innovate belies this rhetoric. Instead, ACTA would require signatories to undertake an unprecedented expansion of customs and law enforcement officials' abilities to police goods and information.<sup>9</sup> It would also create a dispute settlement system outside of existing multilateral institutions such as the WTO Tribunal or TRIPS Council to enforce these new powers. Rather than promote cooperation, ACTA signatories would seek to impose a one-sided vision of the knowledge-based economy on the rest of the world. They do so with no regard for the costs of their actions.

In the absence of widespread support for their position, the states behind the ACTA proposals have restricted participation to those organizations that already share their views. In the case of the USTR, this has included closed-door meetings with industry lobby groups that have a vested interest in expanded IP-law enforcement. Meanwhile, the USTR has shut out civil society groups, corporations, academic experts, and citizens that disagree with their approach. The result has been a set of narrow-minded policies that do not reflect the breadth of opinion and research on the trade in knowledge-based goods.

Much recent research in economics, law, sociology, business, and political science examine the claim that strict IP-rights regimes promote growth, innovation, and well-being.<sup>10</sup> Several of these empirical studies suggest that alternative regulatory and enforcement practices allocate public goods more

efficiently.<sup>11</sup> Of course, other studies contradict the claims of these authors. The point, however, is precisely that such disagreement exists; the prospective ACTA signatories have ignored those findings that do not reflect their ideological agenda. A recent OECD-sponsored study frequently cited in public statements on ACTA typifies their approach.<sup>12</sup> The study frames the problem of IP-related crime exclusively through the lens of “piracy” and lost corporate revenue. In doing so, it overlooks the social costs of overly strict-IP regimes. Such regimes restrict access to knowledge, present barriers to follow-on innovation, incentivize anti-competitive behavior and stifle markets, harming those same corporate interests in some cases. Without a calculation of the economic and social costs of a dubious assertion of rights, or an inappropriate or abusive exercise of those rights, such data does not provide an effective basis for policy-making; yet, that is exactly what would happen under ACTA.

In a series of recent decisions, the Supreme Court of the U.S. has recognized the harm of overly strict enforcement of intellectual property rights. The court has sought to make it more difficult to enforce patents with a low inventive step,<sup>13</sup> or even legitimate patents, when the invention is part of a larger product and the public interest is better served by limits on the ability to enforce injunctions.<sup>14</sup> These decisions signal an important shift towards creating a more balanced IP system and reflect the Court's concern that intellectual property rights can harm innovation when they are poorly implemented and mindlessly enforced. Critics of ACTA share these concerns.

Who wins under ACTA? Some multinational firms believe that their business models depend on ever stricter enforcement of copyrights and trademarks, and they seek to reap a double windfall. Under many legal systems, IPRs are considered “private rights,” meaning that the rights holder - and not the state - bears the burden and cost of enforcement. The countries that sign ACTA would thus provide a very valuable and expensive service to these firms at no charge. In addition, many copyright and trademark owners believe that some provisions in ACTA will alter the level of protection itself, by effectively changing the balance of rights between right-owners and consumers. In seeking to advance their own interests, these companies have overlooked the potential for adverse outcomes that would also affect them negatively. While Microsoft wants to enforce its copyrights on software

products, it is also a defendant in a growing number of patent lawsuits. News Corporation may want strict copyright protection for some products, but it also wants to support new user-generated content services, like Myspace. Time-Warner is both a content owner, and a provider of network services, placing part of its business at risk in the interests of another. Johnson and Johnson, Abbott Laboratories, Toyota, Verizon, and many other firms are likewise finding they have complicated and nuanced interests, as they assert intellectual property rights in some areas, but also are concerned about their growing liability for infringement claims.

The majority of the governments of the Global South have wisely declined to participate in this form of corporate welfare and norm re-balancing. However, if ACTA goes forward, they may find themselves with few alternatives in future negotiations with the E.C. or the USTR.

Already, a number of civil society NGOs and developing country trade representatives have begun to push back against ACTA, but without a clear strategy to block or slow down the agreement.<sup>15</sup> What is needed is a broad alliance that incorporates the innovative private sector companies that are more aware of the complexities and consequences of changes in enforcement policies.

Many corporations and states would suffer if this agreement moves forward, although few have analyzed the treaty proposals in a serious way. The liberal use of the emotionally charged and misleading word “counterfeit” in the proposals reflects negotiants' aversion to critical analysis. Such blithe categorization of complex enforcement issues, including unauthorized non-commercial private uses or infringement disputes involving patents of dubious merit, is designed to undermine effective policy debate. It also portrays treaty opponents as defenders of criminal acts.<sup>16</sup>

Among those most likely to exert diplomatic pressure against ACTA potential dissenters within the G8 and E.U.; powerful Southern states such as China, Brazil, and India; as well as coalitions of smaller states within existing regional trade blocs (Mercosur, Caricom, ASEAN, etc.) could prove most effective. In addition, multinationals that recognize the benefits of more flexible approaches to intellectual property – such as IBM, Google, Intel, Sun Microsystems, and other members of the Open Source Initiative – should mobilize their own lobbyists to resist an agreement that presents new

risks and liabilities. They should be joined by Internet Service Providers, and even corporations like News Corporation or Microsoft that are unlikely to benefit from one-sided approaches to changes in the enforcement of some intellectual property right claims. In addition, these businesses should ally with consumer protection and civil liberties groups whose hard-earned legal rights would be harmed under ACTA.

Numerous elected officials might also take a stand against ACTA once they learn more about such an underhanded attempt to circumvent their legitimate legislative and fiscal authority. These political leaders could explain to voters why enforcement policies that lack procedural safeguards and accountability undermine consumer rights and threaten civil liberties. At the same time, their task is made more difficult by the treaty proponents' deliberate use of the term "counterfeit" to describe activities that have nothing to do with counterfeiting.

Such an alliance could potentially hold the USTR, E.C., and their trading partners accountable for their actions. It could also build consensus for balanced knowledge-based trade policies in the future. However, in the absence of a rapid, widespread mobilization of resistance, the ACTA proponents will not be stopped. They have already shown their willingness to ignore legal, intellectual, political, and moral obstacles to their agenda. Something more must now be done.

- 1 These provisions are mentioned in a “Discussion Paper” circulated among the states involved in the negotiations. As of this writing, the discussion paper has not been disclosed to the public.
- 2 Available at: <http://www.dfat.gov.au/trade/acta/discussion-paper.html> (Accessed 27 March, 2008).
- 3 These include: Coca Cola, Daimler Chrysler, Pfizer, Proctor and Gamble, American Tobacco, Phillip Morris, Swiss Watch, Nike and Canon (among others). See the site of the 2004 Congress: <http://www.anti-counterfeitcongress.org/wco2004/website.asp> (Accessed 27 March, 2008).
- 4 Available at: <http://www.g7.utoronto.ca/summit/2005gleneagles/index.html> (Accessed 27 March, 2008).
- 5 Available at: [http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Enforcement/SECURE\\_E.pdf](http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Enforcement/SECURE_E.pdf) (Accessed 27 March, 2008).
- 6 My analysis refers to the aforementioned “Discussion Paper” circulated among participating governments. An overview of this “Discussion Paper” can be found in the USTR’s “Fact Sheet” on ACTA (available at: [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/asst\\_upload\\_file122\\_13414.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/asst_upload_file122_13414.pdf)) and the Australian DFAT’s “Discussion Paper” (see note 2, above). For a comparable account to my own, see the “IP Justice White Paper on the Proposed Anti-Counterfeiting Trade Agreement,” by Robin Gross, available at: <http://www.ipjustice.org/campaigns/acta> (Accessed 26 March, 2008).
- 7 They would also expand the provisions of existing Free Trade Agreements (FTAs) and European Partnership Agreements (EPAs). See: Abbot, Frederick M. “Intellectual Property Provisions of Bilateral and Regional Trade Agreements on Light of U.S. Federal Law,” UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 12; and Santa Cruz S., Maximiliano, “Intellectual Property Provisions in European Union Trade Agreements: Implications for Developing Countries,” ICTSD Programme on IPRs and Sustainable Development, Issue Paper No. 20. Both available at: <http://www.iprsonline.org> (Accessed 3 April 2008).
- 8 For examples, see the USTR’s “Fact Sheet” (note 6, above) and the E.C.’s own “Fact Sheet” on ACTA, available at: [http://ec.europa.eu/trade/issues/sectoral/intell\\_property/fs231007\\_en.htm](http://ec.europa.eu/trade/issues/sectoral/intell_property/fs231007_en.htm) (Accessed 3 April 2008).
- 9 These changes are consistent with US and EU-led initiatives at INTERPOL and the WCO. See the draft of SECURE available from the WCO (note 5 above) and the speech by INTEPOL Secretary General Ronald K. Noble delivered at the 4<sup>th</sup> Global Congress on Combating Counterfeiting and Piracy, Dubai, U.A.E., 3 February, 2008, available at:

- <http://www.interpol.int/Public/ICPO/speeches/SGDubai20080203.asp>  
(Accessed 24 March 2008).
- 10 See, for example, Weber, Steven, 2004, *The Success of Open Source*, Harvard University Press; Tirole, Jean and Josh Lerner, 2005, "The Economics of Technology Sharing: Open Source and Beyond", *Journal of Economic Perspectives*, vol. 19, n. 2, Spring, p. 99-120; Benkler, Yochai, 2006, *The Wealth of Networks*, Yale UP; Lakhani, Karim and Eric von Hippel, 2003, "How Open Source Software Works: 'Free' User-to-User Assistance," *Research Policy*, Vol 32 No. 6, (June) Pages 923-943; and Stark, David and Gina Neff, 2003, "Permanently Beta: Responsive Organization in the Internet Era," in *Society Online: The Internet in Context*, Philip E.N. Howard and Steve Jones, eds., Thousand Oaks, CA: Sage, 173-188.
  - 11 See: Drahos, Peter, 2007, "Patent Reform for Risk Management: A Separation of Powers Approach," *Knowledge Ecology Studies*, Vol 1; and Jaffe, Adam B.; Josh Lerner; and Scott Stern (eds.), 2005, *Innovation Policy and the Economy*, National Bureau of Economic Research.
  - 12 *The Economic Impact of Counterfeiting and Piracy* (draft). Available at: [http://www.oecd.org/document/40/0,3343,en\\_2649\\_201185\\_39542888\\_1\\_1\\_1\\_1\\_00.html](http://www.oecd.org/document/40/0,3343,en_2649_201185_39542888_1_1_1_1_00.html) (Accessed 27 March, 2008)
  - 13 *KSR v. Teleflex*, 550 U.S. \_\_\_\_, 127 S. Ct. 1727 (2007).
  - 14 *eBay Inc v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).
  - 15 See the following: Comments of Knowledge Ecology International on the Proposal for Anti-Counterfeiting Trade Agreement (ACTA), March 20, 2008; Electronic Frontier Foundation Submission to Office of the United States Trade Representative on Proposed Anti-Counterfeiting Trade Agreement (March 21, 2008); IP Justice Comments to the U.S. T.R. on the proposed Anti-Counterfeiting Trade Agreement (ACTA) 21 March 2008; Anti-Counterfeiting Trade Agreement (ACTA) Comments of Public Knowledge (March 21, 2008); Comments of Essential Action on the Proposal for an Anti-Counterfeiting Trade Agreement.
  - 16 Comments of Knowledge Ecology International on the Proposal for Anti-Counterfeiting Trade Agreement (ACTA), Submitted to United States Trade Representative, Request for Public Comments, March 20, 2008.