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Will Individuals Aboard the Cultural Pirate Ship Be Struck by the ACTA's Cannon Ball?

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ABSTRACT

Combating internet piracy is a global challenge. Fundamentally, piracy lingers because it has become a culturally acceptable behaviour that is under-enforced. The Anti-Counterfeiting Trade Agreement (ACTA) is the latest enforcement measure aimed at sinking the pirate ship.

The first part of this paper will explore piracy as a cultural phenomenon and how it interacts with Australian civil and criminal law. Pirates, who have awareness that their plundering is wrong, convince themselves that: there are moral grounds for their escapades; there is a government conspiracy to reduce internet freedom; they are fighting globalisation by attacking the corporations who reap disproportionate booty, often at the expense of artists and creators; there are no negative moral dilemmas to consider as the victims are faceless; property is not being stolen from a physical store, and with the potential for endless downloads, there are no vendors who will suffer from having less stock to sell. But most importantly, pirates know that there is a slim chance of being caught when they are downloading or uploading for personal use, and non-commercial gain. Primarily, piracy is tempting because it is easy, convenient and free.

The second part of this paper will look at the legislative response to piracy under Australian law. Australia already has a draconian set of intellectual property (IP) laws which expanded in 2006 to meet the requirements of the Australia-United States Free Trade Agreement (AUSFTA). The scope of copyright infringement offences were broadened to target individuals, and penalties were increased. However, there is a difference between creating stringent laws and enforcing them. As Australia has not tested its new IP laws in relation to individuals on a grand scale, international comparison becomes valuable. From 2003-2008 the Record Industry Association of America (RIAA) underwent mass waves of individual suits

against music pirates in America. All but two of the 18,000 targets settled out of court.

Thirdly, this paper will provide an analysis of how the ACTA might impact on piracy in Australia. The ACTA is a plurilateral agreement currently being negotiated by ten counties and the European Union (EU). Its alleged purpose is to establish international standards for enforcing IP rights. Its negotiators (which include Australian representatives) provided a public draft ("the Public Draft") of the proposed text in April 2010. It was criticised for going beyond enforcement measures and into creating substantive law. This paper will address the specific concerns expressed by leading analysts of the ACTA that implementation of these measures would mean further targeting of individuals and greater criminalisation of offences to the detriment of civil liberties and internet freedom.

I. WHAT IS PIRACY?

Sometimes there is confusion about the meaning and scope of the term "piracy." The United Nations Educational, Scientific and Cultural Organization (UNESCO) specifies that piracy concerns on-line copyright offences,[1] but admits that national copyright legislation does not generally

[1] *See What is Piracy*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO) WORLD ANTI-PIRACY OBSERVATORY, http://portal.unesco.org/culture/en/ev.php-URL_ID= 39397&URL_DO= DO_TOPIC&URL_SECTION= 201.html (last accessed at

include a legal definition. The only international definition is provided under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It includes any goods that are copied without consent of the right-holder.[2] This definition is broader than UNESCO's, and might therefore encompass physical copyright infringement such as counterfeiting and bootlegging. For the purpose of this paper, I will be discussing internet piracy.[3]

Internet piracy is commonly used to refer to a variety of unauthorised uses of creative content on the internet. It refers to acts of infringement that are of a commercial nature, and increasingly to acts for other, non-commercial reasons. A report by the Australian Attorney General's Department in 2005[4] commented on the growing friction between copyright owners "who see a commercial necessity to exercise greater control" and users "who have become accustomed to being relatively free of practical constraints in exploiting new technology".

A. Concern about the erosion of internet freedom as a result of piracy enforcement

The internet has been described as the ultimate forum of public expression on a grand scale.[5] It has provided a participatory forum where anyone can voice their opinion "that resonates farther than it could from any soapbox…"[6] Part of the vigilance in retaining freedom of the internet is its

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Aug. 25, 2010).

[2] *See* Agreement on Trade Related Aspects of Intellectual Property Rights art. 51, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last accessed at Aug. 25, 2010).

[3] This paper will use the terms 'illegal downloading' and 'piracy' as having the same meaning.

[4] *Fair Use and Other Copyright Exceptions, an examination of fair use, fair dealing and other exceptions issue paper,* AUSTRALIAN ATTORNEY GENERALS DEPARTMENT 7 (May 2005), http://www.crimeprevention.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~ FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf.

[5] *See* Nicholas Dickerson, *What Makes the Internet so Special - and Why, Where, How, and by Whom Should Its Content Be Regulated*, 46 HOUS. L. REV., 61, 62 (2009).

[6] *Id.* at 65, (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997) (quoting *Reno 1*, 929 F. Supp. at 842)).

alignment to freedom of speech. Increased enforcement of IP measures in the cyberworld tends to spark discussion about impinged internet freedom. There is a fine balance between enforcement and freedom. When preparations for greater enforcement are carried out in secret, as is the case with the ACTA, individuals fill in the blanks with worst case scenarios. This has been the weakness of the ACTA as it has not been drafted in a transparent manner and there has not been participant-facilitated public comment. Perhaps the negotiators have insidious provisions in store, or maybe it was just poor planning and management of public relations.

The activist group *The Free Software Foundation* describes itself as having a worldwide mission to "promote computer user freedom." [7] It is concerned that increased enforcement measures will make it more difficult to distribute free software. It argues that BitTorrents[8] might be disallowed, making the distribution of large amounts of free software much harder and more expensive.[9] However, in the Australian case of *Roadshow v Iinet*, Cowdroy J. found that BitTorrents are permissible given that the system could be used for legitimate copying.[10] Therefore concern about this issue is currently unfounded in Australia. Nevertheless, The Foundation believes that increased enforcement measures will create a culture of "surveillance and suspicion, in which the freedom that is required to produce free software is seen as dangerous and threatening rather than creative, innovative, and exciting."[11]

B. Under-enforcement and the culture of piracy

Much attention has been given to draconian enforcement legislation aimed at targeting the individual, such as reforms under AUSFTA and proposals under the ACTA. However, legislating laws and enforcing them are two different matters. Given that stricter measures were only introduced into

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[7] Peter Brown, *Free software is a matter of liberty, not price,* FREE SOFTWARE FOUNDATION (June 22, 2010), http://www.fsf.org/about/.

[8] A "BitTorrent" is a peer-to-peer file sharing protocol.

[9] *See Speak Out Against ACTA,* FREE SOFTWARE FOUNDATION (Dec. 7, 2009), http://www.fsf.org/campaigns/acta/.

[10] *See Roadshow Films Pty Ltd v. iiNet Ltd (No 3)* [2010] 263 ALR 215, 239-245, 247, 249-250.(Austl.).

[11] Free Software Foundation *supra* note 11. Note that there are other concerns expressed by users on the net that do not have a nexus to piracy, but might serve to justify illegal downloading such as digital rights management ('DRM') and anti-circumvention laws. However, these issues are beyond the scope of this paper.

Australia in 2006 following the AUSFTA agreement, enforcement cases are in their infancy. Typically, enforcement to date has been when piracy has taken place on a commercial scale. For example, in *Cooper v Universal Music Australia Pty Ltd*,[12] Justice Tamberlin in the Federal Court of Australia ruled that Cooper violated a provision in the *Australian Copyright Act 1968* (Cth)[13] that makes it an offence to "authorise" any act that infringes copyright. Cooper authorised infringements by users of his website and by operators of other websites that made infringing copies available.

Global companies such as Nintendo have taken the reins pursuing over 800 actions in sixteen countries since 2008.[14] For example, the recent legal action against Australian James Burt who made *New Super Mario Bros* for the Wii gaming console available for illegal download. The matter was settled for AUD$1.5 million dollars plus legal costs. Interestingly, Burt did not upload the game for financial gain, but under peer pressure from the hacking community in order to gain acceptance.[15] Burt did not pirate or steal the game; he had bought it from a retailer who mistakenly sold it to him before its official release date. Nintendo went on to sell more than 200,000 units of the game in Australian in seven weeks – the only title on any format to sell this quickly.[16] Section132AC of the *Copyright Act 1968* (Cth), requires that when determining whether infringements have occurred on a "commercial scale", not only is the court to take into account the volume and value of the articles, but "any other relevant matter."[17] Here, it seems that the only matter taken into account was the sales loss estimated by Nintendo. Calculating loss is a controversial subject matter in its own right, and will be discussed later in the paper.

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[12] *See Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 (Austl.).

[13] *See Copyright Act 1968* (Cth), (Austl.), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/6024C5BA42EA32C9CA25775B0010511E/$file/Copyright1968.pdf (last accessed Aug. 25, 2010).

[14] *See* Liv Casben, *Nintendo Wins Another Pirating Law Suit*, ABC NEWS (Feb. 20, 2010, 1:27 AM), http://www.abc.net.au/news/stories/2010/02/20/2825376.htm.

[15] *See* Jamie Nettleton, Karen Hayne & Susan Darmopil, *Game Over as Australian Copyright Pirate Walks the Plank,* ADDISONS (Feb. 19, 2010), http://www.addisonslawyers.com.au/focuspaper/141.

[16] *See* Asher Moses, SYDNEY MORNING HERALD (Feb. 10, 2010), http://www.smh.com.au/digital-life/games/nintendo-pirate-just-a-shy-gamer-dad-20100210-nrlr.html.

[17] *Copyright Act 1968, supra* note 15, at s132AC (5)(b).

> Nintendo also took action in the Australian Federal Court against the company IT Solutions Pty Ltd (trading as Gadgetgear) and against its individual Directors Patrick Li and James Li.[18] Both Gadgetgear and its directors agreed to permanently refrain from importing and selling game copying devices that facilitate piracy and delivered up stock for destruction.

It is valuable to compare Australia with countries that have a track record of following through with enforcement measures on a wide scale to find if it makes a difference to piracy levels. In the US, companies represented by the RIAA[19] began a wave of civil lawsuits against individuals on peer-to-peer (P2P) networks in 2003. To be caught in the legal net, the threshold was the illegal distribution of about 1000 music files, which was deemed to be "substantial."[20] By December 2008, when the RIAA announced the end of its five year campaign, it had targeted over 18,000 individuals. Most individuals settled out of court for a few thousand dollars rather than risk statutory damages of up to US$150,000 per music track as per US Copyright legislation.[21] Two defendants went to trial and lost their cases.[22] It is notable that independent filmmakers are picking up this legal strategy by targeting thousands of BitTorrent users accused of stealing their movies.[23]

Did the RIAA's suits affect the level of piracy? After all, RIAA specifically said that the campaign was "largely a public relations effort,

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[18] *See* Tanya Hall, *Nintendo Wins Lawsuit over R4 Mod Chip Piracy*, ITNEWS (Feb. 18, 2010), http://www.itnews.com.au/News/167490,nintendo-wins-lawsuit-over-r4-mod-chip-piracy.aspx.

[19] RIAA represents the world's big four music companies: Sony BMG, Universal Music, EMI and Warner Music

[20] *See* RIAA, *Recording Companies Start Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, (Sep. 8, 2003), http://www.riaa.com/newsitem.php?id= 85183A9C-28F4-19CE-BDE6-F48E206CE8A1&searchterms= &terminclude= individual%20piracy%20action&termexact.

[21] *See* 17 U.S.C. § 504 (2006).

[22] *See* David Kravets, *$675,000 RIAA File Sharing Verdict Is 'Unreasonable'*, WIRED.COM (Jan. 5, 2010) http://www.wired.com/threatlevel/2010/01/riaa-verdict-is-unreasonable/.

[23] *See* David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED.COM (May 18, 2010, 1:24 PM), http://www.wired.com/threatlevel/2010/05/riaa-bump/.

aimed at striking fear into the hearts of would-be downloaders."[24] There are disparate statistical reports about the campaign's effectiveness, depending on the research methodologies and sources employed. For example, survey results by the Pew Institute[25] found a decrease in pirating during the RIAA lawsuit period. However, this survey was criticised as the "widespread publicity attending the RIAA lawsuits may have encouraged the respondents to be more willing to lie about their downloading activities."[26] In comparison, a study of P2P activity at the "link level" demonstrated that there was little to perhaps an increased change to piracy during the law suit period.[27]

Certainly, awareness about piracy infringement increased due to the associated publicity. However, what happens when the lawsuits fade away and a new generation of users arise? Law suits do not provide ongoing education or pierce the heart of social norms that make piracy acceptable. It has long been theorised that the characteristic of crime is that it consists of acts universally disapproved of by members of society,[28] and depend on collective sentiments.[29] Accordingly, mobilising communal disapproval might be the key for long term effectiveness. The application of enforcement measures prior to an evolved collective sentiment may not make sense to the user as it is seen as unfair and/or a disproportionate response.

C. Piracy and Education

Piracy has become socially acceptable behaviour. Given that illegal downloading has become a "social fact,"[30] it might be reasonable to

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[24] *Id.*

[25] *See* Mary Madden & Lee Rainie, *Music and video downloading moves beyond P2P*, PEW INSTITUTE (March 2005) http://www.pewinternet.org/~ /media/Files/Reports/2005/PIP_Filesharing_March05.pdf .pdf

[26] *RIAA v The People: Five Years Later*, ELECTRONIC FRONTIER FOUNDATION (Sept 2008), http://www.eff.org/wp/riaa-v-people-years-later#footnote109_ruh86xx.

[27] *See* Thomas Karagiannis et al., *P2P dying or just hiding?* COOPERATION FOR ASSOCIATION OF INTERNET DATA ANALYSIS (Nov. 2004), http://www.caida.org/publications/papers/2004/p2p-dying/p2p-dying.pdf.

[28] *See* EMILE DURKHEIM, *Individual and Collective Representations*, *in* SOCIOLOGY AND PHILOSOPHY 72 (1933).

[29] *See Id.*, at 76.

[30] EMILE DURKHEIM THE RULES OF SOCIOLOGICAL METHOD AND SELECTED TEXTS

conclude that some individuals are unaware of it being an offence or a crime. Alternatively, illegal downloading may be carefully hidden through its presentation - such as a harmless link. Often, warnings about illegal downloading are not obvious compared to those presented at the beginning of a DVD, for example.

Education has been referred to as a key to changing attitudes to combat piracy.[31] This view is presumably based on the belief that awareness will break down the normative behaviour of illegal downloading.[32] In 2008, the Australian Minister for Home Affairs, Bob Debus said in parliament that "many members of the public have probably bought or received a pirated DVD at some stage and not given too much thought to the criminal aspect of it, because most people think of it as a victimless crime."[33] This is a good point that should be considered when strategising an awareness campaign. Rather than simply *telling* people that piracy is wrong, there needs to be an understanding of the impact piracy has on a concrete victim aligned with personal feelings of outrage which spreads through the communal psyche. The RIAA recognised this approach somewhat when it gathered opinions of well-known, as well as those of up-and-coming artists with views in favour of piracy enforcement.[34]

Emile Durkheim explains that moral rules have a great deal of plasticity due to the relative rapidity of their evolution, and "may not have yet had time to penetrate deeply into consciences..."[35] Due to the relative newness

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ON SOCIOLOGY AND ITS METHOD 53 (S. Lukes ed 1982) ("what constitutes social facts are the beliefs, tendencies and practices of the group taken collectively").

[31] *See IP Awareness*, MUSIC INDUSTRY PIRACY INVESTIGATIONS, http://www.mipi.com.au/IP-Awareness.html (last accessed Aug. 25, 2010).

[32] Examples of this approach are in 'facts sheets' created by organisations such as Australian Federation against Copyright Theft (AFACT) (representative of all major film companies) *See About Us*, AFACT http://www.afact.org.au/aboutus.html (last accessed Aug. 25, 2010); *and Information Sheets*, COPYRIGHT COUNCIL OF AUSTRALIA, http://www.copyright.org.au/publications/infosheets.htm (last accessed Aug. 25, 2010).

[33] Press Release, Australian Federation against Corporate Theft, DVD Piracy is Far From a Victimless Crime (Nov. 24, 2008) (on file with author) *available at* http://www.afact.org.au/pressreleases/pdf/2008/DVD%20PIRACY%20IS%20FAR%20FROM%20A%20VICTIMLESS%20CRIME,-%20SAYS.pdf.

[34] *See Recording Industry to Begin Collecting Evidence and Preparing Lawsuits Against File*, RIAA (June 25, 2003) , http://www.riaa.com/newsitem.php?id= 2B9DA905-4A0D-8439-7EE1-EC9953A22DB9&searchterms= &terminclude= individual%20piracy%20action&termexact (last accessed Aug. 25, 2010)

[35] DURKHEIM, *supra* note 30, at 76

of the Internet, it is not surprising that it will take a number of waves of education and action to change the normative behaviour of piracy. The positive side is that for countries like Australia, the normative behaviour of piracy itself is relatively new as well. However, attempts to equate piracy to real life crimes such as theft could be counter-productive as the relationship is abstract to the average user.[36] For example, the collective finds a difference between walking out of a shop with a CD under their jacket as it deprives the vendor of a physical product to sell. In comparison, a product that can be endlessly downloaded does not correspond with an intention to "permanently deprive the owner of possession of the property."[37]

D. Rallying against the Corporate Machine

Interviews were undertaken with American students in 2004 asking why they illegally downloaded music.[38] The main reasons they gave are as follows:

i. the money only goes to the record companies
ii. it is the record company that bring actions against individuals
iii. online music is only promotional
iv. artists should make money from touring and live performances
v. prices are unfair
vi. people are manipulated by marketers who provide free samples at strategic venues
vii. artists are exploited by record companies so they are pirating as a form of protest on behalf of artists

Students said they would not want an artist they had a connection with to be "ripped off," only the mass produced artists that they perceive are developed by record companies. They said that they would pay for independent artists and those whom they know "need the money."

One suggestion for a loss of connection between major record

[36] For example, the UK Government has considered piracy to be a civil form of theft. *See Creative Industries in the Digital World,* DIGITAL BRITAIN (June, 2009), http://www.culture.gov.uk/images/publications/chpt4_digitalbritain-finalreport-jun09.pdf.

[37] This is a necessary element of 'larceny' or 'theft'. *See Holloway* (1848) 1 Den 370 (Austl.).

[38] *See* Ian Condry, *Cultures of music piracy: An ethnographic Comparison of the US and Japan,* 7 INT'L J. CULTURAL STUD. 23 (2004).

companies and fans has been attributed to the styles of promotion.[39] In 1990s Japan, record companies primarily promoted hit songs through television commercials and prime time dramas rather than fostering relationships with fans.

"Such practices taught fans that music is simply a commodity, not a piece of the soul of an artist or group, and so fans had little compunction against simply copying music CDs, whether from friends or rental shops."[40]

Well known singer Courtney Love[41] lambasted the RIAA for destroying the connection between artists and their fans. She argued that distribution of music was formerly controlled by the major record companies and that the internet served to break those monopolies. This allowed artists to reconnect with their fans and for a greater number of independent artists to be heard. Love's view is that piracy is not committed by the individual student (for example), but record companies that reap the millions of dollars from artist's work, steal their copyright and work within a cartel along with lawyers and the media.

Love's belief is that free downloading will fuel interest amongst fans, who will buy music if they feel a real connection with the artist. She argues that the artist/fan relationship is like a service where artists live off tips if the customer is happy with their work. This concurs with the students' view that they need to feel a connection.[42] But is this merely a justification for their downloading activities? How do people judge which artists "need the money?" And while "tips" might be an approach acceptable to young and/or up and coming artists, it hardly provides a sustainable career.

Another view is that there is tension between two political systems. The first being the sharing of artistic works between fans, friends, and family as a Marxist approach.[43] It arguably goes beyond the sharing of goods too, because the physical property can be duplicated among everyone,

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[39] *See Id.*, at 15 (referencing an interview with Katsuya Taruishi. Taruishi is the head of the statistics division of Oricon, the company that tracks album sales in Japan).

[40] *Id.*

[41] *See* Courtney Love, *Courtney Love Does the Math*, SALON.COM (June 14, 2000), http://www.salon.com/technology/feature/2000/06/14/love.

[42] *See* Condry, *supra* note 40.

[43] *See* Andrew Sullivan, *Dot communist Manifesto*, N.Y. TIMES MAGAZINE (June 11, 2000), http://partners.nytimes.com/library/magazine/home/20000611mag-counterculture.html?scp= 1&sq= dot%20communism&st= cse.

dissolving the concept of property ownership altogether.[44] An opposing model is based on the capitalist society where supply/demand determines that the best way to achieve efficiency of resources is to obtain things for the lowest cost.[45] Further, reports that highlight how much corporations earn from sales might be a factor in consumers striving to buy their goods for the lowest possible price. For example, according to the 2009 financial reports of Microsoft, Sony and Nintendo, the collective games sector reached 269 million consoles worldwide. Market research group GfK Retail and Technology Australia reported that Australia's video and computer game industry recorded its largest ever sales result of $1.96 billion for 2008, an increase of 47% on 2007. Given that mainstream Australian society operates under a capitalist model, it is fair to say that the majority of downloaders are concerned about cost. Therefore, to argue that illegal downloading is about communal sharing without regard to obtaining something for the least amount of money is merely an excuse for most.

It is clear that many artists agree with the idea of their work being property to be sold in exchange for their labour and expenses.[46] Many express this reluctantly as they believe in communal sharing,[47] or recognise that their fans like to see them as artists who are above monetary interests. There is an irony in that artists need to create an image that is anti-consumerist, yet in reality need to sell their products to support themselves. Success as an artist can also mean making it "big" in order to perform in the best arenas, or spread their message to the widest possible audience. Yet their "success" is punished by consumers who justify illegal downloading based on the argument that they are popular and therefore don't need the money. For example, bands that grew out of the 1990s indie rock movement like Nirvana and REM that were popular partly because they rejected the major record structure, struggled with this reality when they became big and needed the corporate structure to manage their distribution and tours.

Well known singer/songwriter Sheryl Crow expressed that if musicians are forced to support themselves and their families by means other than full

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[44] *See Id.*

[45] *See Id.*, at 25-26

[46] *See* Courtney Proffitt, *Recording Industry To Begin Collecting Evidence And Preparing Lawsuits Against File*, RIAA (June 23, 2003), http://www.riaa.com/newsitem.php?id= 2B9DA905-4A0D-8439-7EE1-EC9953A22DB9&searchterms= &terminclude= individual%20piracy%20action&termexact.

[47] *See* Sullivan, *supra* note 45.

time music (which allows them to hone their craft), then the quality would suffer. She expressed that if there is no demand that is supported by payment then eventually there will be no supply.[48] Well known music artist Peter Gabriel concurred with this view:

> *Do people who create material have entitlement to get royalties? That's a bigger question for society. I would argue that you would get better range, better quality and better choice if you do pay the creator something. We live in the luxury of the in between world at the moment where some people pay for the records while others get it for free. It is the part of it that is the market stall, and at a certain point there will be less fruit on the stall if there's no money coming in.*[49]

On the other hand, a Pew survey showed that musicians are divided about the file-sharing impact on artists.[50] Of musicians surveyed, 35% said free downloading of their music was good promotion, whereas 23% said it is bad because it allows people to copy their work without permission or payment. Another 35% of artists agreed with both points of view. Predictably it was major artists who opposed free downloading, whereas up and coming artists said it helped their career. In Australia, hundreds of independent artists place their music on the website Triple J Unearthed, which provides their music to the public for free download.[51] The incentives for artists are chart ratings, exposure, competitions that offer performances at major festivals, fostering a fan base and the potential to be picked up for radio airplay on the Triple J radio station. The study's[52] observation that music is only placed online for promotional purposes therefore has some validity. However, *permission* to download for free becomes the key factor in whether it is right or wrong. Up and coming music artists on the whole are striving to build their career by means of promotion in order to become "big."

And what about creators who do not need to have their work showcased

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[48] *See* Proffitt, *supra* note 48.

[49] *Id.*

[50] *See* Mary Madden, *Musicians are divided over downloading,* PEW INTERNET (Dec. 5, 2004), http://www.pewinternet.org/Reports/2004/Artists-Musicians-and-the-Internet/The-musicians-survey/12-Musicians-are-divided-over-downloading.aspx?r= 1#.

[51] *See* TRIPLE J UNEARTHED, http://www.triplejunearthed.com/ (last accessed Aug. 25, 2010).

[52] *See* Condry, *supra* note 40.

for promotional purposes and to build fan bases? Computer game designers, composers, film-makers, producers and writers are some examples of people who are also lumped into the corporate machine argument. Yet they are people who often rely on sales, and are therefore affected by illegal downloading. Rallying against the corporate machine is a misguided reason for piracy, or merely another excuse.

II. ENFORCEMENT

The latest attempt to strengthen enforcement is through the ACTA. Australia is a participant in the negotiations of this agreement, and this paper will specifically analyse the effect the ACTA might have on Australia with regards to piracy.

A. ACTA Overview

The ACTA is a proposed plurilateral agreement described by the Australian Department of Foreign Affairs and Trade (DFAT) as a new international legal framework for the enforcement of intellectual property ("IP") "to combat the high levels of commercial scale trade in counterfeit and pirated goods worldwide."[53] Representatives from Australia, Canada, the European Union (EU), Japan, Republic of Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the US are drafting the agreement. Its alleged purpose is to establish international standards for enforcing IP rights.[54]

Until April 2010, negotiations have taken place secretly, and the ACTA was strongly criticised for its lack of transparent development. However, since formal negotiations began in 2008, there has been a series of leaked draft documents, which have attracted ongoing commentary and criticism. The first publicly released draft was made on April 20, 2010.[55] Within this

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[53] *Anti-counterfeiting Trade Agreement (ACTA)*, AUSTL. DEP'T OF FOREIGN AFFAIRS AND TRADING, http://www.dfat.gov.au/trade/acta/ (last accessed Aug. 25, 2010).

[54] *See The Anti-Counterfeiting Trade Agreement - Summary of Key Elements Under Discussion*, U.S. TRADE REPRESENTATIVE (Nov. 2009), http://www.ustr.gov/webfm_send/1479 (last accessed Aug. 25, 2010).

[55] *See Anti-Counterfeiting Trade Agreement, Public Predecisional/Deliberative Draft: April 21, 2010*, PIJIP IP ENFORCEMENT DATABASE, http://sites.google.com/site/iipenforcement/acta (follow "Official Consolidated ACTA Text Prepared for Public Release, April 21, 2010" hyperlink) [hereinafter ACTA Draft – April 21, 2010].

document, there are square brackets around sentences to indicate where wording is yet to be confirmed. The Public Draft does not identify which country or countries suggested various sections. However, the prior leaked draft in January 2010 does, and as the two documents are similar, it is usually easy to work out the origins of particular text. The ninth round of the ACTA negotiations took place in Switzerland from 28 June-1 July 2010. A public draft was not released, but there is a leaked document dated 1 July 2010.[56] The tenth round took place in Washington DC from 6-20 August 2010. There will be no official draft from this session and to date there are no leaked documents.

The overriding criticism about the agreement is that it might be creating substantive law, which is beyond the ACTA's alleged purpose. In March 2010, the United States Trade Representative (USTR) produced a fact sheet[57] that denied the ACTA is about raising substantive standards of IP protection or specifying or dictating how countries should define infringement of those rights. Leading critic of the ACTA, Canadian Professor Michael Geist says that on the contrary, the Public Draft confirms that it would require dramatic changes to many domestic laws.[58] Australian commentator Kimberlee Weatherall concurs with this view and suggests that there has been some "mission creep" of the ACTA.[59]

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[56] *See* Anti-Counterfeiting Trade Agreement Informal Predecisional/Deliberative Draft: July 1, 2010, PIJIP IP ENFORCEMENT DATABASE, http://sites.google.com/site/iipenforcement/acta (follow "Consolidated ACTA Text, July 1, 2010" hyperlink) [hereinafter ACTA Draft – July 1, 2010].

[57] *See Fact Sheet (March 2010),* U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/acta-fact-sheet-march-2010 (last accessed at Aug. 25, 2010).

[58] *See The ACTA Threat: My Talk on Everything You Need To Know About ACTA, But Didn't Know To Ask MICHAEL GEIST (Nov. 12, 2009) http://www.michaelgeist.ca/content/view/4530/125/.*

[59] *See* KIMBERLEE WEATHERALL, THE ANTI-COUNTERFEITING TRADE AGREEMENT: ANALYSIS OF THE JANUARY CONSOLIDATED TEXT 5, (April 2010), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article= 1019&context= kimweatherall.

B. Australian Copyright Law and Piracy

In Australia, IP is under the jurisdiction of federal rather than state law, and the Copyright Act 1968 (Cth)[60] includes a range of civil and criminal offences aimed at deterring copyright piracy.

International law has significantly influenced the Australian IP landscape over the past two decades. For example, Australia is an original party to the TRIPS agreement when it first came into force in 1995. TRIPS is an international agreement administered by the World Trade Organization (WTO) which sets down minimum standards for many forms of IP.[61] There are provisions specifically targeted to deal with copyright piracy on a commercial scale including piracy of books, computer software, sound recordings and films. Australia also acceded in 2007 to the World Intellectual Property Organization (WIPO) Internet Treaties,[62] which supplement TRIPS to eliminate any remaining gaps in copyright protection on the Internet.[63] Note that this was one of the requirements in agreeing to the Australia-United States Free Trade Agreement (AUSFTA).[64]

There were a number of amendments made to Australia's copyright law to meet particular obligations under the AUSFTA. For example, via the *Australia US Free Trade Agreement Implementation Act 2004 (Cth),*[65]

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[60] *See Copyright Act 1968, supra* note 15.

[61] *See* TRIPS Agreement, *supra* note 4, art. 1(3).

[62] The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are known together as the WIPO Internet Treaties. They perform as updates and supplements of the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) and the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (Rome Convention).

[63] *See* Press Release, Australian Copyright Council, Government announces accession to WIPO Internet Treaties, (Feb. 17, 2009) (on file with author) *available at* http://www.copyright.org.au/news/news_items/announcements-news/2007-announcements-news/u27462/.

[64] *See* Australia-United States Free Trade Agreement, U.S.-Austl., art. 17.1(4), May 18, 2004, *available at* http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_17.html (last accessed May 29, 2010).

[65] Australia US Free Trade Agreement Implementation Act 2004 (Cth) sch 9 pt 8 154 (Austl.), *available at* http://www.comlaw.gov.au/ComLaw/legislation/act1.nsf/0/2EBE9518D6EB92B7CA25731B00131AC2/$file/1202004.pdf (last accessed Aug. 25, 2010).

"5DB Offence relating to significant infringement of copyright" has been included as an indictable offence:[66]

> *5DB A person commits an offence if:*
> *(a) the person engages in conduct; and*
> *(b) the conduct results in one or more infringements of the copyright in a work or other subject-matter; and*
> *(c) the infringement or infringements have a substantial prejudicial impact on the owner of the copyright; and*
> *(d) the infringement or infringements occur on a commercial scale*

This section will capture people who distribute infringing material, which happens to be on a commercial scale, for no financial gain. The offence is not related to personally obtaining money through distribution, but by what is "substantially prejudicial" to the copyright owner. The agreement to the AUSFTA binds Australia to a significantly higher standard of protection than that required by the international conventions. With the implementation of the Copyright Amendment Act 2006, criminal offences were extended to aggravated, indictable, summary and strict liability offences. Penalties also increased. The maximum penalty for offences relating to certain commercial uses of infringing copies is currently AUD$93,500 and/or five years imprisonment.[67]

Australia has been a participant in the ACTA discussions since the outset in late 2007. Its representatives are from DFAT, the Attorney-General's Department, Australian Customs Service, Australian Federal Police, IP Australia and agencies including the Department of Broadband, Communications and the Digital Economy and the Department of Health and Ageing. DFAT claims that because Australia already has a high quality, effective IP system, it has not joined the ACTA negotiations to drive change in Australian domestic laws. Its view is that it is important to take part in the negotiations so that Australia's perspective is represented. However, critics argue that politically it may be difficult for Australia to avoid signing a treaty that it has been actively negotiating.[68] Weatherall fears the

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[66] *See Copyright Act 1968, supra* note 15, § 132AC(1).

[67] *See Id.*, at § 132AC(3). Where the person is negligent as to the fact, it is a summary offence. Penalty is 120 penalty units or imprisonment for 2 years, or both.

[68] SEE, E.G., ACTA COPYRIGHT NEGOTIATIONS UNDERWAY: STILL SECRET, STILL WORRYING, ELECTRONIC FRONTIERS AUSTRALIA (NOV. 4, 2009), HTTP://WWW.EFA.ORG.AU/2009/11/04/ACTA-COPYRIGHT-NEGOTIATIONS-UNDERWAY-STILL-SECRET-STILL-WORRYING/.

"temptation for negotiators will be to say that since we are already committed to such rules in the AUSFTA, there is 'no harm' in signing up to similar ACTA terms."[69] The difference that Weatherall sees in the ACTA compared with AUSFTA, is that the latter is a trade deal that retains freedom to step away. The ACTA on the other hand would require implementation of general international standards, removing Australia's flexibility and "giving a whole new set of people the right to complain if we want to resile."[70]

C. Criminalisation of Piracy

As discussed, Australia already has a draconian range of criminal laws for commercial scale offences, whether they are for financial gain or not. Theoretically, the case concerning James Burt and Nintendo (as discussed under the heading 'Under-enforcement') could have attracted both criminal and civil penalties had it gone to trial. However, there has not been an Australian court to date that has commenced criminal proceedings against an individual who derived no financial gain.

The Public Draft raises the concern that criminalisation of offences will spread to non-commercial scale offences:

> ACTA ARTICLE 2.14 CRIMINAL OFFENSES
>
> 1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of *willful* trademark counterfeiting or copyright or related rights piracy on a commercial scale. Willful copyright or related rights piracy on a *commercial scale* includes:[71]
>
> [(a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and
>
> (b) willful copyright or related rights infringements for purposes of commercial advantage or financial gain.] [72]

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[69] Kimberlee, Weatherall, *Geist on ACTA*, LAWFONT.COM (Nov. 4, 2009), http://www.lawfont.com/2009/11/04/geist-on-acta/.

[70] *Id.*

[71] Note that square brackets are used by the ACTA to show that the wording is to be confirmed.

[72] ACTA Draft – April 21, 2010, *supra* note 57, n. 37 ("For purposes of this

American University Professor Sean Flynn[73] argues that criminal sanctions will be extended beyond cases of commercial scale infringement due to the addition of the word "willful."[74] "Willful" has been described as a word capable of very broad definition.[75] Coupled with 2.14.1(a), individuals who download for personal use which is deemed to be on a "commercial scale" might be committing a criminal offence.

Interestingly, the July 2010 leaked draft shows that (a) and (b) of Article 2.14 have been deleted. In its place, various countries have proposed text that would require the application of criminal liability to "acts carried out in the context of commercial activity for direct or indirect economic or commercial advantage" (EU, Japan, US, Canada, China).[76] Clearly stating "context of commercial activity" reduces the broadness of the Public Draft. However, there is concern that it is still too broad. Weatherall points out that it might capture single acts such as one unlicensed copy of software, or "**legitimate businesses** acting in good faith…believing they have a fair use or fair dealing defenses…"[77] This is why the interpretation of "willful" is particularly important, and it should therefore be explicitly defined within the Agreement.

i. Personal Use

The Australian Digital Alliance (ADA) explains that when AUSFTA was implemented domestically, concerted effort was placed on ensuring

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section, financial gain includes the receipt or expectation of receipt of anything of value.").

[73] *See* Sean Flynn, *Preliminary Analysis of the ACTA Text,* PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY (April 21, 2010), http://www.wcl.american.edu/pijip/go/flynn04202010.

[74] Note that the ACTA spells the word as "willful" and in other commentary, such as ADA, it is spelt as "wilful". For the purposes of consistency, I will retain the spelling according the ACTA.

[75] *See* AUSTRALIAN DIGITAL ALLIANCE, ANTI COUNTERFEITING TRADE AGREEMENT IMPACT ON INDIVIDUALS AND INTERMEDIARIES 13 (May 2010) , *available at* http://www.digital.org.au/submission/documents/20100519ADA-ACTAimpactonindividualsandintermediaries.pdf [hereinafter *ADA*].

[76] ACTA Draft – July 1, 2010, *supra* note 58, art. 2.14 (last accessed Aug. 25, 2010)

[77] Kimberlee Weatherall, *ACTA: new (leaked) text, new issues,* THE FORTNIGHTLY REVIEW OF IP AND MEDIA LAW (July 15, 2010), http://fortnightlyreview.info/2010/07/15/acta-new-leaked-text-new-issues%E2%80%A6/.

that criminal liability would not be imposed on purely private acts.[78] For example, it is not an infringement to transfer music onto a device for private and domestic use.[79] There is a concern that if Australia accedes to the ACTA, it may lose the flexibility which was negotiated under the AUSFTA.[80] DFAT stated that the negotiators of the ACTA do not intend to target individuals, including their privacy and property, "when those individuals are not engaged in commercial scale trade in counterfeit and pirated goods."[81] The definition of "commercial scale" trade becomes crucial.

The US has the No Electronic Theft Act 1997,[82] which provides a protective measure whereby reproduction or sharing of copyright material must be over US$1000 within a 180 day period to be a federal offence. However, Australia does not have an equivalent protection. Weatherall points out that in the absence of any similar monetary limit in Australia, it would be open to a court to find that less than $1,000 worth of material has had a 'substantial prejudicial impact' and therefore be deemed activity on a commercial scale.[83]

It is interesting to note that according to the leaked July 2010 text, it has been suggested by the EU, US, Japan and China (in various wording) that the acts of end consumers of commercial scale operations might be excluded from this section.

ii. Access to information

ADA expressed that the text of the ACTA does not include one of the most important objectives of copyright – "access to information for the benefit of society."[84] Placing an emphasis on the rights of the copyright holder shifts the balance from continued innovation that is derived from access to information. The ADA suggests that "fair use" and "fair dealing" provisions should be included in the Agreement.

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[78] *See* ADA, *supra* note 77, at 4-5.

[79] *See Copyright Act 1986 (Cth), supra* note 15, § 109(a).

[80] *See* ADA, *supra* note 77, 5.

[81] AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADING, *surpa* note 55.

[82] No Electronic Theft (NET) Act, Pub. L. No. 105-147, § 2(b), 111 Stat. 2678 (1997) (codified at 17 U.S.C. 506).

[83] *See* WEATHERALL, *supra* note 61.

[84] ADA, *supra* note 77. Note that ADA provided recommendations in May 2010 to DFAT regarding the impact on individuals and intermediaries.

"Fair use" is a doctrine in the US which allows limited use of copyrighted material without requiring permission from the rights holders. The main right that fair use protects is freedom of speech.[85] The flexibility of the fair use exception has allowed the courts to play an active role in adapting US copyright law to major changes in technology.[86] The model pro vides that, rather than having a clear rule, courts have discretion to consider factors after the event as to whether or not a particular activity infringes copyright.[87]

In contrast, Australia has a doctrine of "fair dealing" which is found in many common law based Commonwealth countries. It is less flexible than "fair use" as it only applies to acts which fall within one of four categories in the *Copyright Act 1968* (Cth): research or study (§§ 40 and 103C), criticism or review (§§ 41 and 103A), reporting of news (§§ 42 and 103B), and professional advice given by a legal practitioner, patent attorney or trademarks attorney (§ 43(2)). The *Copyright Amendments Act 2006* provided a number of private copying exceptions. For example, it is not an offence to make a copy of a sound recording on a device (such as a CD or iPod) for private and domestic use[88] (as long as it is not illegally downloaded in the first instance). Reform is being considered to adopt the US model of fair use into Australian domestic law,[89] which will be an important protective measure. Better still would be if the ACTA itself incorporated fair use to assist other countries and to strive towards a uniform balance between enforcement and freedom.

iii. Targeted Groups

Weatherall, in her commentary of the ACTA refers to Douglas Husak[90] whose opinion is that "white collar offenders" would be particularly affected by greater criminalisation.[91] Weatherall argues that governments

[85] *See* Flynn, *supra* note 75.

[86] *See* AUSTRALIAN ATTORNEY GENERALS DEPARTMENT , *supra* note 6, at 20.

[87] *See Id.*, at 9-10.

[88] *See Copyright Act 1968* (Cth), *supra* note 15, § 109A.

[89] *See* AUSTRALIAN ATTORNEY GENERALS DEPARTMENT, *supra* note 6.

[90] *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 21 (2008).

[91] Historically, the term "white-collar crime" was introduced by Edwin Sutherland in 1939 to describe a crime committed by: "a person of respectability and high social status in the course of his occupation." Before, crimes were considered mainly as a street level

should be empowered by treaties to exclude from criminal provisions "ordinary commercial practices" and "many relatively harmless and innocent acts."[92] This view perpetuates the long-held debate that "white-collar crime" is less harmful than "street crime." But why should the legal system discriminate or minimalise white collar crime as being less harmful? Weatherall says that the more "laypersons" who become culpable, the greater the potential of reducing respect for the criminal law and substantive law (such as copyright). However, conversely it can be argued that under-enforcement leads to apathy and loss of respect.

Another group identified by Weatherall that might become over-represented is juveniles. A report[93] that researched film piracy across 22 different countries[94] found that there is an overrepresentation of the 16-24 age group, representing 58% of illegal downloaders. It is even higher in the US, where the same age range represents 71% of downloaders. However, it needs to be questioned why crime should be categorised as being innocent or harmful based on demographics rather than the merits of the case.

D. Civil Liberties

The ACTA contains provisions that might have an impact on civil procedure and individual liberties. This paper will discuss those most related to piracy.

i. Protection of Civil Liberties offered by TRIPS

Under Article 42, TRIPS provides for "fair and equitable procedures." Those procedures include:

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phenomenon and he wanted to draw a distinction between "white-collar crime" and "street crime." Husak's footnote to "white collar offenders" is STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME (2006). The distinguishing features of white collar offences as described by Green are financial or environmental harms rather than clear corporeal injuries.

[92] WEATHERALL, *supra* note 61, at 31.

[93] *See* L.E.K CONSULTING, THE COST OF MOVIE PIRACY (May 2004) (containing report commissioned by the Motion Picture Association), *available at* http://www.archive.org/stream/MpaaPiracyReort/LeksummarympaRevised_djvu.txt.

[94] *See Id.* (Australia, Brazil, Canada, China, France, Germany, Hong Kong, Hungary, India, Italy, Japan, Republic of Korea, Mexico, Netherlands, Poland, Russia, Spain, Sweden, Taiwan, Thailand, UK, US).

- timely written notice
- detail about the basis of claims
- right to representation
- a means to identify and protect confidential information (unless contrary to existing constitutional requirements)
- procedures that shall not impose overly burdensome requirements concerning mandatory personal appearances.

It is notable that the ACTA makes reference to TRIPS primarily for definitional purposes,[95] but does not refer to its protective measures. The fact that TRIPS is isolated to limited parts of the ACTA is of concern. If it was not mentioned at all, it might be argued that it applies to the whole of the ACTA. However, its specific use provides an argument that TRIPS is applicable only to the Articles where it is made explicit. TRIPS protections should be included in the forthcoming "general provisions" section so it is clear that those protections apply to the ACTA as a whole.

ii. Evidence Procedures and Privacy of Information

Article 2.4 of the Public Draft extends TRIPS by requiring the infringer to provide *any* information, not just the identity of other persons involved. This might invite fishing expeditions by rights holders, and there is very little information about procedural rules to place limitations on this activity.[96] Similarly, Articles 2.3 and 2.5.2 of the Public Draft provide provisional seizure power for the purposes of gathering evidence. Weatherall points out that the ACTA does not follow the procedural rules of Anton Pillar orders.[97] Some proposals in the ACTA extend seizure power to implements used in infringement which might include general purpose equipment and computers. Further, there is nothing in the ACTA about a defendant's right to challenge provisional seizures. Evidence gathering of this nature is concerning if it becomes acceptable for searches of small

[95] TRIPS is only mentioned a few times in the ACTA, such as in Article 2.X "Scope of the Border Measures."

[96] *See* WEATHERALL, *supra* note 61, at 31.

[97] An Anton Piller order is a court order that provides the right to search premises and seize evidence without prior warning to prevent destruction of relevant evidence. *See* Anton Piller K.G. v Manufacturing Processes Ltd. [1975] EWCA (Civ) 12 (Eng.). Section 503(a) of the Copyright Act contains similar language. *See* 17 U.S.C. § 503(a) (2006). An example of a change in relevant ACTA provisions is the omission of the requirement that seizure only occur where there is imminent risk of destruction. See ACTA Draft – July 1, 2010, *supra* note 58, art. 2.16.

scale, individual piracy. It might be a device to find larger scale pirates, at the expense of individual privacy.

The concern that people involved in non-commercial activities will be forced to provide information (as well as those involved in commercial activities) is derived from comparing the wording of Article 2.4 in the January 2010 leaked draft to the April 2010 Public Draft. There is a significant two-word change in the text which indicates that there has been specific contemplation about the scope of the agreement to include non-commercial infringement. In the January draft, the European Union (EU) suggested wording regarding information about the origin and distribution network of infringed goods and services. Here it was to be restricted to a "commercial scale." However, in the Public Draft, the words "commercial scale" are deleted.

However, there might be protection of privacy under the ACTA if wording by the EU and Canada is accepted. Their suggestion about Article 2.4 is that the provision only applies in so far as it does not conflict with other statutory provisions.[98] Canada is particularly clear, proposing that the article ends with:

> *"[F]or greater clarity, this provision does not apply to the extent that it would conflict with common law or statutory privileges, such as legal professional privilege."*

The EU's suggested heading to the Article is: "without prejudice to other statutory provisions which, in particular, govern the protection of confidentiality of information sources or the processing of personal data." It includes a footnote that states that this clause will be moved to the General Provisions section. This presumably means that if the wording is accepted, privacy will be made more prominent throughout the ACTA. Indeed, Article 1.4 headed "Privacy and Disclosure Information" states that "a suitable provision needs to be drafted that would ensure nothing in the Agreement detracts from national legislation regarding protection of personal privacy."

[98] While the Public Draft does not list which countries suggested various sections, Article 2.4 has not changed from the leaked January draft where attributions were made. Therefore, for the purpose of analysis, an assumption will be made that countries listed in the leaked January document apply to the Public Draft.

iii. Universal affect of civil procedure change

According to Weatherall, when the *European Union Intellectual Property Enforcement Directive*[99] was being proposed, several leading IP scholars expressed that the international balance of fundamental individual freedoms are vulnerable when civil procedures are affected. This is because changes to civil procedure such as remedies, decision making and preventative legal redress may have applications beyond IP law.[100] Different countries' rules have evolved over time and have their own idiosyncrasies. For example, Australia has not codified human rights in the same way that the United States, the European Union and Canada have.[101]

The ACTA does include some protections.[102] It provides for:

- proportionality in various Articles.[103] In addition, footnote 46 says there is a suggestion to make "fair and proportionate" apply to all enforcement measures. It also suggests in this footnote that a direct reference to TRIPS might also clarify the scope of these obligations.
- some privacy/confidentiality protections (Article 2.4)
- some measures against ungrounded claims (Article 2.5 X3). For example, authorities have the power to require the plaintiff to

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[99] *See* Council Directive 2004/48, 2004 O.J. (L 195) 16 (EC), *available at* http://eur-lex.europa.eu/pri/en/oj/dat/2004/l_195/l_19520040602en00160025.pdf (last accessed Aug. 25, 2010).

[100] William Cornish, Josef Drexl, Reto Hilty & Annette Kur *Procedures and Remedies for Enforcing IPRS: The European Commission's Proposed Directive*, 25 EUR. INTELL. PROP. REV. 447, 448 (2003).

[101] For example, the EU has the European Convention on Human Rights which offers some general checks under Article 6 and Article 8. *See* European Convention on Human Rights, art. 6, 8, Nov. 4, 1950, 213 U.N.T.S. 222. Canada has a Charter of Human Rights and Freedoms that may act as a check against unfair procedures. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

[102] This is a summary of provisions - some of which were first identified by Weatherall in her analysis of the January leaked draft. The provisions have been cross checked with the Public Draft. Most are the same (sometimes under different Article numbers), some have been deleted, and there is also a suggestion that some will be placed under a general heading for broader application.

[103] *See, e.g.* ACTA Draft - July 1, 2010, supra note 58, art. 2.X.3 [Effective, proportionate] [fair and equitable] and [deterrent]. Article 2.15.3 (proportionality of criminal penalties). *See Id.* art. 2.16 (proportionality of seizures in criminal context), 2.18(2) (proportionality of remedies in the internet/digital context).

> provide "reasonably available evidence" to be certain that the plaintiff's rights are being infringed or that such infringement is imminent. In addition, the plaintiff is to provide financial security at a sufficient level to protect the defendant.

This shows promise that the ACTA is considering protection as a general concept and hopefully it is not merely a token effort.

E. Remedies under the ACTA

One system of calculating damages that is controversial is the "lost sales analysis" approach for account of profits. The ADA says that the assessment is "discredited and inaccurate,"[104] according to the United States Government Accountability Office (GAO).[105] The GAO argues that the one-on-one substitution rate is inappropriate because online infringing goods are free. The US has protections that consider account substitution rates (would you have bought it anyway?) or complimentary affects (would you then buy something legitimate?) The GAO criticised the ACTA for not including these two considerations.[106]

A counter argument is that each download represents one less good that might have been sold. It is true that there is not one less product in the inventory because downloads are endless. However, there is one less customer (and their interested friends) who might have bought the product. Further, illegal downloading does not just cost corporations the price of the product. Costs of research, development and production are involved as well as the risk taken by a corporation.

Apart from Australia's current regime of damages under civil law, the ACTA might encourage the US remedy of statutory damages. These are damages set without regard to any actual loss occurred by the content owner, and may be out of proportion to the harm suffered. For example, in

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[104] *See* ADA, *supra* note 77, at ii.

[105] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-423, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS, (2010), *available at* http://www.gao.gov/new.items/d10423.pdf (last accessed Aug. 25, 2010).

[106] *See* Matt Dawes *Opinion: the Devil is in ACTA's details*, ITNEWS FOR AUSTRALIAN BUSINESS (April 22, 2010) http://www.itnews.com.au/News/172820,opinion-the-devil-is-in-actas-details.aspx. Matt Dawes is *a copyright advisor for the Australian Digital Alliance.*

the US, statutory damages can reach US$150,000 per infringed work. According to Flynn, statutory damages can be particularly damaging against individuals who copy material with no commercial purpose.[107] Those against statutory damages (in the US) argue it stymies innovation and creativity while encouraging "frivolous litigation and unfair settlements." Without protections such as fair use, Australia might be particularly vulnerable.

ADA also has a concern about Article 2.2.1(b) requiring that courts "shall" consider the various assessments outlined, compared to current Australian law which says that the courts "might" consider them. ADA's argument is that this change will "severely limit the domestic policy freedom" and "encourage future lobbying from rights holder groups for Australia to changes its laws."[108] In saying this, the ADA devalues the strength and independence of Parliament, suggesting that it will bow down to pressure by copyright holder lobby groups, without balancing the views of others. It also devalues the independence of courts as it suggests that in having to consider various assessment factors, judges will be pressured to lean a certain way when handing down their judgments. The courts would not lose their discretionary powers under the ACTA as suggested by ADA. However, the ADA's suggested caveat of adding "where appropriate" or in "appropriate circumstances" might be wise in order to ensure that judges are not obliged to reason *why* they have not applied various assessments. It is interesting to note that in the July 1st version of the document, the negotiators have amended the section by watering down the requirement that remedies (such as account of profits) "shall" be considered. Instead "judicial authorities shall have the authority to consider" them. Effectively, this might imply that judges are not *required* to consider certain remedies, as was the case in the Public Draft.

III. CONCLUSION

Piracy is a cybercrime that has become socially acceptable in Australia. It is therefore difficult to combat because the collective public does not see the moral wrong or harm that warrants draconian rules. On the whole, piracy is under-enforced when it comes to individual infringements unless a civil action is brought. Pirates are lulled into a false sense of security until

[107] Flynn, *supra* note 75.

[108] ADA, *supra* note 77, at 2.

attention is given to private actions such as those by the RIAA in the US. However, these deterrents are short lived and do not provide for lasting results.

Obtaining something for nothing must trouble some users, because justifications are often volunteered. Reacting against the corporate machine or protesting against loss of internet freedom not only provide reasons for piracy, but effectively make the victim faceless. When the victim has an elusive quality, there is no perceived harm to society. In an environment where peers do the same, a culture of justified sharing emerges, and education based on 'awareness' will only have moderate success. For long term deterrence, enforcement needs to be aimed at unravelling the social norms that make it acceptable. Personalising victims is the first key to changing group perceptions.

Enforceability of laws is an important deterrent once communal feelings have started to change. Continually expanding the reach and penalties involved places enormous pressure on law enforcement, which will need to be resourced properly to carry out draconian criminal provisions. Without enforcement, obviously respect for the law diminishes.

The ACTA negotiations have arisen close to the time in which Australia implemented high level IP enforcement measures under AUSFTA. The similarities between AUSFTA and the ACTA are obvious, and DFAT has said that Australia will not have to become party to the ACTA given its current regime. However, as Australia has been an initial participant, there may be political pressure to join as an example to other countries. Therefore, it is valid to look at the differences between the two. The concerns expressed by commentators prior to the Public Draft were somewhat overstated, which is a natural response when negotiations are being conducted in secret and leaked drafts are the only resources available. However, should Australia sign up to the ACTA, there are some substantive changes that will have an effect on Australian law with regards to piracy. The main is an increased potential to target individuals on a non-commercial scale and criminalise their activity whether it is for financial gain or not. Others include the introduction of statutory damages, with the potential to lead to an increase in frivolous claims and out of court settlements. Clarification will be required as to the interpretation of "willful" and "commercial scale" to ensure that they do not broaden Australia's current definitions. TRIPS protections should be placed under a general provisions section to be applicable to the whole of the ACTA, and

fair use protections should be explicit to protect civil liberties.

Round ten of the ACTA negotiations concluded in Washington on 20 August 2010. A draft from this round has not been issued to the public, but it is reported that negotiators made progress in all areas "including general obligations, civil enforcement, border measures, criminal enforcement and enforcement measures in the digital environment…"[109] The final round will be held in Japan at the end of September 2010, and it has been pledged that the final text will be publicly released prior to countries signing it.[110] Concern has been raised about releasing the text after negotiations have concluded as it will be too late to make substantive changes.[111]

On the assumption that the final agreement remains largely the same as the Public Draft, it will not in itself have the 'teeth' to make long term changes to piracy. Whilst individuals might walk the gang plank should Australia enforce its draconian laws, new pirates will soon emerge. For effective long term deterrence the social norms that accept illegal downloading need to be addressed, coupled with appropriate and proportionate enforcement.

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[109] Doug Palmer, *Countries want anti-counterfeit trade deal in September,* REUTERS (Aug. 20, 2010), http://www.reuters.com/article/idUSTRE67J5A220100821?type= politicsNews.

[110] *Countries eye anti-counterfeiting trade deal in September*, REUTERS (Aug. 21, 2010), http://in.reuters.com/article/idINIndia-50979220100820.

[111] *ACTA Round Ten Concludes: Deal May Be One Month Away, Updated Text to Remain Secret*, MICHAEL GEIST (Aug. 21, 2010), http://www.michaelgeist.ca/content/view/5268/125/.