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Setting Global Standards for IP Enforcement: The Anti-Counterfeiting Trade Agreement

The Anti-Counterfeiting Trade Agreement (ACTA) is a proposed plurilateral agreement on intellectual property enforcement, presently being negotiated by the United States, Japan, the European Union, Switzerland, Canada, Australia, Singapore, South Korea, New Zealand, Morocco and Mexico. ACTA may soon be concluded. The stated goal of the ACTA is "to provide a high-level international framework that strengthens the global enforcement of intellectual property rights." In this article, Kim Weatherall discusses the background to ACTA, along with its substantive provisions, with a particular focus on those aspects that affect the online environment.*

Intellectual property enforcement continues to be in the news. Most visible have been the debates over Internet 'piracy' and the attempts by copyright owners to rope internet service providers into becoming copyright police: in Australia through the iiNet litigation;[1] in other countries through legislation.[2] Efforts to have online service providers like eBay enforce trade marks too have attracted some attention. Less visible in Australia, but controversial elsewhere, have been Europe's efforts to enforce patents and trade marks by detaining shipments of generic drugs destined for developing countries.

The substantive standards found in international IP treaties are detailed and prescriptive, creating an international web of rights, but the enforcement provisions of most international IP treaties are far less detailed. The enforcement provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**), for example, have been described as its 'Achilles' Heel'.[3] The truth of the description – at least from a right holder perspective – was graphically demonstrated when the US took China to task over its standards of criminal enforcement of IP before the WTO – and mostly lost.[4] Small wonder, then,

*** Editors Note**: A further official draft of the ACTA was released by the Department of Foreign Affairs and Trade on 6 October 2010. The draft text is available at http://www.dfat.gov.au/trade/acta/.

1 Roadshow Films Pty Ltd v iiNet Ltd (No 3) (2010) 83 IPR 430.

2 Below n21 and accompanying text.

3 Jerome Reichman and David Lange, 'Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions' (1998) 9 Duke Jnl Comp. & Int'l L 11, at 34.

4 China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights - Report of the Panel, WT/DS362/R, January 26, 2009.

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Inside This Issue:

Contents

that at the behest of IP right holders concerned about rampant infringement,[5] we have seen moves to 'beef up' enforcement rules: in the World Intellectual Property Organization (**WIPO**), in the TRIPS Council, in the World Customs Organization[6] – and now through negotiation of a free-standing agreement: the Anti-Counterfeiting Trade Agreement, or ACTA.

The negotiations for the ACTA are plurilateral: as well as Australia, they involve the United States, Japan, the 27 nations of the European Union, Switzerland, Canada, Singapore, South Korea, New Zealand, Morocco and Mexico. The stated goal is "to provide a high-level international framework that strengthens the global enforcement of intellectual property rights." Discussions commenced in 2007, and the eleventh round was held in late September 2010 in Japan.

This article briefly outlines progress of negotiations on the ACTA and explores some of its substantive sections and concerns they might raise, particularly for Australia and particularly for those interested in Australia's communications infrastructure. As will be seen, over time the text of the ACTA has been watered down, or perhaps more appropriately, abstracted up to create high-level obligations already met by Australian law. This makes the agreement perhaps less immediately dangerous to the interests of users and business – but at the same time, makes the longer term impact harder to predict.

The negotiations and the issue of transparency

The ACTA is, at first glance, a strange beast. It is counter-intuitive to negotiate on prevention of counterfeiting amongst a group of countries not including the major sources of counterfeit goods.[7] But the ACTA is part of a broader movement.

Attempts to raise enforcement in multilateral fora have not been successful. In the TRIPS Council, developing countries have resisted

5 Not all right holder organisations have indicated enthusiasm for the ACTA negotiations. For example, the Intellectual Property Owners Association, an umbrella group that includes a number of U.S. pharmaceutical, chemical, software, and industrial firms, has expressed concern about its broad scope: see Michael Gabriel, 'ACTA, Fool: Explaining the Irrational Support for a New Institution', PIJIP Working Paper No 7, 2010, at 6.

6 For one summary of the various efforts, see Susan Sell, 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: the State of Play,' Qsensato Occasional Paper No. 1 2008 (Geneva). http://www.iqsensato.org.

7 Of the top 10 countries of departure of counterfeit goods reported by the World Customs Organization in 2008, only one – the United States itself – is part of ACTA. The top 10 (top 9, in fact, because sometimes the departure country is 'unknown') were in descending order; China, Unknown, Hong Kong (China), India, Thailand, Turkey, United Arab Emirates, US, Poland and Hungary: World Customs Organization, Customs and IPR Report 2008, at 9.

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calls to put IP enforcement on the agenda; in WIPO the push for stronger enforcement has been countered by demands for progress on development issues. ACTA can be seen as a 'shift of forum' to a more select, friendly forum.[8] The ACTA negotiations are, in other words, a 'coalition of the [countries] willing' to commit to strong international enforcement rules. The longer-term goal would be to have the rules adopted by other countries. The negotiators have stated that the ACTA will constitute "a new, higher benchmark for enforcement that countries can join on a voluntary basis", and the publicly-released negotiating text of the ACTA includes provisions to enable a broader membership, including developing countries, with accession processes and provisions to allow for technical assistance and capacity-building for developing country members seeking to join.[9] According to the Department of Foreign Affairs and Trade (**DFAT**), "Australia regards the extent to which the ACTA can attract support from countries in our region as one important issue in determining the value of the ACTA for Australia".[10] As for how this might occur – well, the US, EU and Australia all have a history of requiring bilateral trade partners to sign up to existing international IP agreements.[11]

Thus the plurilateral set-up of ACTA does have a certain weird internal logic. If you cannot make progress multilaterally you try to make progress with the 'willing' and look to expand later, once a consensus model is built. But the logic is more shaky once we realise two things. First, there are reasons why there hasn't been progress on IP enforcement in multilateral fora: for example, legitimate concerns that such provisions will be used as a club against countries choosing not to spend precious resources on enforcing foreign private rights, or perhaps the belief on the part of developing countries that enforcement is a quid for which there must be a pro quo, such as genuine progress on the Development Agenda, or on other non-IP matters in the World Trade Organization's Doha Round. Second, bringing on board countries excluded from the negotiations will be even harder later. In the end, no IP enforcement agreement is going to be effective without the involvement of major non-Western powers. China, India, and Brazil have all criticized the negotiations and the agreement.[12]

Apart from their exclusive nature, a second source of criticism has been the veil of secrecy surrounding the negotiations. The negotiators signed 'confidentiality agreements',[13] and in the early stages, even the negotiating agenda was not clearly identified. Faced with a Freedom of Information request, the Obama Administration told a US court that the key ACTA documents were classified for national defence or foreign policy reasons.[14] There has been one official release of the text, in April 2010, which occurred only after five years of closed-door negotiations and only after the full text was leaked. Despite considerable changes to the text since (apparent from subsequent leaks) no further official text has been published.[15] According to statements issued by the negotiators, this secrecy is part of the normal process of treaty negotiation.[16]

Like the selection of the negotiating group, the secrecy does have a certain internal logic. Discussions are easier without hundreds of journalists and blogs scrutinizing every detail. However, it has costs. From the very beginning, it generated paranoia. We saw at times wild speculation regarding the possible contents of the agreement: widespread ISP filtering for copyright-infringing material; border searches of laptops and iPods; even confiscation of electronic equipment.[17] The public reaction was not helped by the

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fact that certain mostly IP-holding stakeholders were consulted.[18] Even the EU Parliament weighed in, passing a resolution in March 2010 calling for greater transparency.[19]

Nor is the concern about transparency expressed by critics a past debate about the negotiations. ACTA will, if concluded, set up a new international institution, the ACTA Committee, which will meet yearly. It will receive reports on implementation, establish ad hoc committees – and take a leading role in future amendments of the text, which can occur if all the Parties agree. There is nothing in the text that would require widespread consultation or discussion before such an amendment occurred. This gives rise to a legitimate concern that amendments will happen, in the future, with little opportunity for public input (or opposition).

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8 Susan Sell, above nvi; Laurence Helfer, 'Regime-shifting: the TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking', (2004) 29 Yale J. Int'l L. 1.

9 ACTA April Text Article 3.3.

10 http://www.dfat.gov.au/trade/acta/index.html.

11 See US-Australia Free Trade Agreement (signed May 18, 2004; in force January 1, 2005) (**AUSFTA**), Article 17.1.2-17.1.5 (corresponding provisions are found in other US FTAs; see also Singapore-Australia Free Trade Agreement, signed 17 February 2003, Entry into force: 28 July 2003, Article 2; Free Trade Agreement between the EU and the Republic of Korea, signed October 15, 2009, Article 10.5 (affirming various copyright treaty provisions), Article 10.16 (trade marks), 10.33 (patent), and Article 10.39 (plant varieties).

12 All three countries made critical statements at the July 2010 meeting of the TRIPS Council. A summary of the meeting and discussion is published on the WTO's website at http://www.wto.org/english/news_e/news10_e/trip_08jun10_e.htm.

13 IP Watch, 5 June 2008, 'Speculation Persists on ACTA as First Official Meeting Concludes', available at http://www.ip-watch.org/weblog/index.php?p=1082.

14 'NGOs Withdraw ACTA Lawsuit, Blast USTR For Lack Of Transparency', Inside US Trade, 19 June 2009.

15 As a result, the analysis in this paper draws both on the 'Public Deliberative Draft' dated April 2010, as well as leaked texts dated January 2010, July 2010, and August 2010. All four texts have been published online, including at the website of the Program on Information Justice and Intellectual Property (**PIJIP**) at the American University, Washington: https://sites.google.com/site/iipenforcement/acta.

16 But see the attachment to an NGO letter dated 22 July 2009, addressed to the US Trade Representative, comparing other IP treaty negotiations. The letter and attachments are available at http://keionline.org/content/view/246/1.

17 See for example IP Justice White Paper on the Proposed Anti-Counterfeiting Trade Agreement (ACTA), 25 March 2008, available at http://ipjustice.org/wp/wp-content/uploads/IPJustice_ACTA-white-paper-mar2008.pdf.

18 Peter Yu, 'Six Secret (and now open) fears of ACTA' (2010) 63 Southern Methodist University Law Review (2010); available at SSRN: http://ssrn.com/abstract=1624813, at page 27.

19 European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, P7_TA(2010)0058.

This gives rise to a legitimate concern that amendments will happen, in the future, with little opportunity for public input (or opposition).

ACTA is an exclusive club: it has excluded both source countries and the public. Within the charmed circle, it probably makes sense. To those watching from outside, however, the negative effects on confidence in the fairness of the IP system are clear. As I have noted elsewhere:

> The secrecy is... operating, once again, to bring intellectual property law into disrepute. To the extent that at some later point governments and IP owners will ask people to accept the outcomes as 'fair' and ones that should be adopted, it will be more difficult to convince them when the agreement has the appearance of a secret deal done with minimal public input. Since neither copyright, nor trade mark, are readily 'self-enforcing' laws they depend for their effectiveness on a certain amount of support among the public. Secret negotiations on IP policing powers are not an ideal way to garner such support.[20]

Substantive sections

Whatever the concerns about process, the substance of the agreement will, subject to some comments below, have the greater long-term impact. In this section, I review the basic parameters of the ACTA text – noting that until the agreement is concluded, we cannot know the final details. As will become clear, ACTA today is not quite the all-encompassing and terrifying agreement it might have been: negotiations have removed some rough edges. What this means for the future is unclear.

Enforcement in the Digital Environment

I will start with the section of the ACTA most relevant to those interested in Australia's communications infrastructure: the section titled 'Enforcement of Intellectual Property Rights in the Digital Environment'. In its earlier incarnations, this section included several strong provisions:

- a general obligation to ensure the availability of enforcement measures "so as to permit effective action" against online infringement;
- a provision 'affirming' that the Party recognises 'third party liability';
- safe harbours for online service providers, including network access providers, web hosts and search engines, subject to the service provider taking action against infringement – such as 'notice-and-takedown';
- anti-circumvention rules: that is, prohibitions on people circumventing, or distributing tools to circumvent, technical 'locks' used by copyright owners to limit use of their material; and
- the protection of rights management information.

Early on, civil society groups feared that ACTA would mandate the adoption of 'three-strikes' rules (also known as 'graduated response'). Such rules would require ISPs to cooperate actively in copyright enforcement with an escalating scale of penalties to be applied to subscribers identified by right holders as infringing: starting with a warning letter, through to technical measures (such as throttling) and even termination of service. Three strikes systems of varying forms have been introduced in the United Kingdom, France, South Korea, and are being discussed in New Zealand.[21] Early ACTA draft text seemed to confirm this fear.[22]

Over the course of the negotiations, the digital chapter has been gutted. According to the latest leaked text, dated August 2010, we now have provisions:

- to require Parties to "provide the means to address" infringement via technologies that facilitate widespread infringement – such as unlawful file-sharing – without creating barriers to legitimate activity and preserving freedom of expression, fair process, and privacy. In a footnote, safe harbours are given as an example of an implementation that would be consistent with the provision;
- that Parties shall "endeavour to promote cooperative efforts within the business community to effectively address infringement", while preserving legitimate competition, freedom of expression, fair process, and privacy;
- requiring Parties to give authorities the power to order expeditious disclosure of information about subscribers where right holders "have given legally sufficient claim with valid reasons to be infringing" rights, "for the purpose of protecting" those rights;[23] and
- quite general anti-circumvention and rights management information provisions.

The new draft does not contain any clear or certain protection for online service providers: we are left with vague exhortations to protect free speech, privacy, and competition and a footnote. Exhortations can be useful, no doubt, but not nearly as helpful to online service providers as the safe harbours already found in European, American, and to some extent Australian law.[24] This may, however, be the price of one very real improvement: the removal of references to secondary liability.

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The revised digital environment section will not require changes to Australian law. No doubt some will argue that Australian law does not "provide the means to address" file-sharing if the Full Federal Court upholds the trial judge's ruling in iiNet that a large network

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20 Kimberlee Weatherall, 'The Anti-Counterfeiting Trade Agreement: What's It All About?', http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=kimweatherall, at 3.

21 Digital Economy Act 2010 (UK) ss 3-16 (new ss 124A-124N, Communications Act 2003 (UK)); Loi favorisant la diffusion et la protection de la création sur Internet (also known as the 'HADOPI law'), 2009 (France); Copyright Act (Korea) s 133bis. In New Zealand, s 92A of the Copyright Act 1994 (NZ), introduced by the Copyright (New Technologies) Amendment Act 2008 (NZ) would have introduced a three-strikes system. The provision was repealed and a proposed replacement may be found in the Copyright (Infringing File Sharing) Amendment Bill 2010 (NZ). At the time of writing this bill is before the Commerce Committee, due to report on 22 October 2010.

22 See Yu, above nxviii, 57-58.

23 This would not require a change to Australian law, which already confers such power on the Federal Court under Rule 15A Federal Court Rules (Cth).

24 The safe harbours in Australia are not presently useful to most online service providers because they are limited to carriage service providers: see Copyright Act 1968 (Cth) Pt V Div 2AA.

access provider was not liable for authorizing infringement by its users when it did not respond to allegations of infringement by copyright owners.[25] Such a claim would be more rhetorical than legal: it would be hard to prove a 'breach' of the ACTA provision. In any event, such claims about the inadequacy of Australian law post-iiNet will be made with or without an ACTA.

Criminalisation of online non-commercial end-user activities is particularly controversial.

The revised digital enforcement provisions of ACTA, however, could be seen, not so much as a set of rules, but as a framework of expectations: that something will be done about online infringement, that online service providers like ISPs will cooperate on enforcement, and that the signatory governments will take an active role in ensuring both. No doubt this text will become a frequently-used rhetorical tool in the battles for control of the online environment.

A further implication of setting up obligations framed as expectations rather than clear rules is that they will change. This has both benefits and costs. The benefits of flexibility are perhaps obvious: they allow for policy innovation that can assist both rights holders and users. On the other hand, obligations of this kind set up the framework for constantly rising cycles of reform as existing laws are deemed 'ineffective' and new 'best practices' emerge, and spread. They make the longer-term impact of the ACTA, therefore, much more difficult to predict.

Criminal Enforcement

Another controversial aspect of the ACTA is the criminal section. The US has been particularly vehement in its desire to secure more elaborate international criminal provisions in copyright and trade mark: a desire no doubt sharpened by the recent failure in its WTO case against China.[26]

Criminalisation of online non-commercial end-user activities is particularly controversial. Early drafts proposed by the US would have imposed criminal liability on any copyright or trade mark infringement for purposes of commercial advantage or private financial gain (no matter how low the quantity) and non-commercial infringement of sufficient extent to affect prejudicially the copyright owner. These proposals appear to have foundered on the rock of EU and other opposition. Notably, criminalization of IP in the EU has a chequered history: the EU dropped criminal provisions from its IP Enforcement Directive in 2004,[27] and a proposal for a 2nd IP directive ('IPRED2') including criminal provisions is on hold.[28]

The August 2010 leaked text is less stringent, particularly against end-users. An 'anti-camcording offence', designed to criminalise the recording of movies in cinemas, has disappeared – a good thing, given the plethora of relevant offences already found in Australian law.[29] ACTA will also allow Parties to exclude end-user infringement. There is still an expansion of the TRIPS framework in that any willful commercial infringement will have to be criminal (regardless of quantity). This is unfortunate, even if it doesn't change Australian law: IP infringement is too easy to be so readily criminalised and overcriminalisation has well-known negative effects.[30]

There are a whole series of other criminal provisions in the ACTA draft: aiding and abetting liability, criminal liability of companies; forfeiture and destruction of implements; and seizure of the proceeds of IP crime. None of these provisions would require changes to Australian law.[31] Again, however, their inclusion is unfortunate, because we do not know what they mean. Most obviously in the communications context, what does it mean to 'aid or abet' IP infringement? Could a web host 'aid or abet' infringement it knows is occurring? We do not know, because such rules are untested – which would suggest that we should hold off on putting them in a treaty.

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Civil Enforcement

Less frequently discussed, but still important, are the civil enforcement provisions. These cover the availability and calculation of damages; injunctions; preliminary procedures (like Anton Piller or seizure orders), and the like. Three aspects of this section have been most troubling: the provision for calculating compensatory damages; a proposal for statutory damages, and a proposal to make injunctions available against non-infringing intermediaries.

As to the calculation of compensatory damages, the proposal is to expand the list of measures of damage that a court must consider if submitted by a complainant to include "any legitimate measure of value submitted by the right holder, which may include the lost profits, the value of the infringed good or service, measured by the market price, the suggested retail price". This is controversial enough in the copyright context: whoever thinks that every illegal download or illegal copy is a lost sale? It is even more controversial if the provisions extend to patent. How could it possibly make sense to refer to the "value of the infringed good" when you are talking about a patent over a minor component of a complex electronic good? A judge can always reject the evidence, but why require a court to waste the time?

As for statutory damages, a fear was that ACTA would require these pre-set figures for damages that have enabled right holders in the US to claim astronomical sums in the context of online or mass infringement.[32] The latest texts, however, have 'additional

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25 Roadshow Films Pty Ltd v iiNet Ltd (No 3) (2010) 83 IPR 430.

26 TRIPS Article 61. See China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights - Report of the Panel, WT/DS362/R, January 26, 2009.

27 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004); published with corrigendum in OJ L 195, 02.6.2004, P. 0016 – 0025.

28 Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, April 26, 2006, COM/2006/0168 final; COD 2005/0127 */ ('IPRED2'). See Monika Ermert, 'ACTA May Prompt Quick Restart to EU Harmonisation of Criminal Enforcement of IP', Intellectual Property Watch, December 21, 2009. In May 2010, the Presidency called upon the Council and the European Parliament to 'consider as soon as possible legislation on criminal measures aimed at ensuring the enforcement of intellectual property rights': The Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens, O.J. C 115/1, 4 May 2010.

29 See Kimberlee Weatherall. ACTA - Australian Section by Section Analysis (April 2010); Available at: http://works.bepress.com/kimweatherall/21, at page 42-43.

30 Douglas Husak, Overcriminalization: The Limits of the Criminal Law (Oxford University Press 2008), 20.

31 Weatherall, ibid at 43-47.

It bears repeating: ACTA is a very odd beast.

damages' (that is, the current Australian system) as an alternative, so it looks like such an amendment will not be required.

Still troubling, particularly in the online context, is Europe's continued push for courts to have the power to order an injunction against an intermediary whose services are used to infringe IP rights.[33] If accepted, this could lead to legal reform in Australia.[34] The usual rule is that an intermediary should be infringing (for example, by authorization) before an injunction is ordered; orders should be made against an alleged or convicted wrongdoer, putting them at risk should they fail to comply. Involving intermediaries in enforcement of rights, perhaps requiring them to take active steps, under pain of contempt of court,[35] arguably creates a new role for intermediaries as the (temporary and permanent) enforcement arm of the courts.

Other provisions

It is not possible to discuss the rest of the ACTA. The recitations at the beginning of the text are interesting and questionable. The border measures provisions, for detaining goods on import, export, or in transit, are and remain controversial. There are extensive provisions on international cooperation and the sharing of 'best practices' which are broad and could create extensive new reporting and sharing obligations and more IP bureaucracy. If I were a member of the Federal Police, I'd be concerned about the provision requiring Parties to "encourage the development of specialized expertise within its competent authorities responsible for enforcement of intellectual property rights" (don't they have better things to do?). But all these are debates, and details, for another day and another audience.[36]

Concluding comments

What are we to make of all this? It bears repeating: ACTA is a very odd beast. It is an agreement negotiated between countries who already enforce IP rights, for the establishment of enforcement 'standards', that may well end up changing very little local law given the quite broad language it now contains.

By reason of the way in which it has been negotiated, if concluded, ACTA will have little or no claim to moral high ground or legitimacy. Nor is the process the only factor damaging any credibility the ACTA might have. It may not be entirely clear from the discussion in this paper, but reading the text reveals that this is a very one-sided agreement: not because interests and rights other than those of right holders aren't recognised – they are. But they are not protected. The rights of IP owners are repeatedly set out in detail and only limited abrogations of those rights are allowed. In contrast, for the benefit of defendants, users, and other people interacting with IP-protected material, there are vague exhortations dotted through the text stating only that enforcement measures must 'preserve' important things like free speech, privacy, competition, or fair process. There is not a word about what that might mean and nothing more concrete. In this sense, ACTA contrasts unfavourably with TRIPS, which has specific protections for defendants. Even the public education provisions of ACTA are unbalanced, requiring parties to promote measures "to enhance public awareness of the importance of respecting intellectual property rights and the detrimental effects of intellectual property rights infringement".

One is left, at the end of an analysis of the various draft texts, wondering whether the game has been worth the candle. More recent texts suggest that ACTA will be a better (or at least less nasty) agreement than first thought or feared – many of the most controversial provisions have been considerably watered down, qualified or removed. But was it worth 11 rounds of negotiation and countless hours of work on the part of the trade officials involved? Is it worth the ongoing compliance costs and the damage that has been done to the reputation of the IP system?

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Importantly: will right holders see any benefit at all? For them to see a benefit, there would surely have to be a reduction in infringement and an increase in sales of legitimate product. For that to happen, there would need to be more enforcement – by the police, by online intermediaries, or perhaps by right holders at lower cost. The only concrete devotion of resources you will find in the ACTA text is the commitment to have yearly meetings. I'm not sure more bureaucracy will solve anyone's problems. In fact, I would say that I think ACTA is likely to fail to achieve much.

The only way that ACTA could be worth the effort put in is if it is part of a much longer game. If ACTA as now drafted fails, what then? Unfortunately, we know. The yearly meetings of the ACTA Committee will hear reports of continued disastrous infringement. Ad hoc committees will be established. And the Committee will be called on to consider (strengthening) amendments. And that is why, in the end, despite all the softening of the language, ACTA remains something to be concerned about from a user point of view, and from the perspective of any business that deals with IP-protected material. It creates a new framework of expectations for enforcement and the potential for rising obligations over time.

Infringement is a problem. If there were a magic bullet to end it, surely it would already have been discovered. One thing I am certain of. A treaty negotiated in this way and with this one-sided outcome is not that bullet.

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32 UMG Recordings, Inc v MP3.com, Inc No. 00 Civ. 472 (JSR), 2000 WL 1262568, at *1, *6 (S.D.N.Y. Sept. 6, 2000): where a judge proposed to make an order for $25,000 per infringed CD –where 4,700 CDs were in issue (total US$118M); Capitol Records v. Thomas-Rasset 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008), a peer-to-peer (p2p) filesharing case, in which a jury awarded $80,000 per infringed song, for a total award of over $1.92 million, despite the trial judge's estimate of actual damages of around $50.

33 This proposal matches the position in the European Union, where the Information Society Directive, Art 8.3 imposes an obligation in almost identical terms: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. L 167, 22/06/2001 P. 0010 – 0019.

34 The provision carries a footnote stating that the "[t]he conditions and procedures relating to such injunction will be left to each Party's legal system." This still suggests legal reform. It is also true that injunctions against intermediaries are not unheard of in Australian law: the courts have a fairly general power to 'make good' their orders as necessary. Whether this is enough to comply with a requirement under the ACTA text is the question.

35 Which "must realistically be seen as criminal in nature": Witham v Holloway (1995) 183 CLR 525 at 534

36 For more in somewhat excruciating detail, see Weatherall, above n20 and n29.