

Library Copyright Alliance

Issue Brief

The Anti-Counterfeiting Trade Agreement

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The **Anti-Counterfeiting Trade Agreement** (ACTA) is a proposed international agreement aimed at creating a stronger framework for global enforcement of intellectual property rights, with a scope covering counterfeit trademarked goods and infringing copyrighted works. Initiated by the United States, Canada, the European Commission, Switzerland, and Japan, negotiations for the proposed agreement were announced in October 2007. Participants have included the member states of the European Union, the Republic of Korea, Mexico, New Zealand, Australia, Jordan, Morocco, Singapore, and the United Arab Emirates. Governments have provided limited information to the public regarding negotiations, and regard the non-transparent process as necessary for reasons such as efficiency, discretion and national security. The secrecy under which the agreement is being negotiated has raised concerns among citizens and civil society organizations.

What Is ACTA?

In the absence of a publicly available text, the details of the draft agreement are unclear, but general information has been made available as negotiations have progressed. On April 6, 2009 the Office of the United States Trade Representative (USTR) released a six-page summary of the proposed agreement, which aims to “to establish international standards for enforcing intellectual property rights in order to fight more efficiently the growing problem of counterfeiting and piracy.”¹ It addresses physical trade as well as Internet activity. Discussions have focused on higher standards of protection, stricter laws on criminalization of copyright and trademark infringement, heightened customs activity at borders, and cooperation between law enforcement agencies. Discussions are now projected to continue at least through the end of 2009, with a view toward reaching agreement in 2010.

As of April 2009, the proposed agreement was known to comprise six sections, encompassing:

- Initial Provisions and Definitions, including objective, scope and definitions;
- Legal Framework for Enforcement of Intellectual Property Rights, covering four areas:
 - civil enforcement, pertaining to the authority of courts or other competent authorities to take action concerning intellectual property infringement,
 - border measures, pertaining to actions of customs officials and other competent authorities to prevent the transfer of infringing goods across borders,
 - criminal enforcement, pertaining to standards for definition of criminal activity, criminal procedures, and penalties,

- intellectual property rights enforcement in the digital environment, concerning challenges presented by new technologies and the role of Internet Service Providers in enforcement of copyright and related rights;
- International Cooperation, pertaining to the need for nations to cooperate in combating cross-border trade in counterfeit and pirated goods;
- Enforcement Practices, pertaining to application of laws on enforcement, building of expertise among authorities, and public awareness;
- Institutional Arrangements, pertaining to the institutional framework for the agreement;
- Final Provisions, pertaining to issues such as joining, withdrawing from, and amending the agreement.

ACTA could alter ways in which intellectual property infringement is discovered and penalized; expand the reach and activity of courts in prosecuting intellectual property infringers; alter the scope of civil and criminal infringement; lower the threshold at which criminal infringement is defined, thus increasing cases of criminal infringement; increase remedies, including monetary damages and reimbursement of legal fees and costs in cases of infringement; increase border searching; and increase instances of confiscation and destruction of goods.

The ACTA timeline dates from October 2007, when governments announced that negotiations would take place. The first round of negotiations was held in Geneva on June 3-4, 2008. Subsequent rounds were held on July 29-31, 2008 in Washington, DC; October 8-9, 2008 in Tokyo; December 15-18, 2008 in Paris; and July 16-17, 2009 in Morocco. The next round of negotiations is scheduled for November 4-6, 2009 in the Republic of Korea. Initial participants in ACTA discussions included Canada, the European Commission, Japan, Switzerland and the United States. They were later joined by Australia, the Republic of Korea, New Zealand, Mexico, Jordan, Morocco, Singapore, the United Arab Emirates, and Canada.

Concerns for Libraries

There are a number of major concerns for the U.S. library community concerning the proposed ACTA agreement. A primary concern is the further imbalance that ACTA could create in the intellectual property systems of participating nations. The ACTA framework is built upon the high standards of enforcement in U.S. and European Union laws, and it would introduce stricter enforcement in other nations. The agreement would export to other countries an intricate enforcement regime, but it would not export the system of copyright limitations and exceptions existing in U.S. and European laws that limit protections and enforcement mechanisms for important societal goals. Without further limitations and exceptions to balance right holder interests with public policy considerations, ACTA could undermine the essential purpose of copyright law in other countries.

It is widely held that an imbalance already exists in the level of limitations and exceptions in national legislations, because of the encroaching culture of enforcement and the higher protections introduced in recent years by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and free trade agreements (FTAs), with effects such as extension of copyright terms and anti-circumvention legislation. ACTA would further the imbalance, harming not only the rights of foreign citizens, but also U.S. entities that operate abroad.

The USTR takes the position that ACTA will not result in changes to U.S. law. But even if an ACTA regime is consistent with the current U.S. intellectual property laws, it could have negative

effects. Once adopted, ACTA could limit the ability of the courts and Congress to change U.S. intellectual property law in the future. Intellectual property law is dynamic, constantly being shaped by social and economic needs and technological advances. A rigid plurilateral system of enforcement could hinder the flexibility of the U.S., as well as other nations, to adapt their intellectual property laws to future needs and scenarios.

On March 21, 2008 the Library Copyright Alliance (LCA) and other organizations submitted a joint statement of principles to the USTR, in response to the February 15, 2008 request for comments published in the *Federal Register*.² The statement emphasizes that ACTA should not be used to change U.S. law relating to intellectual property enforcement, and that the scope of ACTA should be enforcement, and not substantive issues of intellectual property laws. It also states that ACTA should not target activity conducted under an existing exception (such as fair use) to an exclusive intellectual property right. ACTA enforcement should not hinder legitimate commerce, innovation, consumer privacy, or the free flow of information.

Another library-related concern is the range of proposed ACTA enforcement activities. Although the USTR summary indicates that the intended focus of ACTA is on counterfeiting and infringement that significantly affect commercial interests, there are indications that it could affect innocent third party intermediaries, including Internet service providers. The summary states that ACTA is intended to address “some of the special challenges that new technologies pose for enforcement of intellectual property rights, such as the possible role and responsibilities of internet service providers in deterring copyright and related rights piracy over the Internet.”

LCA holds that ACTA should focus on commercial counterfeiting and infringement, and should not target innocent intermediaries, including Internet access providers. It also submits that ACTA should be technology neutral and should not impose additional burdens, obligations, or penalties regarding Internet activity. On September 18, 2008 LCA submitted additional comments to the USTR focusing on the proposed Internet provisions of ACTA.³ They requested that any discussion of Internet issues in ACTA not result in changes with respect to Section 512 of the U.S. Copyright Act that would disrupt the delicate balance achieved in the Digital Millennium Copyright Act, or result in increased liability for Internet service providers.

In a further joint communication concerning the ACTA Internet provisions, dated July 14, 2009, ALA and other organizations suggest that efforts to combat counterfeiting and infringement be pursued in a way that benefits, rather than harms, U.S. business and consumer interests. The joint letter expresses concerns with the Internet provisions of ACTA that threaten to harm technology industries and the Internet economy. The letter urges the USTR to delete the Internet provisions of ACTA, to make ACTA negotiation documents publicly available, and to establish advisory committees to represent Internet and civil society constituencies.⁴

There are additional concerns. The proposed agreement contains the rudiments of new requirements for education and coordination among competent authorities engaged in intellectual property enforcement, as well as requirements that will place additional layers of responsibility on federal state and local law enforcement in nations that sign the agreement. This includes public awareness promotion efforts. In its joint statement of principles, LCA addresses the issue of consumer public awareness, recommending that public education campaigns on intellectual property present a balanced and accurate view of both exclusive rights and limitations and exceptions, and that governments be allowed flexibility in designing public awareness campaigns.

Finally, LCA has concerns over ACTA provisions concerning statutory damages for copyright infringement. On July 23, 2008 LCA submitted a joint letter to the Assistant United States Trade

Representative for Intellectual Property and Innovation opposing any provision in ACTA requiring signatories to enact provisions on statutory damages.⁵ The U.S. Copyright Act allows rights holders the option of seeking statutory damages—sums of money set in the law—instead of receiving amounts reflecting actual damages suffered from an infringement, and profits gained by an infringer. Statutory remedies for infringement are set at up to \$30,000 for any one work infringed, and they may increase to \$150,000 per work for willful infringement. The amounts available have in many cases encouraged frivolous lawsuits and have resulted in unfair settlements, granting awards far in excess of actual damages.

The threat of statutory damages for copyright in the U.S. stifles innovation and creativity. A system of statutory damages exported to other nations is not a solution for global economic and social development. ACTA enforcement should not hinder legitimate commerce, innovation, consumer privacy, or the free flow of information.

Context of ACTA

Within the sphere of international governance of intellectual property, the proposed agreement represents a *plurilateral* approach that allows participating nations latitude to create new global norms for higher standards of intellectual property protection outside the *multilateral* organizations currently entrusted with governance of intellectual property and its enforcement—the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).

Since WIPO was established in 1967 as a successor to governing bodies extending back to the late 19th century, it has been the primary organization for multilateral international governance of intellectual property. In the 1980s WIPO's influence began to change. When intellectual property came to be recognized as a major factor in the economies of nations with highly developed intellectual property industries, such as the U.S., Japan, and some European countries, the wealthier nations sought stricter mechanisms for protecting and enforcing their intellectual property than were available in the WIPO framework.

At that time, the major industrialized nations made efforts to incorporate intellectual property into the world's multilateral trading system, to leverage higher standards of protection and enforcement, in their best interests, against trading opportunities for nations who adopted the higher standards. The result, with the establishment of the WTO, was the TRIPS Agreement, which took effect on January 1, 1995, linking intellectual property protection with trade. It represented a major shift of forum in matters of intellectual property enforcement.

ACTA represents another forum shift. It moves intellectual property enforcement outside both WIPO and the WTO. The plurilateral framework of ACTA involves a group of nations, again, largely representing the world's major industrialized democracies, and excluding the developing world. Forum-shifting has become a strategy used by industrialized nations as a way of circumventing WIPO and the WTO, where their interests are often opposed by developing nations, who have become forceful in resisting dominance by industrialized nations. Developing nations are in a stronger position today within the multilateral organizations. They seek solutions that are in their own best interests. The growing emphasis on the WIPO Development Agenda and the participation of developing countries at WIPO have hindered attempts by the group of wealthier nations to succeed in international negotiations, and they now seek alternative mechanisms for achieving their goals.⁶

ACTA is another attempt at increasing standards and methods of IP enforcement, for the benefit of nations with highly developed intellectual property industries, at a time when it has become more difficult for highly developed nations to negotiate consensus in their favor at WIPO, given the active presence of developing and least developed nations.

Another type of forum shift common today involves FTAs, through which developed nations often leverage trading opportunities for developing nations against high standards of intellectual property protection, involving “TRIPS-plus” protections in developing nations—standards higher than the TRIPS Agreement requires. FTAs, which may be negotiated secretly between nations, provide a means of circumventing multilateral organizations to achieve goals through non-transparent bilateral means. The lack of transparency in the ACTA negotiation process parallels the negotiation process for bilateral FTAs. While it is not unusual for trade agreements to be conducted secretly, international intellectual property agreements are usually conducted more openly and inclusively.

Secrecy of ACTA Negotiations

One of the most highly criticized aspects of the ACTA process is the closed manner in which it is taking place. This lack of transparency raises concerns among civil society advocates. Participating countries have kept the details of negotiations from the public. Participants are not allowed to discuss the substantive content of the discussions, and documentation is treated as confidential. Information on ACTA initially reached the public largely through unofficial channels and information leaks. Governments have justified the non-transparent process as necessary for reasons such as efficiency, discretion and national security.⁷

Efforts by several U.S. public interest organizations to obtain copies of the draft agreement under the Freedom of Information Act (FOIA) have led to release of documents such as meeting agendas and communications, some heavily redacted, but have not produced a draft of the text.⁸

In a new development, the USTR has begun to broaden its consultations, in preparation for the November 2009 discussions, to include a number of public interest organizations and intellectual property and technology industries. The USTR has invited certain representative stakeholders to comment on parts of the draft ACTA agreement, which it made available for viewing purposes, under non-disclosure agreements signed since August 2009. The organizations have been allowed to provide input on the draft agreement. Their comments are also classified as confidential. While this limited visibility is an improvement over the previous policy of complete secrecy, any secrecy surrounding the process is unnecessary, because intellectual property agreements are not a matter of national security.

Conclusion

Laws involving Internet use and copyright are a matter of public policy and should involve open, inclusive discussions and democratic solutions. LCA will continue to address developments on ACTA to voice the concerns of the library community and to contribute toward reasonable solutions to the global issue of counterfeiting and copyright infringement.

1. “The Anti-Counterfeiting Trade Agreement – Summary of Key Elements Under Discussion,” http://www.ustr.gov/sites/default/files/uploads/factsheets/2009/asset_upload_file917_15546.pdf.

2. See <http://www.arl.org/lca/bm~doc/actaprinciples.pdf>.
3. See <http://www.arl.org/lca/bm~doc/acta---acta-comments.pdf>.
4. See http://www.librarycopyrightalliance.org/bm~doc/kirk_letter_2009.pdf.
5. See <http://www.arl.org/lca/bm~doc/acta---acta-damages.pdf>.
6. The WIPO Development Agenda, reached through consensus of WIPO member nations in September 2007, seeks to reverse the ill effects of intellectual property protection and enforcement standards that have disadvantaged developing nations, and have widened the knowledge gap and digital divide that separate wealthy nations from poor nations. See Janice T. Pilch, *Library Copyright Alliance Issue Brief: WIPO Development Agenda*, <http://www.arl.org/lca/bm~doc/issuebriefdevagendajune172009final.pdf>.
7. European Commission Trade, “The Anti-Counterfeiting Trade Agreement (ACTA): Fact Sheet, Revised January 2009,” p. 4, http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142039.pdf; Letter from the Office of the United States Trade Representative to Electronic Frontier Foundation, January 16, 2009, http://www.eff.org/files/filenode/EFF_PK_v_USTR/foia-ustr-acta-response2-doc1_0.pdf; Letter from the Office of the United States Trade Representative to Knowledge Ecology International, March 10, 2009, http://www.keionline.org/misc-docs/3/ustr_foia_denial.pdf.
8. FOIA requests have been made by Electronic Frontier Foundation, Public Knowledge, and Knowledge Ecology International. See <http://www.eff.org/cases/eff-and-public-knowledge-v-ustr>, and <http://keionline.org/foia/ustr>.