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## ACTA's State of Play: Looking Beyond Transparency

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## INTRODUCTION

# ACTA'S STATE OF PLAY: LOOKING BEYOND TRANSPARENCY

MICHAEL GEIST\*

*[This keynote address was delivered in June 2010, reflecting the state of the Anti-Counterfeiting Trade Agreement (“ACTA”) negotiations at that time. The agreement was concluded several months later as a result of near-constant negotiations in Switzerland (July), the United States (August), and Japan (September). While the substantive provisions within the agreement evolved from their draft state in June to the final agreement later that year, the core public interest concerns remain largely unchanged.]*

I have titled this talk *State of Play: Looking Beyond Transparency*. I want to try to answer the question of what happens when ACTA transparency is no longer the key issue for those concerned with this proposed agreement. I pose that question because for a long time much of the focus has been on the lack of transparency associated with ACTA and the increasingly vocal demands that an authorized, public text be made available.

The text leaked months ago<sup>1</sup> and was available to anybody with Internet access, but until late April of this year,<sup>2</sup> an official version of

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1. See Anti-Counterfeiting Trade Agreement: Informal Predecisional/Deliberative Draft, Jan. 18, 2010 [hereinafter ACTA Draft—Jan. 18, 2010], available at <https://sites.google.com/site/iipenforcement/acta> (follow “Full Leaked Text Dated January 18, 2010”).

2. Anti-Counterfeiting Trade Agreement: Public Predecisional/Deliberative

the text was unavailable.

With the release of the ACTA text, the focus begins to change since ACTA is no longer solely, or even primarily, about transparency, or the lack thereof. Rather, the focus shifts to other procedural and substantive concerns.

## THE ACTA BASICS

For those who are new or relatively new to ACTA, here briefly are the basics.

The ACTA talks date back six years to 2004, when some of these issues were first put on the table at the first Global Congress on Counterfeiting, an annual congress focusing on counterfeiting-related issues.<sup>3</sup> The prospect of developing a treaty nominally dealing with counterfeiting was raised at that meeting.<sup>4</sup>

Thus ensued several years of background discussions led by the U.S. government and others, typically taking place at side meetings at the World Trade Organization or at the World Intellectual Property Organization (“WIPO”). This fueled the beginning of a framework on what a proposed agreement might look like.

In 2007, these talks became public as negotiating countries reached sufficient agreement to announce plans to negotiate an anti-counterfeiting trade agreement.<sup>5</sup> Those countries—a “coalition of the

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Draft, Apr. 21, 2010 [hereinafter ACTA Draft—Apr. 21, 2010], available at [http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc\\_146029.pdf](http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf).

3. See *First Global Congress [Brussels]*, GLOBAL CONG. COMBATING COUNTERFEITING & PIRACY, <http://www.ccapcongress.net/Brussels.htm> (last visited Mar. 1, 2011).

4. See *id.* (stating that the discussion included “examining and understanding current international instruments for co-operation among governments in enforcement work, and identifying enhancements required for strengthening enforcement efforts,” but did not refer to any specific treaty process); Second Global Cong. on Combating Counterfeiting and Piracy, Lyon, Fr., Nov. 14-15, 2005, *The Lyon Declaration*, at 1 (Nov. 15, 2005), available at <http://www.ccapcongress.net/archives/Lyon/files/OutcomesStatement20051115.pdf> (mentioning Japan’s proposal for an international treaty on enforcement of intellectual property rights, first raised at the G8 Gleneagles summit in July 2005).

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

willing,” some say—included the United States, the European Union, Japan, Korea, Mexico, New Zealand, Switzerland, and Canada. Australia was clearly viewed as a likely participant, but first launched a public consultation before confirming its participation.

In 2008, preparatory meetings were held early in the year followed by the first of four rounds of negotiations. It is striking to see how the negotiation rounds have become progressively longer and in some ways a bit more public. The very first meeting that took place in Geneva in June 2008 was very short—running for just a day and a half. It was also held in secret and the specific location itself was not disclosed.<sup>6</sup>

The issue was not completely off the public radar screen, however. If you review the press and online discussion during the spring of 2008, there had been some leaks identifying the draft discussion document that made the rounds among various lobbying interests.<sup>7</sup>

The following year, the negotiations were delayed by the arrival of a new administration in the United States. There was some question, although I do not think much doubt, as to whether or not the United States would continue to participate in the ACTA talks.

In June of 2009, the U.S. Administration announced its commitment to continue,<sup>8</sup> which led to a meeting one month later in Morocco, followed by another in Seoul, South Korea later that year.

This brings us to where we are now in June 2010. There have been two meetings so far this year—Mexico in January and New Zealand in April—the most aggressive negotiation schedule to date. The participating governments are very much on record that they would

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6. See *An International Proposal for a Plurilateral Anti-Counterfeiting Trade Agreement (ACTA)*, AUSTL. DEP'T OF FOREIGN AFF. & TRADE (Nov. 13, 2007), <http://www.dfat.gov.au/trade/acta/discussion-paper.html> (noting merely that the meeting was “in Switzerland” and not specifying a particular location).

7. See *The Anti-Counterfeiting Trade Agreement*, KNOWLEDGE ECOLOGY INT'L, <http://keionline.org/acta> (last visited Mar. 1, 2011) (providing a robust number of articles regarding the ACTA drafts and negotiations, including blog commentary, papers, articles, and government documents).

8. Press Release, Office of the U.S. Trade Representative, Ambassador Ron Kirk Announces Plan to Move Forward With the Negotiation of the Anti-Counterfeiting Trade Agreement (ACTA) (Jun. 12, 2009), <http://www.ustr.gov/about-us/press-office/press-releases/2009/june/ambassador-ron-kirk-announces-plan-move-forward-negot>.

like to conclude ACTA this year.<sup>9</sup>

The next meeting is scheduled for Lucerne, Switzerland in late June. It has again been shrouded—unfortunately, I think—in a fair amount of secrecy. For example, the agenda that governments had begun to make available several weeks or even a month before the negotiations take place has still not been made public.

In fact, even the dates themselves have not been formally disclosed. There was a meeting with Swiss officials earlier this week in which they corrected the general public understanding that the meeting was running from the 28th of June until the 2nd of July. It turns out it is set to conclude on the 1st of July. One day difference is not that significant, but the mere fact that the meeting is just days away and this still has not been publicly disclosed is not particularly encouraging.

The draft text is now readily available to everyone.<sup>10</sup> ACTA's basic structure has remained unchanged since the beginning of the negotiations. There are six broad chapters, though virtually all of the discussion is focused on a single chapter, the enforcement of intellectual property ("IP") rights, which is itself divided up into four sections: civil enforcement, border measures, criminal enforcement, and the Internet provisions. There is draft text on a range of the other chapters, but they have not been the subject of significant negotiation.

In addition to the IP enforcement chapter, the institutional structure that will be built around ACTA is noteworthy since the agreement is envisioned as more than just a conventional trade or IP agreement. The chapter, "institutional arrangements," first drafted by the Canadian government, establishes a comprehensive ACTA

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9. See Press Release, Office of the U.S. Trade Representative, The Office of the U.S. Trade Representative Releases Statement of ACTA Negotiating Partners on Recent ACTA Negotiations (July 1, 2010), <http://www.ustr.gov/about-us/press-office/press-releases/2010/june/office-us-trade-representative-releases-statement-act> (acknowledging that the participants of ACTA reaffirmed their commitment to conclude ACTA negotiations in 2010). This goal was in large part accomplished. The negotiating parties released a final draft of the treaty on Dec. 3, 2010. Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, *available at* <http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf>

10. ACTA Draft—Apr. 21, 2010, *supra* note 2.

institutional framework.<sup>11</sup> Note that there are some delegations that have indicated that they would like to delay those discussions until there is a consolidated agreement on the substantive provisions.

As we all know, after much public outcry, a text was made available days after the conclusion of the New Zealand round of negotiations in April.<sup>12</sup> In the weeks leading up to those discussions, there was growing public and political pressure to release the text to the public. Part of that pressure came from the fact that the full text itself had already leaked,<sup>13</sup> thereby undermining claims that public release would harm the negotiations.

Equally important, however, was that for well over a year the standard response from many countries on the transparency issue was that they favored transparency, but that others did not. Countries steadfastly refused to identify who opposed releasing the text, noting that the consensus document that all had agreed to at the beginning of the negotiations mandated unanimity.<sup>14</sup>

Perhaps the most important leak, other than the leak of the text itself, was the leak in March of a Dutch document identifying the specific countries that were opposed to releasing the text.<sup>15</sup> Within about ten days, the European countries identified in that document were on the public record saying they supported release.<sup>16</sup> This left

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11. See, e.g., Howard Knopf, *Canadian Proposal for ACTA Secretariat*, EXCESS COPYRIGHT BLOG (Dec. 6, 2009, 7:09 PM), <http://excesscopyright.blogspot.com/2009/12/indispensable-jamie-love-has-posted.html> (expressing that Canadians will react poorly to an agreement drafted outside the normal democratic process).

12. ACTA Draft—Apr. 21, 2010, *supra* note 2.

13. Cf. ACTA Draft—Jan. 18, 2010, *supra* note 1 (including particular countries' suggestions on the specific wording of provisions, thereby, exposing the countries' views).

14. See *Ask The Ambassador: ACTA Text*, OFF. U.S. TRADE REPRESENTATIVE (Sept. 23, 2009, 11:55 AM), <http://www.ustr.gov/about-us/press-office/blog/ask-ambassador-acta-text> (alleging that secrecy invites more frank conversation and facilitates negotiation and compromise).

15. Brenno de Winter, *New ACTA Leak Reveals Internal Conflicts Among Negotiators*, COMPUTERWORLD (Feb. 26, 2010), <http://computerworld.co.nz/news.nsf/news/acta-leaks-reveal-internal-conflicts-among-negotiators> (noting that the U.K., Netherlands, Poland, Estonia, Finland, Sweden, Austria, and Japan were in favor of disclosure; Germany, Denmark, Singapore, and South Korea opposed; the United States was silent; and the EC had not made a decision).

16. See Rune Pedersen, *Lene Espersen Skal i Samråd om Antipirat-aftale*, COMPUTERWORLD (Mar. 2, 2010), <http://www.computerworld.dk/art/55244/lene->

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three countries as the primary holdouts—with the United States as the key stumbling block.

When you read the official text, it becomes clear that while ACTA has certainly advanced from its early stages, there is, in a number of different areas, a fair amount of disagreement. There are square brackets around considerable portions of text, which indicate differing proposals from different countries for which there is currently no consensus.

That said, there is an increasing urgency to try to conclude the agreement in 2010. I've spoken with a number of officials in the last month or so, and there is a sense that with the transparency issue addressed, ACTA can be placed on a "rocket docket," with the goal of moving very, very quickly. Further, with sideline negotiation in advance of the meeting in Switzerland, I think we will see many square brackets removed through the next round.

It is noteworthy that when there have been highly controversial issues that have struck a chord with the public, there has been a willingness among the negotiating countries to back down and search for alternatives.

The very first instance of that involved fears of iPod-searching border guards as part of the border measures chapter, which was discussed before the first round of negotiations commenced. As a result, governments began proposing a *de minimis* provision that is at least nominally designed to address some of those concerns.

Similarly, three strikes became the real *cause célèbre* associated with ACTA. It made its first appearance as a footnote inserted by the United States into the Internet enforcement chapter.<sup>17</sup> After the New Zealand meeting, it was removed from the text. It seems clear that that controversy was viewed as a distraction, though there are some that believe there is still the prospect of its return.<sup>18</sup>

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espersen-skal-i-samraad-om-antipirat-aftale (noting that Danish Foreign Minister Lene Espersen (formerly Industry Minister) had reportedly committed to releasing a draft text before the agreement was finalized).

17. ACTA Draft—Jan. 18, 2010, *supra* note 1, art. 2.17 n. 29 (suggesting that an option to address unauthorized storage and transmission of IP rights protected materials is to allow termination of subscription accounts, for repeated infringers, on the internet service providers' ("ISPs") system or network).

18. See Rebecca Marr, *ACTA: 'Three Strikes' Rule Still on the Cards*, NEW EUR., May 9, 2010, <http://www.neurope.eu/articles/100698.php> (insinuating that

It is certainly the case that ACTA leaves the door open for various countries to include three strikes within their national legislation. That is no surprise. A number of ACTA countries have three strikes, or have proposed three strikes rules.<sup>19</sup> I do not think ACTA would foreclose three strikes. Rather, the bigger question is whether ACTA will actually mandate it.

The other major development is the growing interest in this issue amongst developing countries, particularly India and China.<sup>20</sup> The release of an authorized version of the text has enabled non-ACTA countries to now speak more forcefully, because other countries are themselves on the public record. Developing states are now taking this on as an issue themselves, and I would argue probably represent by far the most important ally for those who are concerned with where ACTA may be headed.

## TRANSPARENCY

Let me turn to the question of what happens when transparency is no longer the issue and actually start with a caveat to suggest that I do not think the transparency issue is over just yet.

The path to ACTA transparency started with total secrecy, even in the first stages of negotiation. The first change was an effort to

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the European Union is not strongly encouraging the implementation of the three strikes policy, but member states are still considering it); *see also* Brett Winterford, *How ACTA Could Sneak in a Three Strikes System*, IT NEWS (Apr. 13, 2010, 12:50 PM), <http://www.itnews.com.au/News/171980,how-acta-could-sneak-in-a-three-strikes-system.aspx> (positing that a backdoor in the treaty might allow IP rights holders to issue injunctions against ISPs or webhosts that they suspect are infringing on IP rights).

19. *E.g.*, Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (1) [Law 2009-669 of June 12, 2009 Favoring the Dissemination and Protection of Creation on the Internet], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], June 13, 2009; Digital Economy Act, 2010, 59 Eliz. 2, c. 24, § 124A (U.K.).

20. *See* James Love, *China Describes TRIPS Council Proposal on ACTA and Other Plurilateral Enforcement Agreements*, KNOWLEDGE ECOLOGY INT'L (July 7, 2010, 10:41 AM), <http://keionline.org/node/883> (reproducing China's proposed concerns regarding ACTA, prepared for the June 8-9, 2010 WTO TRIPS Council, which identified concerns such as potential legal unpredictability, potential distortions on legitimate trade, compromising the balance between developing and developed countries that was sought carefully in drafting TRIPS, and the allocation of public resources).

provide brief summaries of the various meetings. These summaries were very predictable, typically thanking the host government, indicating which issues had been discussed, and expressing support for the conclusion of the ACTA negotiations by the end of 2010.

Summaries have been released after each meeting.<sup>21</sup> They are not particularly helpful. The meeting agenda is a little bit better in terms of at least providing a sense of the subject matter that is up for negotiation. As I mentioned, however, that information still has not been made available for the meeting in Lucerne.

Before the ACTA text was made available, there were a couple of attempts to summarize the state of the negotiations.<sup>22</sup> The summaries did a nice job of confirming the leaks found in the public blog posts, but they did not really tell anybody anything new.

As I discussed earlier, this really came to a head in the month or two before the New Zealand meeting in April when the countries that were opposed to transparency were outed and when the European Parliament took this on as an issue and began to call for transparency.<sup>23</sup> It became clear that this was an issue that was going to have to be addressed as part of the New Zealand round of negotiations, and sure enough at the conclusion of those negotiations, the governments announced that they would make a text available, doing so several days later.

Notably, that text removes information about each particular country's positions. That information is an open secret, however, because the official version can be compared easily to the leaked text, which provides a sense of which country stands where. Nevertheless, by scrubbing the information on where each country

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21. *E.g., Joint Statement: ACTA 7th Round of Negotiation, Guadalajara, Mexico, January 26-29, 2010*, CAN. DEP'T FOREIGN AFFAIRS & INT'L TRADE (Jan. 29, 2010), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/7-negotiation-7-negotiation.aspx>.

22. *See, e.g., The Anti-Counterfeiting Trade Agreement – Summary of Key Elements Under Discussion*, CAN. DEP'T FOREIGN AFFAIRS & INT'L TRADE (Feb. 11 2010), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/key-summary-resume-cle.aspx?lang=en> (providing a fairly detailed summary of ACTA's chapters and sections).

23. *See Andrew Willis, MEPs Demand More Transparency on ACTA Talks*, EU OBSERVER (Nov. 3, 2010, 9:27 AM), <http://euobserver.com/9/29655> (demonstrating MEPs strong insistence on increasing transparency around ACTA negotiations by threatening legal action in the European Court of Justice).

stands, it makes it difficult to assess the validity of claims made by some countries that the ACTA provisions are wholly consistent with their existing domestic law.

Two further points on transparency need to be raised. First, I think it is important to emphasize that ACTA is not the norm. There are those that would argue the fact that a draft text has now been made available represents a great gift to the public and is out of step with the typical approach in this area. This is untrue. If we compare ACTA to virtually any other international agreement involving intellectual property, ACTA is less transparent<sup>24</sup> and less inclusive.<sup>25</sup>

Second, there are ongoing transparency concerns since secrecy remains the norm. The level of secrecy with this next meeting in ten days has been higher than any other meeting in well over a year. It is not entirely clear why having moved forward with more transparency around the meetings, countries have now reverted back to far less transparency about this particular meeting, but that is in fact the case.

Moreover, there have been comments that suggest that the draft text that was released at the conclusion of the April meeting will be the only draft text that is made available until there is a final text. A number of officials have noted that they have made a text available, but nobody should expect that there will be a new text made available at the conclusion of each round of talks. I think it is absolutely essential to insist that an updated version of that text be made available at the conclusion of every round. Transparency in April is not good enough in July when there is a new text and it is not being made available.

I should also note from a transparency perspective, most governments have still been very, very poor with respect to public consultation. There have been the occasional meetings, but many countries have not sought true substantive input. The consultations

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24. *ACTA is secret. How Transparent are Other Global Norm Setting Exercises?*, KNOWLEDGE ECOLOGY INT'L, [http://www.keionline.org/misc-docs/4/attachment1\\_transparency\\_ustr.pdf](http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf) (last visited Mar. 1, 2011).

25. *Compare Member States*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/members/en/> (last visited Mar. 1, 2011) (cataloging 184 member states of the World Intellectual Property Organization), with *ACTA Fact Sheet*, OFF. U.S. TRADE REPRESENTATIVE (Mar. 2010), <http://www.ustr.gov/acta-fact-sheet-march-2010> (listing 37 parties to the ACTA negotiations, including 27 member states of the European Union).

tend to be more along the lines of information sessions in which the information that is provided is already readily accessible in the public domain.

## PROCESS

Beyond transparency, the ACTA process is crucial because the agreement represents a fundamental shift—not just in intellectual property, but in other areas as well—away from multilateral, more inclusive fora toward the so-called plurilateral, closed fora. If this is successful, I believe we will see attempts to replicate it many other fields.

There are also, from a process perspective, constitutional concerns. I think it is clear that one of the primary reasons the European Parliament has been active on ACTA is its concern that the negotiations have not been fully compliant with the Lisbon Treaty. So, too, in the United States, the hope of completing this as an executive agreement, so it would not involve Congressional oversight or Congressional approval, raises enormous concerns, given the substantive elements within the agreement.

In other countries, where there are efforts underway to reform domestic laws—I'm thinking particularly of my own country of Canada—there are shifting negotiation mandates. The Canadian mandate at the Lucerne round will have changed from the New Zealand round because there is now a copyright reform bill on the table.<sup>26</sup> The Canadian government will likely agree to ACTA provisions consistent with its domestic copyright bill, even though, with a minority government it has not been passed by Parliament, where there may still be amendments.

Many developing countries are concerned with ACTA's ultimate effect on WIPO. Progress on the WIPO Development Agenda and the Treaty for the Visually Impaired may well be stymied because those countries that are making progress or perceived progress with respect to ACTA decline to enter into good faith negotiations in some of those other fora.

Once ACTA is concluded, it is likely that there will be great

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26. See Bill C-32, An Act to Amend the Copyright Act, 2010 3d Sess., 40th Parl., 59 Eliz. 2 (Can.).

pressure on many countries to comply with “ACTA standards”—with the United States using the USTR Special 301 process to exert pressure for ACTA compliance.<sup>27</sup> Countries may face pressure even if they are not signatories or have not agreed to the treaty, much less participated in those negotiations.

I think these concerns help explain recent events at the Council for the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), where India, China, and a number of developing countries expressed their concern last week with “TRIPS-plus” efforts such as ACTA. They noted a number of specific concerns including a distortion of the balance of rights, potential violations of or conflicts with the TRIPS agreement, concerns about the absence of flexibility within the agreement, and a real fear that ACTA will establish a precedent in other places.<sup>28</sup>

ACTA is very much on the political agenda with countries fearing that this is now an ongoing process from which they have been deliberately excluded. All reports suggest that countries involved in the ACTA process have made the determination that they are going to stick with the people that brought them to the dance from the beginning. New countries might want to come onboard at this negotiation stage, but the sense is that it is too late for them. They are left with nothing other than a “take it or leave it” approach, and it is going to be clear that there will be a lot of pressure to take it when the time comes.

### SUBSTANCE: UNIVERSAL CONCERNS

I want to highlight six substantive concerns that I think apply universally in all ACTA countries.

First, the scope of the agreement is unclear.<sup>29</sup> It is striking that

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27. See Judith H. Bellow & Alan F. Holmer, “Special 301”: *Its Requirements, Implementation, and Significance*, 13 *FORDHAM INT’L L.J.* 259, 259 (1990) (noting Special 301 “is designed to use the credible threat of unilateral retaliation by the United States to ‘persuade’ trading partners to reform currently deficient intellectual property practices”).

28. *TRIPS Council Debates Anti-Counterfeiting Talks, Patents on Life*, WORLD TRADE ORG. (June 8-9, 2010), [http://www.wto.org/english/news\\_e/news10\\_e/trip\\_08jun10\\_e.htm](http://www.wto.org/english/news_e/news10_e/trip_08jun10_e.htm); see Love, *supra* note 20 (reproducing China’s proposed concerns presented at the TRIPS Council meeting).

29. Cf. Jonathan Lynn, *States Clash Over Anti-Counterfeiting Enforcement*,

there is still disagreement on this issue. The issue as to whether or not the scope of the agreement includes patents or is limited just to copyright and trademark is an enormous question, one that has very significant implications for virtually every other section in the agreement.

If patents are included, it will have a major impact on border measures, civil enforcement, and criminal enforcement, because the laws in many countries often exclude patents on these issues. Moreover, the inclusion of patents has significant implications for access to medicines.<sup>30</sup>

Second, privacy is a universal concern. There will be a provision in ACTA that seeks to address privacy, but there remains uncertainty about the hierarchy between IP enforcement within ACTA and privacy rights more generally.<sup>31</sup> Is it one where IP enforcement now trumps what in many countries is a fundamental right to privacy? Does privacy supersede some of those concerns? Is there a mechanism to allow the two to effectively co-exist? These issues have yet to be worked out.

Third, there is an absence of balance within the agreement stemming from the inclusion of enforcement rules but not the limitations, exceptions, and balancing provisions that are typically found in copyright law. The export of U.S.-style rules on enforcement without U.S.-style rules on fair use risks creating a distorted framework for most other ACTA countries as well as the non-ACTA countries that will ultimately be asked to be join the agreement. It is essential to include limitations and exceptions within the text, notwithstanding opposition from some delegations.<sup>32</sup>

Fourth, in-transit seizures are a concern for all countries. Europe

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REUTERS (June 9, 2010), <http://in.reuters.com/article/idINIndia-49179920100609> (suggesting a potential problem raised by India regarding whether ACTA will affect trade in generic drugs)

30. See Sean Flynn, *ACTA and Access to Medicines*, AM. U. WASH. C. L. PROGRAM ON INFO. JUST. & INTELL. PROP. (Apr. 28, 2010), <http://www.wcl.american.edu/pijip/go/blog-post/acta-and-access-to-medicines> (warning that the problem of “Dutch Seizures”—the E.U. port seizure of in-transit drugs, which are lawfully protected in the receiving countries but not in the E.U.—could arise from the inclusion of patents in the ACTA treaty).

31. See ACTA Draft—Apr. 21, 2010, *supra* note 2, art. 1.4 (containing only aspirational language).

32. ACTA Draft—Jan. 18, 2010, *supra* note 1, art. 2.17 n.23.

attracts most of the attention on this issue due to the in-transit pharmaceutical seizures in the Netherlands.<sup>33</sup> The impact is felt by all countries, however, since any country exporting goods to another country via trans-shipment may find those goods blocked or seized.

Fifth, ACTA's injunctive powers are troubling. Knowledge Ecology International has been focused, I think, quite rightly from the beginning on issues around injunctions.<sup>34</sup> The current ACTA provisions on injunctions are far broader than those found in most countries today, targeting not only the direct parties involved but potentially third parties as well.<sup>35</sup>

Sixth, there is the prospect that the proposed ACTA institutional structure could usurp the role that WIPO has played on development or technical assistance. The portions of the ACTA text on international cooperation and institutional structure make it evident that this is going to impact all countries.

### SUBSTANCE: COUNTRY SPECIFIC ISSUES

There are many country-specific issues in ACTA that would require changes to domestic rules in some jurisdictions. Kim Weatherall does a nice job of arguing that even where domestic rules are consistent with ACTA, there may still be an impact.<sup>36</sup>

Some of the country specific issues include ACTA's anti-circumvention provisions, which envision a "WIPO Internet Treaty-

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33. See Jonathan Lynn, *Brazil, India Denounce Dutch Generic Drug Seizure*, REUTERS (Jan. 30, 2009), available at

<http://www.reuters.com/article/idUSTRE50T27O20090130> (illustrating outcry from Brazil and India over the seizure of generic high blood pressure drugs in the Netherlands as a "setback" to the principle of universal access to medicine).

34. See James Love, *ACTA Provisions on Injunctions and Damages* (Knowledge Ecology Int'l, Research Note Apr. 6, 2010), available at [http://keionline.org/sites/default/files/kei\\_rn\\_2010\\_1.pdf](http://keionline.org/sites/default/files/kei_rn_2010_1.pdf) (offering analysis on various situations in which injunctions might apply including cases of innocent infringement and statutory exceptions to injunctions allowed in Article 44.2 of the TRIPS among others).

35. ACTA Draft—Apr. 21, 2010, *supra* note 2, art. 2.X, ¶ 2 (injunctions) (allowing IP rights holders to apply for injunctions against intermediaries "whose services are used by a third party to infringe an intellectual property right").

36. Kimberlee G. Weatherall, *ACTA – Australian Section-by-Section Analysis 1-2* (May 2010) (unpublished), available at <http://works.bepress.com/kimweatherall/21/> (advancing the argument that many sections of ACTA would require changes to Australian law).

plus” approach. It takes the anti-circumvention rules found in the U.S. Digital Millennium Copyright Act and tries to establish it as the international standard.<sup>37</sup> That will have an impact in a number of ACTA countries, including Canada, New Zealand and Japan, which have not implemented anti-circumvention laws precisely in the same manner as the United States.<sup>38</sup>

ACTA also seeks to establish “notice and takedown” as the international standard with respect to Internet service providers. Other countries have adopted different approaches. For example, Canada just introduced legislation<sup>39</sup> that codifies a “notice and notice” system, which I think is actually a more effective and balanced approach. That system requires Internet service providers to forward allegations of infringements to their subscribers, but leaves it to the courts to determine whether an actual infringement has occurred.

ACTA includes anti-camcord provisions which are found in some countries, but not others, thus requiring them to update their domestic laws.<sup>40</sup>

It also features statutory damage provisions that are found only in some countries. If adopted in ACTA’s final version, they would result in dramatic changes in those jurisdictions without statutory damages for IP violations.

There are also criminal provisions that would require change in some countries—including the notion of inciting, aiding, and

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37. Compare 17 U.S.C. § 1201 (2006) (making illegal the circumvention of technological controls designed to prevent public access to copyrighted material, and banning the manufacture, import, and sale of devices that permit people to circumvent such controls), with ACTA Draft—Apr. 21, 2010, *supra* note 2, art. 2.18, ¶ 4 (mandating that parties should provide adequate protection and remedies to prevent the “unauthorized circumvention of effective technological measures”).

38. See, e.g., ACTA Draft—Jan. 18, 2010, *supra* note 1, art. 2.17, ¶ 4, option 2 (indicating that Japan, for instance, notes that the U.S. proposal in Section 4, paragraph 4 is inconsistent with both the WIPO treaties and Japanese domestic law).

39. See Bill C-32, An Act to Amend the Copyright Act, 2010 3d Sess., 40th Parl., 59 Eliz. 2, para. 41 (Can.).

40. *C.f. Anti-Camcord Legislation (ACL) Chart*, NAT’L ASS’N THEATRE OWNERS (Aug. 20, 2008), <http://www.natonline.org/pdfs/PDF%20Movie%20Theft/International%20Camcord%20Statutes.pdf> (listing the existence of anti-camcord laws, which essentially prohibit the recording of publicly performed films, in various countries and their penalties).

abetting certain kinds of offenses. The response to this took the form of a *de minimis* provision, which, as I mentioned earlier, was designed to mitigate concerns around iPod-searching border guards. However, there remain some rights holders who are opposed to the inclusion of a *de minimis* provision altogether, fearing that it would send the message that a little bit of counterfeiting is permitted if it is done on a personal level.<sup>41</sup> Further, there has been some debate as to whether or not to include within that provision “in small consignments.” I believe the Australians have been supportive of that language which covers personal carriage of goods and which would be consistent with TRIPS.

There are also the border measure provisions, which in many countries would involve some degree of change, particularly in terms of empowering customs officials. A number of countries still require, I think quite sensibly, court oversight but ACTA envisions new powers that do not involve domestic courts.

## CONCLUSION

I conclude on a pessimistic but urgent note. I recently talked to a couple of people about my upcoming ACTA travel schedule which involves this meeting and then a meeting that is planned for Switzerland in a couple weeks time.

The response from one official was: why do you even bother? At this stage, the train has left the station. The notion that somehow groups can come together and stop ACTA from taking place is just not credible. ACTA is going to happen. You can talk amongst yourselves if you like, but the efforts to try to stop this are just not going to be successful.

This was from someone who is actually generally sympathetic to some of the concerns around ACTA. So it may have been a resigned comment more than anything else.

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41. See Press Release, Int'l Trademark Ass'n, Global Organizations Provide Governments with Joint Recommendations on Anti-Counterfeiting Trade Agreement (June 25, 2010), <http://www.inta.org/images/stories//2010-06-25%20final%20inta%20and%20icc%20joint%20press%20release%20on%20acta.pdf> (noting that the International Trademark Association and the International Chamber of Commerce's Business Action to Stop Counterfeiting and Piracy suggested that removing the *de minimis* provision sends the message that it is permissible to buy counterfeit goods for personal use).

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I think many would like to see ACTA just go away altogether. But if it does not go away, it becomes all the more important to redouble efforts to provide substantive contributions, to highlight some of these concerns, to minimize the harm and to make it an agreement that is more typical of international agreements—based on high-level principles open to individual countries to implement in a manner consistent with their laws, their cultures, and their customs.

I do not think the 2010 date that has been put forward as a conclusion for ACTA is there just as theater. I think there are many who are now very serious about trying to get that done this year. Unless we move quickly and loudly, this may be done before we feel we've even begun.

Thanks very much for your attention.