International Experts Find that Pending Anti-Counterfeiting Trade Agreement Threatens Public Interests

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This statement reflects the conclusions reached at a meeting of over 90 academics, practitioners and public interest organizations from six continents gathered at American University Washington College of Law, June 16-18, 2010. The meeting, convened by American University's Program on Information Justice and Intellectual Property, was called to analyze the official text of the Anti-Counterfeiting Trade Agreement (ACTA), released for the first time in April, 2010. Negotiating parties released the text only after public criticism of the unusually closed process and widespread disquiet over the negotiations' presumed substance. (See Wellington Declaration, EU Resolution on Transparency and State of Play of the ACTA Negotiations).

We find that the terms of the publicly released draft of ACTA threaten numerous public interests, including every concern specifically disclaimed by negotiators.

- Negotiators claim ACTA will not interfere with citizens' fundamental rights and liberties; it will.
- They claim ACTA is consistent with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); it is not.
- They claim ACTA will not increase border searches or interfere with cross-border transit of legitimate generic medicines; it will.
- And they claim that ACTA does not require "graduated response" disconnections of people from the internet; however, the agreement strongly encourages such policies.

ACTA is the predictably deficient product of a deeply flawed process. What started as a relatively simple proposal to coordinate customs enforcement has transformed into a sweeping and complex new international intellectual property and internet regulation with grave consequences for the global economy and governments' ability to promote and protect the public interest.

Any agreement of this scope and consequence must be based on a broad and meaningful consultative process, in public, on the record and with open on-going

access to proposed negotiating text and must reflect a full range of public interest concerns. As detailed below, this text fails to meet these standards.

Recognizing that the terms of the agreement are under further closed-door negotiation over a text we do not have access to, a fair reading of the April 2010 draft leads to our conclusion that ACTA is hostile to the public interest in at least seven critical areas of global public policy:fundamental rights and freedoms; internet governance; access to medicines; scope and nature of intellectual property law; international trade; international law and institutions; and democratic process.

The following specific comments are based on a review of the publicly released text which is highly bracketed and the conclusions are therefore tentative.

FUNDAMENTAL RIGHTS AND FREEDOMS

ACTA would authorize or encourage private and government enforcement measures that would:

- curtail enjoyment of fundamental rights and liberties, including domestic and internationally protected human rights to health, privacy and the protection of personal data, free expression, education, cultural participation, and right to a fair legal process, including fair trial and presumptions of innocence.

THE INTERNET

ACTA would

- Encourage internet service providers to police the activities of internet users by holding internet providers responsible for the actions of subscribers, conditioning safe harbors on adopting policing policies, and by requiring parties to encourage cooperation between service providers and rights holders;
- Encourage this surveillance, and the potential for punitive disconnections by private actors, without adequate court oversight or due process;
- Globalize ‘anti-circumvention’ provisions which threaten innovation, competition, free (freedom-respecting) software, open access business models, interoperability, the enjoyment of user rights, and user choice;

ACCESS TO MEDICINES

ACTA would threaten global access to affordable medicines, including by:

- Authorizing customs authorities to seize goods in transit countries, even when they do not infringe any laws of the producing or importing countries;

- Implicating non-infringing active pharmaceutical ingredient suppliers whose materials may be used downstream in infringing products without their knowledge;

- Limiting key flexibilities on injunctions, including in patent cases, that are necessary for government use, for court-ordered royalties, and for innovation prizes and other policies that de-link cost of research and development from the price of products.

- Expanding its scope to patents in many areas of the agreement, which is an inappropriate subject of a counterfeiting policy;

SCOPE AND NATURE OF INTELLECTUAL PROPERTY LAW

ACTA would distort fundamental balances between the rights and interests of proprietors and users, including by

- introducing highly specific rights and remedies for rights holders without detailing correlative exceptions, limitations, and procedural safeguards for users;
- shifting enforcement burdens to public authorities and private intermediaries in ways that are likely to be more sensitive to proprietary concerns;
- requiring formula-driven assessment of damages, potent
  ially unrelated to any proven harm or gain;
- omitting strong disincentives to abuse of enforcement processes by right holders;
- including rigid injunction, damages and heightened civil and criminal enforcement requirements that will restrict government flexibility, impede innovation and slow the development and diffusion of green technology;
- threaten the continuation or development of innovative public intererst exceptions, such as common law approaches to permitting copies of works by “authorization.”

INTERNATIONAL TRADE

ACTA would raise barriers to the trade in knowledge imbedded goods, disproportionately harming developing countries dependent on imports and exports of essential goods. Specifically, ACTA will

- Extend ‘ex officio’ and in transit border search and seizures to a broad range of “suspected” intellectual property infringements, even including alleged patent infringements involving complex questions of law and fact that are impossible to judge by custom authorities.

INTERNATIONAL LAW AND INSTITUTIONS

ACTA would conflict with a large number of existing international laws and processes. Specifically, ACTA contains provisions that:

- Conflict with the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) by allowing seizures based on the law “of the party providing the procedures” instead of “the country of importation” (TRIPS Art. 52) and by failing to fully protect and incorporate key protections against abuse (e.g. Articles 41.1, 48.1, 48.2, 50.3, 53.1, 56), flexibilities to promote public interests (e.g. TRIPS Art. 44.2), requirements for the proportionality of enforcement measures (e.g.

Arts. 46, 47), and provisions providing for balance between the interests of proprietors, consumers and the greater society (e.g. TRIPS Arts. 1, 7, 8, 40, 41.2, 41.5, 54, 55, 58).
- Conflict with the WTO Doha Declaration on TRIPS and Public Health and World Health Assembly Resolution 61.21 by limiting the ability of countries to use the TRIPS flexibilities "to the full" to promote access to medicines;
- Undermine the World Intellectual Property Organization (WIPO) Development Agenda, particularly recommendation 45's commitment to "approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns";
- Undermine the roles of WIPO and WTO by creating a new and redundant international administration.

DEMOCRATIC PROCESS

ACTA alters traditional and constitutionally mandated law making processes by:

- Exporting and locking in controversial and problematic enforcement practices, foreclosing future legislative improvements in response to changes in technology or policy;
- Requiring substantive changes to laws of many countries without legislative process;

The process of ACTA's negotiation is fundamentally flawed. Specifically, the negotiations:

- Have not been conducted in public as are many multilateral negotiations;
- Have not been accompanied by evidence demonstrating the public policy problems sought to be addressed;
- Have proceeded under conditions that restrict public input to select stakeholders, held off-the-record and without access to the latest version of the rapidly changing text;
- Lack a balanced representation of stakeholders, especially from civil society.

Detailed explanation of issues in declaration

ACTA section by section analysis

SIGNATURES: http://www.wcl.american.edu/pijip/go/acta-communique