IP JUSTICE WHITE PAPER

on the Proposed

Anti-Counterfeiting Trade Agreement (ACTA)

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I. Introduction

In 2007 a select handful of the wealthiest countries began a treaty-making process to create a new global standard for intellectual property rights enforcement, the proposed Anti-Counterfeiting Trade Agreement (ACTA). ACTA is spearheaded by the United States, the European Commission, Japan, and Switzerland -- those countries with the largest intellectual property industries. Other countries invited to participate in ACTA’s negotiation process are Canada, Australia, Korea, Mexico and New Zealand.

Noticeably absent from ACTA’s negotiations are leaders from developing countries who hold national policy priorities that differ from the international intellectual property industry.

After the multi-lateral treaty’s scope and priorities are negotiated by the few countries invited to participate in the early discussions, ACTA’s text will be “locked” and other countries who are later “invited” to sign-on to the pact will not be able to re-negotiate its one-sided terms. It is claimed that signing-on to the trade agreement will be "voluntary", but few countries will have the muscle to refuse an “invitation” to join, once the rules have been set by the select few conducting the negotiations.

The US is negotiating ACTA through the Office of the US Trade Representative (USTR), an office within the Bush Administration that has concluded more than 10 “free trade” agreements in recent years, all of which require both the US and the other country to increase intellectual property rights and enforcement measures beyond the international legal norms in the WTO-TRIPS Agreement and WIPO Internet Treaties.

As of 25 March 2008, no draft text for ACTA has been published to provide the public with any substance of the proposed international treaty. A “Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement” was reportedly provided to select lobbyists in the intellectual property industry, but not to public interest organizations concerned with the subject matter of the proposed treaty.

II. Substance of ACTA

In October 2007 the USTR published a press release1 and a “Fact Sheet”2 on ACTA that

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provides a glimpse into what its proponents have planned. Based on the USTR’s “Fact Sheet”, ACTA would consist of 3 main parts:

4. International “Cooperation” and Government Spying

“Cooperation” is the “key component” to ACTA, which means governments agree to exchange information with each other about their citizens in order to protect the IPR industry (although the data exchange won’t be limited to that goal). According to the USTR, this includes “sharing of information and cooperation between law enforcement authorities, including customs and other relevant agencies.”

The US Bush Administration has spied on more Americans than any President in US history, and now the Administration proposes to share all of that data about Americans with the governments of other countries (in exchange for the personal data of their citizens). ACTA’s “key component” relies on building a global network of governments that spy on their citizens and easily share that data with other governments.

5. Enforcement Practices & Propaganda Campaigns

The USTR suggests it should coordinate with rights holders and trading partners to promote “strong” standards of intellectual property protection. Left out of the USTR’s stated vision is coordination with any non-industry groups, such as educators, librarians, civil liberties experts or consumer groups who are concerned with ACTA’s potential to harm the public interest.

Possible provisions include creating public or private advisory groups, embedding specialized IPR expertise in law enforcement structures, and funding “consumer public awareness” campaigns to convince the public that intellectual property rights are good and that infringement is bad.

6. New Civil & Criminal Legal Framework for Internet & Digital Technology

The USTR suggests ACTA is building a “strong and modern legal framework” to “bring pirates to justice”. But under a true justice system, someone isn’t a pirate until he or she has been convicted of wrongdoing. A “strong and modern” justice system does not presume everyone is a criminal in order to justify violating due process of law protections, privacy rights, and freedom of expression guarantees.

Possible provisions to create a new legal framework under ACTA include:

i) Criminal enforcement – criminalizing non-commercial infringements (lower the international legal standard since the existing standard under the TRIPS
Agreement Article 61 provides criminal provisions against commercial infringements. Legal due process rights during criminal proceedings are on the chopping block with ACTA too.

ii) **Border measures** – deputize tax-payer funded customs and border agencies to become “copyright cops” (when they aren’t busy protecting national security). When luggage or laptops are searched at airports, the “copyright cops” will be authorized by ACTA to search personal music collections to look for evidence of P2P file-sharing or burned CDs and DVDs.

iii) **Civil enforcement** -- open-up local civil courts and national legal systems to foreign companies for filing infringement lawsuits against the locals. ACTA will create new forms of legal liability for third parties over infringements of others, or lowering existing standards for secondary (intermediary) liability.

iv) **Optical discs (CDs / DVDs)** – emphasis on more rights for music and movie industries and products distributed by CD and DVD.

v) **Internet distribution and information technology** – focus on restricting Internet distribution of information including Peer-2-Peer (P2P) file-sharing, creating liability for search engines and other online service providers, requirements that ISPs police and control Internet content.

III. **Problems with ACTA**

1. **Concerns with ACTA’s Process**

i) **Lack of Transparency in Process**

Very little public information has been provided about the details of the substance of the proposed treaty. Negotiations are going on in secret between intellectual property industry lobbyists and the trade offices of wealthy countries. No draft text has been provided to the public or representatives from civil society groups concerned about the treaty. The only information provided by the USTR on ACTA to the public is the press release announcing the initiative in October 2007 and the accompanying skeletal “Fact Sheet”. The lack of transparency in the process to negotiate the global trade pact for an information society is concerning.

ii) **Undemocratic Process**

Equality of representation is a core principle of democracy. ACTA’s negotiation process involves the world’s wealthiest countries banding together and forming a unified block to unilaterally set new global rules for intellectual property rights. Although left out of the negotiation process, developing countries will later be required to adhere to ACTA’s
provisions in exchange for trade benefits with the wealthy countries. The product of insider lobbyist negotiations, ACTA’s mission is imposed on other countries through national trade offices. Since developing countries do not have equal input into the text of the treaty they will be asked to adhere to, ACTA is undemocratic and imperialistic in its approach.

iii) Public-Interest Groups Excluded from Process

ACTA negotiations have not included participation from public interest groups concerned about the subject matter of the proposed treaty. The USTR briefed international IPR trade associations on ACTA developments according to news reports in early 2008 however. And the USTR “Fact Sheet” on ACTA proposes coordination with “rights holders” in the ACTA process to establish enforcement practices, but makes no mention of similar coordination with public interest organizations concerned about the proposal’s impact on social justice principles. Representatives from non-industry organizations have been excluded from the ACTA negotiation process and from USTR briefings on the treaty.

Existing international legal regimes for intellectual property rights like the World Intellectual Property Organization (WIPO) regularly permit participation from accredited public interest groups in the treaty negotiation process. WIPO is a United Nations Specialized Agency, but ACTA would reside entirely outside of existing international legal frameworks and any related accountability structures that insure inclusiveness of non-commercial views. ACTA negotiations go on in secret by invitation only and ACTA’s proponents have yet to welcome input from public interest groups or others concerned about the proposal’s cost to the public or potential for harm or abuse.

iv) What about WTO-TRIPS and WIPO?

A number of international legal regimes already exist to negotiate intellectual property rights treaties, including the World Intellectual Property Organization (WIPO) and the WTO TRIPS Council. Part III of the TRIPS Agreement already deals specifically with the enforcement of intellectual property rights, so ACTA appears to supplant those legal standards. The 1997 WIPO Internet Treaties were intended to address concerns about online and digital piracy and are only now beginning to be implemented in national legislatures. Besides duplicating efforts that are regularly coordinated elsewhere, ACTA also asks countries to undertake new obligations without allowing them the benefit of implementing existing obligations to address those concerns.

Developing countries regularly participate in WIPO and WTO-TRIPS negotiations and the international press routinely cover treaty negotiations in those existing fora. Since developing country and civil society perspectives are not included in ACTA negotiations and ACTA is not on the radar of most press, ACTA negotiations happen in secret outside of any accountability structures. The results of such a secretive and selective process are one-sided international obligations that would be unobtainable in the
existing regimes of WTO or WIPO. Thus, ACTA provides a new forum to circumvent WTO-TRIPS and WIPO negotiations entirely.

v) Relies upon questionable data

The economic data underlying the urge to increase intellectual property rights and their enforcement is often supplied by the very industries lobbying for the change in law to increase their rights. Data about lost profits due to infringement supplied by major entertainment companies or giant pharmaceutical manufacturers is subject to no scrutiny by politicians who adopt the numbers as “fact” and propose new and stronger rights based upon the biased data.

Noticeably absent from government statements on ACTA or intellectual property is the enormous economic value of robust limitations and exceptions to exclusive rights. The Computer and Communications Industry Association (CCIA) conducted an economic study in 2007 that revealed, “fair use exceptions to US copyright laws are responsible for more than $4.5 trillion in annual revenue for the United States.”3 The government has yet to recognize that its blind faith in increased intellectual property rights comes at a significant economic and social cost to society, as the CCIA report points out.

2. Substantive Problems with ACTA

i) Burdens Public for Private Interest

All the new responsibilities that ACTA places on local and national law enforcement, border agencies, customs controls, and local courts to promote the interest of a narrow few will cost the public billions of dollars. Shifting the costs of protecting the private profit of the IP industry onto the public inevitably means that whatever scarce resources are available to fund genuine public benefit projects will be even scarcer. Unfortunately, the measures proposed by ACTA, at best, benefit the few at the expense of the many.

ii) Criminalizes Ordinary Consumer Activity

According to the discussion paper, ACTA proposes to criminalize infringements that were done without any motivation for financial gain. Peer-2-Peer (P2P) file-sharing activity would be criminalized by ACTA and numerous accidental and innocent infringements would be subject to criminal penalties, including prison.

Article 61 of the TRIPS Agreement represents the international legal standard for criminal infringement, and Article 61 already permits criminal prosecution of IPR

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infringements for commercial purposes. Proponents of ACTA are working to lower this standard such that non-commercial infringements will also be criminal acts (in addition to civil violations). The US lowered this legal standard in the US with the 1997 No Electronic Theft Act such that non-commercial infringements can be criminally punished in the US, and the US has required the last 10 countries it has signed IPR trade agreements with to also criminalize non-commercial infringements. Criminalizing a wide range of ordinary consumer activity on the Internet is one of ACTA’s main goals.

iii) Threatens Freedom of Expression

ACTA places an emphasis on restricting the free flow of information on the Internet. It will require Internet Service Providers (ISPs) to police and control their systems for infringing content and require ISPs to turn-in their customers to law enforcement for prosecution of intellectual property violations. It threatens to require ISPs to block access to online information or delete their customers’ websites at the request of Hollywood entertainment companies and without any due process of law. The new IPR enforcement tools created by ACTA will make it easy to stifle online criticism of companies or products that are trademarked or copyrighted in violation of free expression.

iv) Encourages Privacy Violations

A key component to ACTA’s objective is to increase government surveillance of consumer activity and share that consumer data with the governments and law enforcement agencies of other countries. In some countries there are no protections for consumer privacy rights, while other countries provide strong privacy protections. But under ACTA, consumer data will be shared freely among countries and their various law enforcement and border agencies, so the privacy protections in place in one country are irrelevant when that data is shared with foreign nations. The needs of the IP industry are not so great that the public must build a global surveillance network to enforce their private rights.

v) Curtails Legal Due Process Rights

Another concern about the direction ACTA takes is its negative impact on legal due process rights during legal or administrative proceedings where a consumer has been accused of infringement. Legal due process protections are the means by which fairness is ensured in a justice system. Providing notice and opportunity to respond to a person before her property is seized or destroyed over an infringement allegation is an important principle of legal due process that is threatened by ACTA. The requirement that a judge weigh evidence before the rights of another are curtailed is another due process protection at risk by the proposal. ACTA operates under the premise that accusations of infringement should be treated as “fact”, thus triggering legal enforcement mechanisms without any scrutiny of the underlying claim of infringement.
But initiatives like the “Chilling Effects Project”\(^4\) have documents thousands of cases where Intellectual property attorneys have made bogus claims about infringing activity on the Internet.

vi) **Need Flexibility to Address Technological Change**

ACTA will lock countries into pre-determined information policy choices when what is needed is flexibility to address technological change. ACTA imposes a “one-size-fits-all” (X-Large) policy for intellectual property rights enforcement on poor and wealthy countries alike. Given the nature of digital technology and the rapid social change it can create, policymakers need to be free to respond in unanticipated ways to the needs of the public. But ACTA will not provide local or national policymakers with the freedom or flexibility to respond and alter the information policy choices set by Hollywood and Basel via ACTA.

viii) **Anti-Innovation and Competition**

ACTA will hamper technological innovation and market competition because third parties will be held legally responsible for the infringing activities of others. Software designers, hardware manufacturers, and online service providers will not be able to build new products or provide information or services that could be used to infringe copyrights if Hollywood is successful in crafting ACTA. Since entrepreneurs will need to retain IP attorneys to advice them on how to offer their products or services without incurring legal liability, innovation will be chilled. Market competition will also be discouraged by ACTA because device manufacturers will need licenses just to build interoperable devices.

ix) **No Need for “Stronger” Protections**

There has been no showing made by the intellectual property industry that it needs greater rights than it has already been given in existing international treaties such as WTO-TRIPS Agreement and the WIPO Internet Treaties. The proponents of ACTA do not attempt to explain why current rights are inadequate nor how increasing those rights will provide more public benefit than expense.

x) **Imperialistic view of the world**

ACTA takes a remarkably imperialistic worldview in that it attempts to regulate global IPR enforcement from the perspective of the world’s wealthiest and to the detriment of the needs of developing nations and the global public interest. Developing countries are not permitted to participate in the negotiation of ACTA’s terms, although they will be expected to abide by them.

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\(^4\) [http://www.chillingeffects.org](http://www.chillingeffects.org)
Through trade agreements like ACTA, IPR-exporting countries are able to impose policies that favor them onto the domestic legislation of IPR-importing countries. A clear example of neo-colonialism, ACTA will, at best, benefit a few private interests at the expense of the many.

IV. Public Input

Despite the general lack of information about the substance of ACTA, several countries have begun a process to receive input from the public on ACTA.

The Office of the United States Trade Representative (USTR) accepted public comments on ACTA from 15 February 2008 until 21 March 2008, but few people were aware of ACTA or the public comment period other than industry trade organizations.\(^5\) IP Justice submitted comments to the USTR “ACTA’s Misguided Effort to Increase Government Spying and Ratchet-Up IPR Enforcement at Public Expense” in March 2008.\(^6\)

The Australian Department of Foreign Affairs and Trade published a discussion paper about ACTA on 13 November 2007.\(^7\) And on 15 November 2007, the government of Australia launched a public consultation on its possible involvement with ACTA, but it only accepted public input until 3 December 2007. Australian public interest group, the Australian Digital Alliance submitted a comment on ACTA to DFATT.\(^8\)

Canada published a press release in October 2007 to announce that it was participating in preliminary negotiations about ACTA. Canada’s Department of Foreign Affairs and International Trade published a website\(^9\) on ACTA and listed a contact email address for accepting comments of consultations@international.gc.ca

\(^5\) USTR Notice in 15 Feb. 2008 Federal Registrar to accept public comments on ACTA, available online at: http://ipjustice.org/wp/2008/02/16/comment-on-anti-counterfeiting-trade-agreement-acta-to-ustr/

\(^6\) IP Justice Comments to USTR on ACTA are available online at: http://ipjustice.org/wp/2008/03/21/acta-ipj-comments-ustr-2008march/

\(^7\) Discussion paper is available online at: http://ipjustice.org/wp/2008/02/16/comment-on-anti-counterfeiting-trade-agreement-acta-to-ustr/

\(^8\) Australian Digital Alliance submission of December 2007 is available online at: http://www.digital.org.au/submission/documents/ACTAsub ADA.pdf

\(^9\) ACTA website of Canadian Department of Foreign Affairs and International Trade is: http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx
V. IP Justice ACTA Campaign & Mailing List

Concerned about the potential harm to the public interest from ACTA, IP Justice created a campaign website on ACTA at:
http://ipjustice.org/wp/campaigns/acta/

An email discussion list for information and public discussion about ACTA has also been set-up by IP Justice. Anyone may sign-up to participate on the ACTA mailing list at: http://mailman.ctyme.com/listinfo/acta

More Info on ACTA:


USTR „Fact Sheet“ on ACTA (Oct. 2007):


Australian Government ACTA website:

FAQ of the European Commission on ACTA:
http://ec.europa.eu/trade/issues/sectoral/intell_property/fs231007_en.htm

Canada on ACTA:

http://ipjustice.org/wp/2008/03/21/acta-ipj-comments-ustr-2008march/


“The International IP Enforcement Landscape from a Developing Country Perspective“: South Center Research Paper 15:

Professor Michael Geist on ACTA:
http://www.michaelgeist.ca/tags/acta