

ACTA Fact Sheet

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Introduction

This article seeks to supply in a concise and instructive manner information regarding the final draft (15 November 2010) of the proposed *Anti-Counterfeiting Trade Agreement* ('ACTA'), and to help locate more comprehensive material.

ACTA¹ is a plurilateral agreement (which has yet to come into force as of February 21 2012) concerned with establishing a new international standard for the enforcement of intellectual property rights ('IPR'), to counter counterfeiting and piracy, both physical and online.² It first came to public attention in May 2008 when a discussion paper was leaked on WikiLeaks,³ and has presently sparked public discussion, and protests, internationally,⁴ amidst protests against similar instruments – SOPA (Stop Online Piracy Act) and PIPA (Protect IP Act), and the TPP (the Trans-Pacific Partnership)⁵.

1 The full text can be found at <http://keionline.org/acta>.

2 Office of the United States Trade Representative, *Anti-Counterfeiting Trade Agreement (ACTA)* <<http://www.ustr.gov/acta>>.

3 Wikileaks, *Proposed US ACTA plurilateral intellectual property trade agreement (2007)* (May 22 2008) Wikileaks http://wikileaks.org/w/index.php?title=Proposed_US_ACTA_multi-lateral_intellectual_property_trade_agreement_%282007%29; Wikipedia, *Anti-Counterfeiting Trade Agreement* (February 12 2012) Wikipedia <http://en.wikipedia.org/wiki/Anti-Counterfeiting_Trade_Agreement#cite_note-Wikileaks-firstversion-24>.

4 Iain Thomson, *European revolt over ACTA treaty gains ground* (February 3 2012) The Register <http://www.theregister.co.uk/2012/02/03/acta_protests_grow/>.

5 Andrew Lee, 'ACTA and TPP: The wrong approach to intellectual property protection' on Andrew Lee, *ESET Threat Blog* (February 10 2012) <<http://blog.eset.com/2012/02/10/acta-and-tpp-the-wrong-approach-to-intellectual-property-protection>>.

Scope

ACTA is a plurilateral agreement containing six chapters designed to establish an international legal framework for IPR enforcement.⁶ The U.S., Australia, Japan, the E.U., Switzerland, Canada, Singapore, South Korea, New Zealand, Morocco and Mexico were involved in its negotiation.⁷ It addresses both civil and criminal IPR enforcement, affecting both domestic processes, and international processes, for cooperation on IPR enforcement.⁸

ACTA builds on existing international agreements relating to intellectual property, such as TRIPS - it has been referred to as “TRIPS-Plus-Plus”, in reference to its agenda of conforming international IP standards towards stronger U.S. IP law.⁹

The substantive elements of ACTA's provisions in the final draft are found in Chapter II entitled 'Legal Framework for Enforcement of Intellectual Property Rights'. The chapter covers civil enforcement, border measures, criminal enforcement and enforcement of IPR in the digital environment of:

- ⤴ Copyright and related rights
- ⤴ Trademarks
- ⤴ Patents
- ⤴ Geographical indications
- ⤴ Industrial designs
- ⤴ The layout designs of integrated circuits and
- ⤴ “Undisclosed information” or trade secrets.

Other chapters include:

- ⤴ A preamble.
- ⤴ Chapter I entitled “Initial Provisions and General Definitions”.
- ⤴ Chapter III entitled “Enforcement Practices”.
- ⤴ Chapter IV entitled “International Co-Operation”.
- ⤴ Chapter V entitled “Institutional Arrangements”.
- ⤴ Chapter VI entitled “Final Provisions”.

6 Kimberlee Weatherall, 'Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement' (2011) 33 *Sydney Law Review* 229, 231.

7 Ibid 232.

8 Ibid.

9 Margot E. Kaminski, 'An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement' (2011) 21 *Albany Law Journal of Science and Technology* 385, 390.

Changes to ACTA over time

While the ‘final’ draft of May 2011 is considered in this fact sheet, there are six previous versions of the ACTA agreement, and this fact sheet does not discuss the changes between them:

| Version | Date of agreement | Date released or leaked | Changes from previous version | Link to draft |
|---------|---|-------------------------|---|---|
| 1 | 18/01/10 | 23/03/10 | | http://www.laquadrature.net/files/201001_acta.pdf |
| 2 | 20/04/10 | 20/04/10 | http://fortnightlyreview.info/2010/04/23/acta-reaches-a-critical-new-stage/ | http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf |
| 3 | 01/07/10 | 01/07/10 | http://fortnightlyreview.info/2010/07/15/acta-new-leaked-text-new-issues.../ | http://publicintelligence.net/anti-counterfeiting-trade-agreement-acta-july-2010-draft/ |
| 4 | 25/08/10 | September 2010 | http://fortnightlyreview.info/2010/09/09/acta---brief-comments-on-the-august-2010-leaked-draft/ | http://publicintelligence.net/anti-counterfeiting-trade-agreement-acta-august-2010-draft/ |
| 5 | 02/10/10 | 02/10/10 | http://www.michaelgeist.ca/content/view/5352/125/ | http://keionline.org/sites/default/files/actaact2010.pdf |
| 6 | 03/12/10 – there was a “final” version released in November 2010, pending legal review. | 03/12/10 | http://www.ip-watch.org/2010/12/06/'final-final'-acta-text-published-more-discussion-ahead-for-eu/ | http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf |
| Final | Final | May 2011 | http://acta.ffii.org/?p=633 | http://info.publicintelligence.net/ACTA-Final.pdf |

For a comparison of the different versions, see also:

http://euwiki.org/ACTA/diffs/Tutorial_for_helping_with_comparing_ACTA-leaks

- ⤴ The final official version of the ACTA text was released in May 2011, but contains no significant changes from the December 2010 version.¹⁰
- ⤴ The provisions in the final text have been watered down in comparison to earlier texts.¹¹

History¹²

ACTA was first suggested by Japan in November 2005 at the Second Global Congress on Combating Counterfeiting and Piracy, with generally lukewarm responses by participants.¹³ Conference participants though expressed a general sentiment that TRIPS (the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights) was inefficient at combating counterfeiting and piracy.¹⁴ Following this, the US proposed in late 2006 a similar agreement.¹⁵

ACTA was negotiated between the U.S., Australia, Japan, the E.U., Switzerland, Canada, Singapore, South Korea, New Zealand, Morocco and Mexico.¹⁶ Discussions began formally in 2007 and concluded in December 2010.¹⁷

On October 1 2011, eight negotiating partners (the U.S., Australia, Canada, South Korea, Japan, New Zealand, Morocco and Singapore) officially signed the ACTA at a ceremony in Tokyo.¹⁸

The remaining parties attended the ceremony and confirmed their continuing support.¹⁹

On January 26 2012, 22 member states of the E.U. signed ACTA as well.²⁰

10 Ante, 'New Version of the ACTA Text' on FFII, *ACTA Blog* (May 27 2011) <<http://acta.ffii.org/?p=633>>.

11 Peter Yu, 'Six Secret (And Now Open) Fears of ACTA (2011) *Southern Methodist University Law Review* 975, 979.

12 See <http://acta.michaelgeist.ca/acta-timeline> for an interactive timeline, or <http://keionline.org/node/991> for a timeline providing links to relevant documents. For a comprehensive history, see Peter Yu, 'Six Secret (And Now Open) Fears of ACTA (2011) *Southern Methodist University Law Review* 975, 980-987.

13 Trove Iren S. Gerhardsen, *Japan Proposes New IP Enforcement Treaty* (15 November 2005) Intellectual Property Watch <<http://www.ip-watch.org/webblog/2005/11/15/japan-proposes-new-ip-enforcement-treaty/>>.

14 Ibid.

15 Kaminski, above n 9, 389.

16 Weatherall, above n 6, 232.

17 Ibid.

18 Office of the United States Trade Representative, above n 2.

19 Ibid.

20 Martin Bryant, *The EU and 22 member states sign the controversial ACTA 'Internet surveillance' treaty* (January 26 2012) The Next Web <<http://thenextweb.com/eu/2012/01/26/the-eu-and-22-member-states-sign-the-controversial-acta-internet-censorship-treaty/>>.

However, the ACTA has sparked severe controversy, leading to protests by both citizens and high profile public figures around the world, and especially in E.U. Countries, including Slovenia, Greece and Poland.²¹ Slovenia's ambassador to Japan, Helena Drnovsek Zorko, publicly apologised on January 31 2012 to her countrymen for “carelessness” in signing the agreement against her “civic conviction”, and appealed to them to protest ACTA.²² Kader Arif, the E.U's rapporteur for ACTA resigned on January 26 2012 in protest to ACTA.²³ Some E.U. countries, such as Germany, Poland and the Netherlands, have declined to sign ACTA in its current form stating it endangered freedom of speech and privacy.²⁴

On February 22 2012, Commissioner Karel De Gucht announced the E.C would submit a request to the European Court of Justice to determine the legality of ACTA – whether it would conflict with the E.U's fundamental rights and freedoms²⁵, in response to political pressure.²⁶ The Commissioner used this chance to state ACTA will not change any E.U laws and was necessary to protecting E.U jobs.²⁷ Others doubt the truth of the Commissioner's words, indicating that many member states have indicated ACTA will change their laws, and despite the E.C's unanimity in agreeing to ACTA, ACTA was hidden in an agriculture and fisheries meeting.²⁸

Article 40 of the final version indicates ACTA will come enter into force thirty days after the deposit of the sixth ratification.²⁹ No parties have yet ratified the ACTA as of February 21 2012.³⁰ Given the widespread debate, the ACTA saga is likely to continue for a long period.

21 Euronews, *Anti-Acta Sentiment in Slovenia, Greece and Poland* (February 5 2012) Euronews <<http://www.euronews.net/2012/02/05/anti-acta-sentiment-in-slovenia-greece-and-poland/>>. See also Melissa Bell, ‘ACTA Protests Erupt in Poland’ on Melissa Bell, *The Washington Post BlogPOST* (January 27 2012) <http://www.washingtonpost.com/blogs/blogpost/post/poland-protests-erupt-over-acta-law-debate/2012/01/27/gIQA6UOVQ_blog.html>; Dave Lee, *Acta: Europe braced for protests over anti-piracy treaty* (February 6 2012) BBC <<http://www.bbc.co.uk/news/technology-16906086>>.

22 Wikipedia, above n 10.

23 Ibid.

24 Charles Arthur, *ACTA approval stalled by European Commission* (February 22 2012) The Guardian <<http://www.guardian.co.uk/technology/2012/feb/22/acta-stalled-european-commission?newsfeed=true>>.

25 Press release, *Statement by Commissioner Karel De Gucht on ACTA (Anti-Counterfeiting Trade Agreement)* (February 22 2012) European Commission <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=778>>.

26 Arthur, above n 29.

27 Press release, above n 30.

28 Mike Masnik, *ACTA Approval On Hold While EU Commission Asks EU Court of Justice to Weigh In* (February 22 2012) TechDirt <<http://www.techdirt.com/articles/20120222/10201317841/acta-approval-hold-while-eu-commission-asks-eu-court-justice-to-weigh.shtml>>.

29 *Anti-Counterfeiting Trade Agreement*, signed 1 October 2011, [2011] ATNIF 22 (not yet in force) ('ACTA').

30 Wikipedia, *Anti-Counterfeiting Trade Agreement* (February 21 2012) Wikipedia <http://en.wikipedia.org/wiki/Anti-Counterfeiting_Trade_Agreement>.

Responses

ACTA has been criticised on both procedural and substantive grounds.³¹ As a result of these strong criticisms and the pressure exerted by various groups, ACTA negotiators have watered down the final version's enforcement requirements³², although many significant issues about the final draft (May 2011) remain.

The main substantive concerns are:

- ⤴ ACTA continues the “one-way ratchet” towards stronger IP protection, but it does not preserve provisions relating to fair use and limitations and exceptions.³³ Fair use and limitation and exceptions allow exceptions to IPR for legitimate and socially beneficial uses.³⁴ ACTA's approach is in contrast to existing international agreements concerning intellectual property, from WIPO (World Intellectual Property Organisation) agreements to TRIPS, which contain such provisions.³⁵
- ⤴ ACTA may result in a ratcheting up of IP laws domestically in countries with already strong IP protections, despite statements to the effect by the US and the EU that ACTA will not change any domestic law.³⁶ For example, Article 23(4) requires criminal liability for aiding and abetting to be established for criminal offences created under ACTA. This may expand secondary liability of Internet intermediaries, consumer device manufactures and software developers beyond that currently in US law.³⁷ Other negotiating countries were unwilling to make

31 Yu, above n 11, 1002.

32 E.D. Kain, *Final Draft of ACTA Watered Down, TPP Still Dangerous On IP Rules* (January 28 2012) Forbes <<http://www.forbes.com/sites/erikkain/2012/01/28/final-draft-of-acta-watered-down-tp-tp-still-dangerous-on-ip-rules/>>. For example, the three-strikes provision has been removed, which would have required participating countries to require a user to be disconnected from the Internet after repeated infringements. For further examples, see Kain.

33 Timothy B Lee, *As Anonymous protests, Internet drowns in inaccurate anti-ACTA arguments* (February 1 2012) Ars Technica <<http://arstechnica.com/tech-policy/news/2012/01/internet-awash-in-inaccurate-anti-acta-arguments.ars>>; Kaminski, above n 9, 394. The only time ACTA makes provisions for limitations and exceptions is in the provisions relating to technological circumvention measures in article 27(8) of the final version. Kaminski suggests this implies by exclusion this does not apply to the rest of the agreement. Kaminski, above n 12, 394. The only time ACTA makes provisions for limitations and exceptions is in the provisions relating to technological circumvention measures in article 27(8) of the final version. Kaminski suggests this implies by exclusion this does not apply to the rest of the agreement.

34 Lee, above n 33.

35 Kaminski, above n 9, 394. For a further comparison of ACTA and TRIPS provisions on enforcement see *TRIPS-ACTA Comparison (PIJIP 11/2010)* (February 9 2012) Program on Intellectual Justice and Intellectual Property <https://docs.google.com/spreadsheet/ccc?key=0AnmGGVkb4s1_dHdIQVRZdFVZbHmN2Q4UC1uNUg0enc&hl=en#gid=0>.

36 Yu, above n 11, 1019-1024. See also the section on EU law in *Opinion of European Academics on Anti-Counterfeiting Trade Agreement* (January 2011) <<http://www.statewatch.org/news/2011/jul/acta-academics-opinion.pdf>> for a discussion of the incompatibility between ACTA and EU law.

37 Ibid 1020.

express statements to that effect.³⁸ Related to this criticism is that such lawmaking is akin to what commentators call “policy laundering”.³⁹

- ✦ ACTA will be used as a launching platform to foist strong intellectual property protection standards onto other countries through political and economic pressure.⁴⁰ In consequence, ACTA will require in some cases substantial changes to those countries' laws, with negative consequences.⁴¹
- ✦ The implementation of ACTA by countries will result in a much more restrictive regulatory regime for IPR than what the provisions explicitly require – an “ACTA-plus”.⁴²
- ✦ The wide-reaching provisions of ACTA may harm legitimate small to mid-sized businesses and innovative start-ups, with more stringent and inflexible IPR regulations, while favouring large businesses⁴³, impose non-tariff trade barriers⁴⁴ and stifle innovation and competition,⁴⁵ and stifle creativity.⁴⁶ This will adversely affect citizens - as consumers, by potentially limiting their access to goods and services produced overseas⁴⁷, and as individuals, for it would restrict and diminish the experience and development of culture and knowledge-sharing.⁴⁸
- ✦ ACTA threatens fundamental freedoms and rights, particularly the freedom of expression and the right to privacy online.⁴⁹ Among other things, ACTA, for example, does not eliminate the possibility of the introduction of a graduated response system whereby repeat infringers are disconnected from the Internet for a period of time by ISPs, curtailing their freedom of expression without due

38 Ibid 1019

39 Yu, above n 11, 1024. For a detailed analysis of the consequences of policy laundering, both theoretically and practically, see Yu, above n 11, 1024-1028.

40 Lee, above n 33.

41 Yu, above n 16, 1028. For a critical discussion of such consequences, see pg. 1028-1039.

42 Ibid 1039-1040. For a discussion of the reasons, see pg. 1039-1044.

43 Ibid 1045. See also Monika Emert, *Treaty Negotiators Turn To “ACTA Lite” In Hopes of Closure* (September 8 2010) Intellectual Property Watch <<http://www.ip-watch.org/2010/09/08/treaty-negotiators-turn-to-“acta-lite”-in-hopes-of-closure/>>, which discusses how large companies holding numerous patents could, under ACTA, kill off start-ups, small business and medium sized businesses in the software industry.

44 Ibid 1048.

45 European Digital Rights, *ACTA – Innovation and Competition* (January 18 2012) EDR <http://www.edri.org/files/EDRI_acta_series_3_20120118.pdf>

46 LABtoLAB, *Expression of Concern Regarding the ACTA Agreement* (February 2011) LABtoLAB <http://www.labtolab.org/~labtolab/wiki/index.php/Acta_expression_of_concern#SUPPORT_THE_TEXT>

47 Yu, above n 11, 1045-1046.

48 LABtoLAB, above n 45.

49 Yu, above n 11, 1050-1059. See also Alberto J. Cerda Silva, 'Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardises the Right to Privacy' (2011) 26 *American University International Law Review* 601, 602, 604-605.

process.⁵⁰ Commentators further observe that Article 27(3), requiring cooperation in the business community (between rights holders and ISPs) in combating IP infringement, could encourage a private three-strikes system.⁵¹ In relation to privacy, though the final draft is moderate compared to earlier drafts of ACTA, with several direct and indirect references to privacy and data protection, commentators observe these are in practice insufficient.⁵² For example, were countries to implement a graduated response system, which they still could, this would necessarily require accessing user data, for which ACTA provides no sufficient procedural or substantive safeguards in relation to this process.⁵³

- ✧ ACTA may criminalise ordinary companies and individuals.⁵⁴ Article 23(1) require imposing criminal sanctions on trademark counterfeiting or copyright or related rights piracy on a commercial scale, and Article 23(4) defines the minimum of commercial scale vaguely as commercial activities carried out for direct or indirect economic or commercial advantage. Commentators note that the vague language without a *de minimis* clause could potentially capture a range of innocent or trivial activities by daily Internet users.⁵⁵ Thus the language of ACTA fails to distinguish between differing levels of culpability in infringement cases, and potentially innocent activities may be conflated with direct, commercial-scale infringement – an activity that would merit criminal liability.
- ✧ ACTA will increase the risk of in-transit seizure of non-infringing legitimate medicines that are vital to public health in developing countries if there is suspicion of trademark infringement.⁵⁶ ACTA furthermore poses additional obstacles and deterrents to the supply of generic medicines.⁵⁷

50 Yu, above n 11, 1056.

51 Alberto J. Cerda Silva, 'Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardises the Right to Privacy' (2011) 26 *American University International Law Review* 601, 611. Cf Lee, above n 33.

52 See generally Alberto J. Cerda Silva, 'Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardises the Right to Privacy' (2011) 26 *American University International Law Review* 601.

53 Silva, above n 51, 611-612.

54 Douwe Korff & Ian Brown, *Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights* (31 August 2011) <<http://rfc.act-on-acta.eu/fundamental-rights>>, 23.

55 Ibid, 24-25; EFF, Docket No. USTR-2010-0014 to United States Trade Representative, *Request for Comments from the Public on the December 3, 2010 text of the Anti-Counterfeiting Trade Agreement (ACTA)*, February 15 2011, 4.

56 Sean Flynn and Bijan Madhani, 'ACTA and Access to Medicines' (2011) *PIJIP Research Paper Series Paper 22*, pg. 7-9 <<http://digitalcommons.wcl.american.edu/research/22>>. Cf Lee, above n 33.

57 Flynn and Madhani, above n 56, 8-11.

The main procedural concerns are:

- ✧ ACTA was negotiated in secrecy by unelected representatives.⁵⁸ Although the ACTA negotiations were announced in 2007⁵⁹, until the leak of a draft agreement in 2010, no draft texts or relevant background documents were officially released, with no rational explanation, in some commentators' views.⁶⁰ The official explanation given – firstly, keeping ACTA secret is in the public interest, and secondly, ACTA is a trade agreement, and secrecy is usually paramount to such negotiations to ensure negotiating partners can freely engage in the “give-and-take” necessary for a successful conclusion.⁶¹ Commentators have suggested other reasons also, though not official.⁶² This secrecy has undermined its legitimacy in the eyes of many as the secrecy has limited democratic input from lawmakers, public stakeholders and civil society groups⁶³, and limited the accountability of negotiators.⁶⁴ This process has attracted the strongest criticism, including a letter to President Obama by over 75 law professors.⁶⁵ At the same time however, vested industry groups (such as media copyright holders and pharmaceutical companies) were given privileged access to relevant documents.⁶⁶
- ✧ The secretive negotiation process may set a precedent for avoiding principles of transparency and democratic accountability in future negotiations⁶⁷, and the earlier heavy-handed provisions of ACTA may influence the substantive elements of future international IP agreements, notably the TPP.⁶⁸
- ✧ ACTA was negotiated among a group of exclusive, like-minded, developed countries with already strong IP laws.⁶⁹ Countries such as Brazil and China, where piracy and counterfeiting are prevalent, and who would be most affected by

58 A comprehensive analysis of the secrecy of ACTA negotiations can be found in Yu, above n 11, 1002-1011.

59 Press Release, Office of the U.S. Trade Representative [USTR], *Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes* (October 23 2007) USTR <<http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes>>.

60 Yu, above n 11, 978, 998.

61 Ibid 998, 1002, 1004.

62 Ibid 1005-1011.

63 Weatherall, above n 6, 232. See also Yu, above n 11, 1011-1015.

64 Yu, above n 11, 998.

65 *Over 75 law professors call for halt of ACTA*, (October 28 2010) Program on Information Justice and Intellectual Property <http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta#_ftn1>.

66 Yu, above n 11, 1012-1013.

67 Lee, above n 33.

68 Weatherall, above n 6, 263.

69 Ibid.

ACTA, however were excluded from negotiations.⁷⁰ There are reports this exclusion was deliberate.⁷¹

- ✧ The adoption of ACTA into domestic law will entrench those laws so that democratically elected representatives will have their hands tied by an agreement negotiated by unelected representatives.⁷² Thus Congressman Darrell Issa has stated ACTA could be “more dangerous than SOPA”.⁷³
- ✧ ACTA was negotiated outside established multilateral fora such as the WTO and WIPO, which is one of the strongest criticisms.⁷⁴ Although ACTA negotiating partners attempted to negotiate through such fora, and despite several strong reasons discussed by ACTA proponents⁷⁵ criticisms of such an approach include undermining the legitimacy of such fora for multilateral negotiations⁷⁶, alienating other nations which would hamper future multilateral negotiations⁷⁷, and “forum proliferation”.⁷⁸
- ✧ In addition to potentially setting substantive precedents to influence the strength of future IPR negotiators, ACTA also envisages creating an ACTA committee, with the power to create further ad hoc committees.⁷⁹ This would create a self-reinforcing ACTA architecture to facilitate ACTA's evolution, once adopted.⁸⁰ Yu warns that though Chapter 5, which contains the provisions on the ACTA committee, is the most ignored, it is potentially the “most far-reaching and dangerous of all the chapters in the agreement” as it is not bound by safeguards built into other multilateral processes such as TRIPS.⁸¹

For the E.U.'s response to some of these criticisms, see:

<http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/>.

70 Weatherall, above n 6, 236.

71 Ibid.

72 Alexander Furnas, *Why an International Trade Agreement Could be as Bad as SOPA* (February 6 2012) The Atlantic <<http://www.theatlantic.com/technology/archive/2012/02/why-an-international-trade-agreement-could-be-as-bad-as-sopa/252552/#.TzA4K12gfMU.twitter>>.

73 'ACTA: “Would Usurp Congressional Authority”, “Threatens Numerous Public Interests”, a “Backroom Special Interest Deal”, a “Masquerade”' (January 30 2012) on *Washington Post's Blog* <<http://www.washingtonsblog.com/2012/01/acta-would-usurp-congressional-authority-threatens-numerous-public-interests-a-backroom-special-interest-deal.html>>.

74 Yu, above n 11, 988.

75 Ibid 988-998.

76 Ibid 1078, 1079-1080.

77 Ibid 1078.

78 Ibid 1074-1076.

79 Ibid 1072.

80 Ibid.

81 Ibid, 1070, 1072-1074.

Impact of ACTA on Australian individuals and businesses

Although the stated aim of ACTA is to combat large scale counterfeiting and piracy, there is a general consensus ACTA is also aimed at regular Internet users.⁸² No countries have yet to ratify ACTA, and so while a general idea of what IP laws may be passed under ACTA can be gleaned, the specifics of their operation and enforcement remain unknown. Some examples of potential effects of ACTA (the final May 2011 version) are:

- ✦ Article 8(1) requires Courts to have the authority to order third parties such as Australian businesses or other organisations to prevent goods that involve infringement from entering channels of commerce.⁸³
- ✦ Courts can order third parties to undertake provisional measures to prevent an infringement from occurring under Article 12(1).⁸⁴
- ✦ Australian individuals and businesses may be subject to criminal liability, even if they do not commit an infringement, for “aiding and abetting” intellectual property infringement under Article 23(4).⁸⁵ Under Article 24, penalties include imprisonment.⁸⁶
- ✦ The provisions concerning secondary liability discussed above, combined with Article 27(1) and 27(2)⁸⁷, may be used to support a law requiring intermediary liability or intermediary involvement in enforcing IPR.⁸⁸ The potential entry of secondary liability into legislation is significant. Currently *Roadshow Films & Ors v iiNet Limited*, a case concerning the secondary liability of an internet service provider for infringements committed by its customers, is before the High Court, and combined with worldwide developments, reflect that issues regarding secondary liability in infringement remain in a state of flux.⁸⁹

82 Ibid 1004.

83 Kimberlee G. Weatherall, *Submission to the Joint Standing Committee on Treaties Inquiry into the Anti-Counterfeiting Trade Agreement* (2012) <<http://works.bepress.com/kimweatherall/26>>, 9.

84 Ibid.

85 Ibid.

86 Ibid.

87 Article 27(1) states that enforcement procedures shall be available under a Party's law to ‘permit effective action against an act of infringement of intellectual property rights which takes place in the digital environment, including expeditious remedies to prevent infringement’. Article 27(2) states that ‘enforcement procedures shall apply to infringement of copyright or related rights over digital networks, which may include the unlawful use of means of widespread distribution for infringing purposes’.

88 Weatherall, above n 83, 10.

89 Ibid 10.

- ⤴ Innocent and trivial activities (such as small scale file sharing) by daily Internet users could be criminalised.⁹⁰
- ⤴ The expansion of criminal liability for infringement of IPR will shift the resource burden onto the government to police IPR, redirecting resources from other areas.⁹¹
- ⤴ Materials and implements owned by Australian businesses or individuals, and used without their knowledge to manufacture infringing goods, may be destroyed or disposed of without regard for third party interests under Article 10.⁹²
- ⤴ A right holder may successfully request extensive information of the supply chain of an Australian business suspected of infringement (though such infringement may not be proven) under Article 11.⁹³ This forced disclosure could be potentially to a competitor, and has implications for commercial confidentiality.⁹⁴
- ⤴ Australian exporters could be harmed by inappropriate seizures and destruction of goods, upon a determination by the importing country's competent authorities (e.g. customs officials) that the goods constitute infringements.⁹⁵ ACTA does not provide any oversight or accountability provisions for this process.⁹⁶
- ⤴ Statutory damages for infringement of copyright and related rights are optional under ACTA in Article 9.⁹⁷ Australian individuals and businesses found guilty of such infringement, if statutory damages are implemented, will have to pay a fixed amount per infringement that may be wholly disproportionate to the harm to the rights holder.⁹⁸

Although the provision requiring a three-strikes policy to be implemented was eliminated, ACTA does not prevent such a graduated response system being implemented.⁹⁹ Australian individuals may be exposed to being disconnected from the Internet for a period of time for repeated infringements.¹⁰⁰

90 EFF, Docket No. USTR-2010-0014 to United States Trade Representative, *Request for Comments from the Public on the December 3, 2010 text of the Anti-Counterfeiting Trade Agreement (ACTA)*, February 15 2011, 4.

91 Weatherall, above n 83, 11, 15.

92 Ibid 11.

93 Ibid 12.

94 Ibid.

95 Ibid 14.

96 Ibid.

97 Brett Winterford, *Netizens: How ACTA will make a criminal out of you* (April 12 2010) IT News <<http://www.itnews.com.au/News/171910,netizens-how-acta-will-make-a-criminal-of-you.aspx>>.

98 Ibid.

99 Yu, above n 11, 1056.

100 Ibid.