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Collateral Damage: The Impact of ACTA and the Enforcement Agenda on the World's Poorest People

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COLLATERAL DAMAGE:
THE IMPACT OF ACTA AND THE ENFORCEMENT
AGENDA ON THE WORLD'S POOREST PEOPLE

*Andrew Rens*¹

ABSTRACT

ACTA is billed as a trade agreement, and it is likely to have a far reaching impact on the poorest people in the world. ACTA's purported aim is to increase the efficacy of enforcement of intellectual property. However, like the enforcement agenda that gave rise to it, ACTA's provisions threaten access to medicines, access to learning materials, and access to markets by developing countries, and in so doing threaten development.

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I. INTRODUCTION

More than 1.4 billion people in the world live below the poverty line defined by the World Bank, of 1.25 U.S. dollars a day.² People living at or below the poverty line are vulnerable to disease, starvation and the natural elements and are deprived of medicines, knowledge and power over the international laws and economic dispositions that affect their daily lives. What does this have to do with the Anti-Counterfeiting Trade Agreement (ACTA), currently the subject of secretive negotiations by the United States, Europe and a few close allies? ACTA is, after all, described by its advocates as a trade agreement. However, little attention has been paid to its potential impact on the world's poorest people. This article points to some of the ways in which ACTA will almost certainly threaten the world's poorest people.

ACTA itself is part of a far bigger agenda: the “enforcement agenda.” The enforcement agenda, taking the guise of strengthening the enforcement of existing rights, attempts to enact national laws and to create policies and practises that effectively eliminate existing limitations and exceptions in the current international intellectual property regime, at least as far as cross

² Shaohua Chen & Martin Ravallion, *The Developing World Is Poorer Than We Thought, But No Less Successful in the Fight against Poverty* 35 (Development Research Group, World Bank, August 2008), available at http://siteresources.worldbank.org/JAPANINJAPANESEEXT/Resources/515497-1201490097949/080827_The_Developing_World_is_Poorer_than_we_Thought.pdf.

border regulation of intellectual property is concerned. ACTA is the pre-eminent vehicle of the enforcement agenda. Developing countries have had a number of recent experiences with the enforcement agenda. These experiences provide concrete examples of the likely impact of ACTA. This article sets out to describe in plain terms the likely impact of ACTA on the world's poor. Doing so requires an understanding of the enforcement agenda and its primary vehicle—ACTA—which requires drawing on a great deal of work by others, some if it still in progress. This paper describes ACTA as both a process and set of provisions, examines its emergence in the enforcement agenda, and discusses how ACTA threatens multinational development, especially access to medicines and access to knowledge.

II. WHAT IS AT STAKE?

At one time intellectual property law was viewed by both the public in the developed world and by most developing country policy makers as a purely technocratic domain. Reliance on expertise effectively disguised political choices. While this view has changed, it is too often forgotten that intellectual property laws disproportionately impact the world's poorest people. How will the enforcement agenda affect the lives of the world's poorest people? Will it fracture the multinational intellectual property regime? Will it derail international co-operation on health, on renewable energy, and on food security?

III. THE ENFORCEMENT AGENDA

The “enforcement agenda” is a sustained, wide-ranging effort by lobbyists for certain industries in crisis to deploy state resources, secure legislation, and institutionalize practises that support their current business models under the banner of enforcing intellectual property rights. “The overall picture that emerges is a web of numerous multilateral forums, regional and bilateral agreements and unilateral institutions being captured to pursue a global TRIPS-plus enforcement agenda.”³

The agenda is being realized through a range of means; ACTA, increasingly onerous enforcement provisions in Free Trade Agreements (FTAs),⁴ far reaching national legislation on “counterfeits” (often the results

³ Viviana Muñoz Tellez, *The Changing Global Governance of Intellectual Property Enforcement: A New Challenge for Developing Countries*, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 3, 10 (Li & Correa eds. 2009).

⁴ “Free Trade Agreements” is the name of a type of bi-lateral trade agreement that is not,

of “expert technical assistance”) and a cohort of other means. Muñoz Tellez lists thirteen different international fora where enforcement efforts are being pursued.⁵

The enforcement agenda is being set by multinational tobacco, pharmaceutical, film and record corporations. The Global Business Leaders’ Alliance Against Counterfeiting (GBLAAC), whose members include Coca-Cola, Daimler Chrysler, Pfizer, Proctor and Gamble, American Tobacco, Phillip Morris, Swiss Watch, Nike, and Canon, sponsored the meeting held in Geneva hosted by Interpol and WIPO on counterfeiting which appears to have begun the public ACTA process⁶. The primary lobbying bodies appear to be the Motion Picture Association, the Recording Industry Association of America, the International Intellectual Property Alliance, and the Business Software Alliance, global pharmaceutical giants, and global tobacco companies⁷.

Significant features of the agenda are that it seeks to reduce or eliminate exceptions and limitations to intellectual property law through over-broad provisions purportedly aimed at infringement. Examples from East Africa will be used to illustrate this effect. The enforcement agenda seeks to move the focus of international and national intellectual property policy away from efforts to reform intellectual property laws to ensure access to medicines and access to knowledge and instead to dedicate resources to expanding the reach and impact of the statutory monopolies granted by intellectual property legislation. The enforcement agenda is often framed in terms of security, which justifies inroads into civil liberties, recruits new constituencies to the political economy of intellectual property maximization, and attempts to stigmatize critics.⁸ As the enforcement agenda unfolds across a range of arenas, the impact on real life situations by the agenda becomes all too clear; presaging the impact of ACTA.

IV. ACTA

however, confined to trade as traditionally understood, but includes requirements for changes to the national legislation of signatories, most notably intellectual property legislation.

⁵ Muñoz Tellez, *supra* note 3.

⁶ Aaron Shaw, *The Problem with the Anti-Counterfeiting Trade Agreement (and What To Do About It)*, KE STUDIES (2008), <http://kestudies.org/ojs/index.php/kes/article/view/34/57>.

⁷ A peculiar difficulty attends ACTA with respect to both the text and the process: the text has been withheld from the public, and largely from the public's duly appointed representatives, and that the negotiations do not take place on the public record.

⁸ Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: the State of Play* 4 (IQsensato, Occasional Paper No. 1, June 9, 2008), available at http://www.iqsensato.org/wp-content/uploads/Sell_IP_Enforcement_State_of_Play-OPs_1_June_2008.pdf.

What is ACTA? Although the few official government announcements on ACTA have described it as a draft treaty agreement, for developing countries it is another arena of conflict in an immensely complex strategy of forum shifting by certain multinational corporations. Susan Sell describes the process as the latest iteration in a longer process:

Since the early 1980s advocates of a maximalist IP agenda have shifted forums both horizontally and vertically in order to achieve their goals. Those who seek to ration access to IP are engaged in an elaborate cat and mouse game with those who seek to expand access. As soon as one venue becomes less responsive to a high protectionist agenda, IP protectionists shift to another in search of a more hospitable venue. . . .⁹

Sell describes how those seeking ever increasing intellectual property rights shifted forum from the World Intellectual Property Organisation (WIPO) to the World Trade Organisation (WTO) and then back to WIPO¹⁰, and then to bi-lateral trade agreements, and the multiple other fora.

A. *The ACTA Process*

ACTA is being negotiated by trade representatives from the United States, Australia, Canada, the European Commission, Japan, Mexico, Morocco, New Zealand, Singapore, and South Korea. Official statements by negotiators such as the European Trade Commission claim that ACTA “does not purport to create new intellectual property rights but to create improved international standards as to how to act against large-scale infringements of IPR”¹¹ Despite this claim, ACTA provisions stipulate penalties for non-commercial infringement, impose liability on a wide range

⁹ *Id.* at 5.

¹⁰ *Id.* (“Once the access to medicines coalition of developing countries and NGOs mobilized in the WTO, the IP maximalists renewed their earlier WIPO deliberations on a Substantive Patent Law Treaty (SPLT) in an effort to secure IP protection that went beyond TRIPS. However, the mobilized medicines coalition paid attention to WIPO and tried to counter this quest with a Development Agenda for WIPO. The ensuing stalemate at WIPO over the SPLT led the IP maximalists to pursue other avenues, including continued bilateral and regional trade and investment treaties marked by TRIPS-Plus provisions as well as this new pluri-lateral effort behind the IP enforcement agenda. Industry has been relentless pursuing its IP agenda and circumventing developing country and NGO opposition, favoring non-transparent forums of ‘like-minded’ actors.”)

¹¹ European Commission Trade Office, *Anti-Counterfeiting Trade Agreement (ACTA) Fact Sheet* (November 2008), available at http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf [hereinafter *ACTA Fact Sheet*].

of third parties, create new categories of rights, and effectively eliminate exceptions and limitations granted by TRIPS. ACTA is sometimes presented as a tough but practical means by some states to secure their trade interests in economically difficult times. The reality is more complex:

The main actors in the ACTA process are “nodal actors” or networks of state and private sector actors who coordinate their positions and enroll nodal actors to help the cause. These are not single issue coalitions of states, but rather a *mélange* of private and public sector actors who share compatible goals and continue to coordinate their negotiating positions over time and across forums.¹²

ACTA is being created outside all of the existing multinational organisations and is intended to create a new international organization. Once the provisions have been settled, it is intended that they will be applied to developing countries, especially emerging economies. According to the European Commission Trade Office: “[t]he ultimate objective is that large emerging economies, where IPR enforcement could be improved, such as China or Russia, will sign up to the global pact.”¹³ Although official notification of a process that led to ACTA was first given in 2007, it was only on 21 April 2010 that an official draft of ACTA was made public, and then only after widespread protest and leaking of previous drafts.¹⁴

B. ACTA Provisions

Any discussion of provisions of ACTA, or putative provisions suffers from the secrecy of the process. At the time of writing only three public drafts have been released and two of those have been redacted. The third, distributed in October 2010, purported to require no further negotiations but is indeterminate in key respects.

Even though negotiations have apparently concluded in the eleventh “final” round the text released from that round is labeled “Predecisional/Deliberative.” Further deliberations are remains hidden from public

¹² Sell, *supra* note 8, at 5–6. Sell derives the term “nodal actors” from Peter Drahos, *Four Lessons for Developing Countries from the Trade Negotiations over access to Medicines*, 28 LIVERPOOL L. REV. 11, 35 (2007).

¹³ *ACTA Fact Sheet*, *supra* note 11.

¹⁴ The Program on Information Justice and Intellectual Property (PIJIP) at the American University Washington College of Law provides a webpage that hosts various leaked and released versions of the drafting text. See <https://sites.google.com/site/iipenforcement/acta>.

scrutiny. It is therefore the potential rupture zone around each provision rather than the precise wording of provisions which requires attention. The secretive process and textual indeterminacy may still result in the re-writing of the provisions or the (re) introduction of other more onerous provisions. In addition, as the interception of medicines by the Dutch customs authorities discussed later in this article shows, the nuances of legislative drafting are disregarded when government officials act at the behest of alleged rights holders.

The first chapter of the text sets out initial provisions and definitions. Several key definitions have been introduced only in the October 2010 version of the text.¹⁵ The second chapter sets out provisions which require changes to national laws. The second section of the second chapter which is on civil enforcement binds states to grant peculiar categories of civil penalty to claimants that consists of awards for unproven loss, entitled “pre-established” and “special” damages.¹⁶ The same article requires a presumption in respect of damages for copyright works. One such presumption is that damages presumed to be equal to an amount calculated by multiplying the profit that the plaintiff would earn on authorized copies by the number of unauthorized copies. The presumption requires the logically fallacious conclusion that every infringing copy distributed is equivalent to a lost sale. The conclusion is false because the infringing copy would not necessarily be sold by a guilty defendant at the same price as the plaintiff. The defendant would sell for less than the plaintiff's price so as to make sales to those for whom the plaintiff's price is too high, therefore sales to persons who wouldn't or couldn't buy at plaintiff's price are not sales lost by the plaintiff due to the defendant's actions.¹⁷ In this section ACTA seeks to overturn the basic economic principle that as prices rise demand decreases by fiat.

The section also requires courts to grant injunctions without hearing the other party in certain circumstances¹⁸ and to require alleged infringer's to give information about other parties without allegations of infringement having first been proved.¹⁹ These procedural requirements disregard the

¹⁵ For the first time in the ACTA process “counterfeit trademark goods” and “pirated copyright goods” are defined in the text.

¹⁶ Anti-Counterfeiting Trade Agreement Consolidated Text: Oct. 2, 2010, Ch. 2, Art. 2 (3), PIJIP IP ENFORCEMENT DATABASE, <http://sites.google.com/site/iipenforcement/acta> (follow “Official Text - October 2, 2010” hyperlink) [hereinafter ACTA Text – October 2010].

¹⁷ *States v. Dove*, _ F.Supp.2d _, 2008 WL 4829881 (W.D. Va., Nov. 7, 2008) (“It is a basic principle of economics that as price increases, demand decreases. Customers who download music and movies for free would not necessarily spend money to acquire the same product.”).

¹⁸ ACTA Text – October 2010, *supra* note 16, ch. 2, § 2, art. 2.4.

¹⁹ *Id.* ch. 2, § 2, art. 2.5.

competence of courts to regulate issues of their own procedure, especially the granting of injunctions, in common law countries. Interference in the constitutional separation of powers is generally regarded as well beyond the ambit of trade agreements.

The third section of chapter two, dealing with so-called border measures, was designated in previous version of the agreement as applying to all the rights listed in the TRIPS agreement; trademarks, patents, copyrights, data protection, integrated circuit protections, trade secrets and geographical indications: “For the purposes of this section, ‘goods infringing an intellectual property right’ means goods infringing any of the intellectual property rights covered by TRIPS.” In an apparent response to widely raised concerns about access to medicines, the October consolidated text states in a footnote “For the purpose of this Agreement, Parties agree that patents do not fall within the scope of this Section.”

Customs authorities are mandated to seize goods suspected of being infringing goods. Customs officials are therefore granted quasi-judicial powers to decide complex matters of intellectual property law which they are ill suited to exercise. Customs officials are also required to give detailed information about goods in transit to rights holders. Confidential commercial information, usually disclosed to customs officials for taxation and excise purposes will be disclosed to commercial competitors who purport to be “rights holders” either prior to or after seizure. Customs officials are also to destroy goods without a judicial hearing.

Border measures apply to the novel category of “counterfeit trademark goods,” defined as “any goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set out in Section 2, 3, 4 and 5 of Chapter 2 are invoked.” Since border measures apply to goods in transit this effectively grants trademark holders a new right, the right to prevent the transit of goods through a country in which they are not offered for sale. The consequence of this is to substantially change trademark law in most jurisdictions that require that goods be offered by way of trade in the jurisdiction, and that usually reserve penalties, such as the forfeiture and destruction of goods to courts, and then often only when intention is proved.

Section 4 entitled “Criminal Enforcement” requires imprisonment as a possible sentence for infringement. The fifth section deals with what it terms the “digital environment” and requires laws that require service providers to remove allegedly infringing content on notice from purported

rights holders.²⁰ Service providers are also required to provide information about third parties, including commercially confidential and private and personal information, to purported rights holders alleging infringement. The section makes use of an ambivalent term, “adequate legal protection and effective legal remedies,” which leaves considerable for proponents of the enforcement agenda to insist that these include criminal sanctions.

The third chapter entitled 'Enforcement Practices' requires states to commit resources to create specialized expertise on intellectual property enforcement, and to convince their populations of the importance of intellectual property as currently configured. States would thus enter into mutually binding obligations to use state resources to create national political economies dedicated to maintaining the status quo to be established by ACTA, limiting their national sovereignty to adapt intellectual property law to changes in technology.

The fourth chapter places obligations for international co-operation, information sharing and capacity building in making ACTA operational on participating states. Participating states are required to dedicate resources to extending ACTA to other states in co-operation with the private actors whose interests ACTA serves.²¹ Chapter five creates a new multinational organization in all but name, consisting of a committee, which can control its own procedures, and sub-committees are which are empowered to involve non governmental bodies at will in their processes. The chapter creates a mandatory consultation procedure that purports to oust the operation of the World Trade Organization's Understanding on Rules and Procedures Governing the Settlement of Disputes. The sixth and final chapter sets out the procedure for the signature and entry into force of the

²⁰ The required notice and take down provisions are reminiscent of the United States Digital Millennium Copyright Act (DMCA).

²¹ ACTA Text – October 2010, *supra* note 16, ch. 4, art. 4.3 provides: "1. Each Party shall endeavor to provide, on request and on mutually agreed terms and conditions, assistance in capacity building and technical assistance in improving enforcement of intellectual property rights for Parties to this Agreement and, where appropriate, for prospective Parties to this Agreement. Such capacity building and technical assistance may cover such areas as:

- (a) enhancement of public awareness on intellectual property rights;
 - (b) development and implementation of national legislation related to enforcement of intellectual property rights;
 - (c) training of officials on enforcement of intellectual property rights; and
 - (d) coordinated operations conducted at the regional and multilateral levels.
2. For the purposes of paragraph 1, each Party shall endeavor to work closely with other Parties and, where appropriate, countries or separate customs territories not a Party to this Agreement.
3. Each Party may undertake the activities described in this Article in conjunction with relevant private sector or international organizations. Each Party shall strive to avoid unnecessary duplication of the activities described in this Article with respect to other

proposed treaty.

V. THE CONSTRUCTION OF COUNTERFEITING

The use of the term “piracy” in reference to copyright has historically taken place outside of legal discourse, in rhetorical efforts by interests groups seeking changes in the law or public perception. The term as applied to copyright has not had a clear legal meaning.²² Earlier texts of ACTA used the term in reference to some kind of infringement, without defining it. The appearance of a vague rhetorical term as a central term in a draft international instrument signals that the text is written entirely from the perspective of the interest group that uses the term, if not by that group. The term “piracy” is used in parallel with the term “counterfeit” in the enforcement agenda and the text of ACTA. The October consolidated text defines “pirated copyright goods” as “any goods that are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set out in Sections 2, 3, 4 and 5 of Chapter 2 are invoked.”

The procedures referred to in the definition refer to obligations to provide injunctions including those given without hearing the defendant, damages and the destruction of property without compensation, and requiring third parties to furnish information.

“Counterfeit” has historically borne a number of legal meanings, one of which is indicating large scale production and sale of goods that bear an intentionally deceptive resemblance to trademarked goods, while others relate to the integrity of state issued currency. As the East African experience recounted shows, the term is being used in the pursuance of the enforcement agenda not only to refer to goods subject to copyright, patents and other intellectual property rights, but also to constitute otherwise non-infringing conduct as an infringement, in some cases criminal infringement. The term “counterfeit trademark goods” is defined in the October consolidated text of ACTA;²³ however, the term “counterfeit” is not.

international efforts.”

²² PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 28 (2002); ANTHEA WORSALL & ANDREW CLARK, ANTI-COUNTERFEITING: A PRACTICAL GUIDE 1 (1998) 1; Debora Halbert, *Intellectual Property Piracy: The Narrative Construction of Deviance*, 10 Int’l J. for the Semiotics of Law 55 (1997).

²³ ACTA Text – October 2010, *supra* note 16 (“[C]ounterfeit trademark goods means any

The use of “counterfeit” in the title of ACTA raises doubt whether the term is intended to refer only to trademarked goods or to goods subject to patents, and other forms of intellectual property, especially since the agreement is according to the October consolidated text intended to apply to a wide variety of forms of intellectual property. “Counterfeit” as used in the title and preamble is invested with a vague but ominous meaning in order to homogenize a heterogeneous set of regulations and practices, which in turn are the implementations of objectives of the network of private and state actors who have constructed the enforcement agenda.

The enforcement agenda appears to have been precipitated by the adoption by WIPO of an agenda focusing on development.²⁴ The rights language employed by the access to medicines and access to knowledge movements rendered the putative technocratic language of “minimum standards,” which had previously been deployed to maximize intellectual property rights, less effective. The terms “counterfeiting” and “enforcement” were therefore mobilised to invoke the language of security in an era in which democratic governments in developed countries have exhibited a tendency to allow security to trump human rights.

VI. THREATENED EFFECTS OF ACTA ON DEVELOPING COUNTRIES

A. *Negating Multinational Development*

The immediate effect of ACTA, even before pressure is brought to bear on developing countries, is the exclusion of most developing countries from international decision making. It is thus a means of circumventing the processes of WIPO and WTO. India raised this concern in a letter to the WTO: “Another systemic concern is that IPR negotiations in RTAs and plurilateral processes like ACTA completely bypass the existing

goods, including packaging, bearing without authorization a trademark that is identical to the trademark validly registered in respect of such goods, or that cannot be distinguished in its essential aspects from such a trademark, and that thereby infringes the rights of the owner of the trademark in question under the law of the country in which the procedures set out in Section 2, 3, 4 and 5 of Chapter 2 are invoked.”)

²⁴ Two weeks after WIPO adopted the Development Agenda, United States Trade Representative (USTR) Susan Schwab announced that USTR would seek to negotiate ACTA in order to “set a new, higher benchmark for enforcement that countries can join on a voluntary basis.” Press Release, Office of the United States Trade Representative, Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes (Oct. 23, 2007), available at <http://www.ustr.gov/ambassador-schwab-announces-us-will-see-new-trade-agreement-fight-fakes>; Japan and the European Union made a similar announcement. See Ermias Tekeste Biadgleng & Viviana Muñoz Tellez, *The Changing Structure and Governance of Intellectual Property Enforcement* 25 (South Centre Research Paper No. 15, Jan. 2008).

multilateral processes.”²⁵ Because WIPO is a United Nations organization, it is duty bound to pursue development. One consequence of the abandonment of their commitment to multinational decision making is an effective abandonment of commitments to pursue the United Nations Millennium Development Goals adopted by the United Nations General Assembly. Response by the leading emerging economies such as India and China²⁶ cannot be characterised as merely representing national trade interests that happen to compete with those of the negotiating countries. Instead, countries with emerging economies have many of the world’s poorest people, who will be directly impacted by ACTA, living in them. For example, India, the world’s most populous democracy, has some 456 million people living below the poverty line.²⁷

C. Limiting Access to Medicine

ACTA threatens access to medicines through the indeterminacy of the terms “counterfeit” and “enforcement.” Similarly problematic are provisions that require injunctions against a broad class of actors including “a third party over whom the relevant judicial authority exercises jurisdiction, to prevent infringing goods from entering into the channels of commerce” and requirements that customs officials intercept goods in transit, applying the intellectual property law of the transit country. In the current draft of the text, patents are excluded only from Section 3 of Chapter 2, which concerns border measures. The exclusion operates through a footnote, raising the question why it is not firmly placed in the text. What is the status of the footnote intended to be? The wording of the footnote itself requires attention: “For the purpose of this Agreement, Parties agree that patents do not fall within the scope of this Section.” Why this circumlocutory language? Why not simply state that patents do not fall within the scope of the section? The wording suggest that parties may enter into other agreements in terms of which the section may apply to patents, enabling developed countries to require developing countries to apply the provisions of the section to patents in bilateral agreements.

Even if pharmaceutical patents are ultimately excluded from these provisions (an exclusion that is not guaranteed given the lack of accountability of the negotiators to elected lawmakers), trademark and

²⁵ India's Intervention on “TRIPS plus IPR Enforcement” as delivered at the WTO TRIPS Council (Jun. 9, 2010), *available at* <http://keionline.org/node/864>.

²⁶ *Id.*; Proposal by China to WTO TRIPS Council (Jun 8–9, 2010), *available at* <http://keionline.org/node/883>.

²⁷ World Bank, New Global Poverty Estimates—What It Means for India, <http://go.worldbank.org/51QB3OCFU0>.

copyright claims can be used to block generic medicines.

For example, earlier this year German customs officials seized and held a shipment of the generic drug Amoxicillin which was being shipped through Germany to a least developed country. The drugs were held for four weeks apparently because German customs officials were confused by the alleged similarity of the generic name Amoxicillin with the GlaxoSmithKlein brand Amoxil.²⁸ The incident usefully highlights the negative consequences for global health when customs authorities are empowered and required to engage in determinations of intellectual property rights in respect of goods in transit.

How these provisions and subsequent developments will affect access to medicines can be seen through two instances of the enforcement agenda in the developing world: the East African experience of new counterfeit legislation, and the Dutch seizure of generic drugs in transit. The East African countries of Tanzania, Kenya and Uganda rely on generic drugs.²⁹ Efforts by a group claiming a World Health Organisation mandate and the European Union have resulted in “anti-counterfeiting” legislation in Tanzania and Kenya and a legislative process in Uganda. The International Medical Product Anti-Counterfeiting Taskforce (IMPACT) is described by the World Health Organisation secretariat as “a partnership comprised of all the major anti-counterfeiting players, including: international organizations, non-governmental organizations, enforcement agencies, pharmaceutical manufacturers associations and drug and regulatory authorities.”³⁰ Historically, counterfeiting has referred to an intentional violation of exclusive trademark rights on a commercial scale. However, in East Africa, legislation or draft legislation defines counterfeiting as infringement, including unintentional infringement, of not only trademark, but also other intellectual property rights including copyright and patent.³¹ The Kenyan legislation defines goods as “counterfeit” if they infringe an intellectual property right “in Kenya or elsewhere.” The consequence is that even if a trademark or patent is not registered in Kenya goods which

²⁸ “European Generic Drug Seizures Take Centre Stage at TRIPS Council Meeting,” INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (Jun. 10, 2009), <http://ictsd.org/i/news/bridgesweekly/48330/>.

²⁹ Wambi Michael, *EU Supports Law Threatening Access to Medicines*, INTERPRESS SERVICE (Mar. 15, 2010), <http://ipsnews.net/news.asp?idnews=50661> (“The European Union (EU) is funding the drafting of Uganda’s controversial Counterfeit Goods Bill, a proposed law that has caused an outcry as it threatens access to life-saving generic medicines in this low income East African country. Some 90 percent of medicines used in Uganda’s health-care system are imported, of which about 93 percent are generics.”).

³⁰ <http://www.who.int/impact/about/en/>.

³¹ Johanna von Braum & Peter Munyi, *New Enforcement Mechanisms Challenge the Legality of Generics in the Name of Public Health: The Emergence of Anti-Counterfeiting Legislation in Africa*, 18 AFR. J. OF COMP. INT’L L. 238 (2010).

allegedly infringe such a right elsewhere in the world may be subject to an injunction or seizure. This represents a marked departure from the general rule of territoriality for copyright, trademarks and patents that they have effect only within the jurisdiction that grants the right.

On 23 April 2010, the Kenyan Constitutional Court suspended the application of the Act with respect to medicines, as it bans import and manufacture of generic medicines, and so infringes constitutional rights.³² The campaign to pass the legislation involved claims that the legislation is necessary to prevent sub-standard medicines and other defective and even dangerous goods.³³ Typically, the legislation requires the state to devote resources to create agencies or change the emphasis and power of existing agencies, constitutes unknowing infringement as a criminal offense.

ACTA explicitly requires countries to enable customs officials to seize goods in transit at the behest of purported rights holders. The provision appears to be based on European regulations that have already been used to intercept generic medicines in transit.³⁴

European Council Regulations³⁵ have been used on a number of occasions by Dutch customs authorities to stop the transit of generic medicines lawfully produced in India, on to be lawfully imported into developing countries, that happen to be passing through European facilities. In transit, seizures negate the freedom of transit guaranteed by Article 5 of the Global Agreement on Tariffs and Trade (GATT).³⁶ The Doha Declaration allows countries to manufacture, export, and import generic medicine under compulsory licenses under certain circumstances. The Dutch customs authorities, apparently unable or unwilling to parse the complexities seized the medicines unlawfully.³⁷

Experiences of the enforcement agenda in practise show that aspects of that agenda embedded in ACTA, including the seizure of goods in transit and an expansive notion of “counterfeit” already impede access to

³² The Kenyan Constitutional Court found that the Act 13 of the 2008 Anti-Counterfeit Act arguably bans the importation of generic medicines and so infringes constitutional rights and thus issued an order suspending the application of the Act to medicines pending a full hearing on the issue.

³³ Von Braum & Munyi, *supra* note 31.

³⁴ Sean Flynn, ACTA and Access to Medicines, PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY BLOG (April 28, 2010, 2:57 PM), <http://www.wcl.american.edu/pijip/go/blog-post/acta-and-access-to-medicines>.

³⁵ Council Reg. 1383, 2003 O.J. (L 196) (EC).

³⁶ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

³⁷ TRIPS art. 31, read with paragraph 6 of the Doha declaration, allows member states to issue compulsory licenses to manufacture and import generic medicines in certain circumstances. Caroline Neube, *Enforcing Patent Rights against Goods in Transit: A New Threat to Trans-Border Trade in Generic Medicines*, 21 S. AFR. MERCANTILE L.J. 680

medicines for people in developing countries.

D. Limiting Access to Knowledge

The policy space for developing countries was massively reduced by TRIPS, which requires what it terms “minimum standards” of intellectual property protection. Developed countries have generally complied, as borne out by research findings from Africa that “in many cases, the African countries studied provide even greater protection than international legal norms require.”³⁸

TRIPS imposed obligations on developing countries to pass and adhere to laws based not on the conditions prevailing in developing countries, but rather according to the requirements of trade offices in developed countries acting on the behest of certain corporate constituencies.

Perhaps the most important revelation from this research is that copyright laws in all study countries comply with international copyright standards. In many cases, the African countries studied provide even greater protection than international legal norms require. Thus, the countries studied do not need advice or assistance in drafting legislation to bring levels of legal protection up to par. Simply put, Africa does not need stronger copyright laws. Realising this point is urgent, as some of the study countries—Kenya, Ghana, South Africa—are in the midst of revising, or planning revisions, to their copyright laws.³⁹

In these circumstances it is not surprising, then, if intellectual property legislation and practise diverge in developing countries. Research in Africa found that:

Access to learning materials is obtained primarily through activities that infringe copyright. When—and if—the enforcement of sanctions against copyright violation becomes a greater reality in the study countries, then, without mechanisms in place to promote and ensure non-infringing access to

(2009).

³⁸ Tobias Schonwetter et al., *Copyright and Education: Lessons on African Copyright and Access to Knowledge*, 10 AFR. J. INFO. & COMM. 37, 49–50 (2009/2010), available at <http://link.wits.ac.za/journal/AJIC10-Schonwetter.pdf>.

³⁹ *Id.*

knowledge, many learners, particularly at the tertiary level, will be in a precarious position and entire systems of education will be vulnerable.⁴⁰

ACTA will require precisely the enforcement that will cut off access to learning materials in such countries. While TRIPS constrains what exceptions and limitations to exclusive rights a country may make it does not set out minimum exceptions, instead rendering the entire process of writing exceptions and limitations far more complex than it was for developed countries, which were free to create whatever exceptions they deemed appropriate during their own development. Because of the speed with which developing countries are expected to create complex intellectual property legislation—legislation that has been developed over centuries by developed countries—most developing countries have not developed appropriate balancing provisions that enable access to knowledge. As a result, infringement in developing countries, even widespread infringement, is a symptom of a system imposed from outside, not suitable or even meaningful to many in developing world.⁴¹ Enforcement required by ACTA will deprive millions of people of their only viable access to knowledge.

E. The Effect of Border Measures on Developing Country Exports

Broadly drafted border measures will enable global corporations to exert pressure on developing country exporters, either barring them access to markets or extracting licensing fees from them. This is illustrated by a campaign by Monsanto to prevent the importation of soymeal from Argentina into Europe. Monsanto had obtained a so-called “gene patent” in Europe and the United States, which enabled it to exercise a monopoly over the supply of a particular type of soybean for agricultural use.⁴² Monsanto did not obtain a patent in Argentina, where crops of the bean were processed to produced soymeal. Some of the soymeal was imported into Europe. After a number of years without protest, Monsanto requested detainment of shipments of the soymeal into Denmark, the Netherlands,

⁴⁰ *Id.* at 50.

⁴¹ *Id.* (“Evidence from the study countries strongly suggests that the copyright environment can be improved by legal reforms that make copyright more flexible and suitable to local realities. Paradoxically, less restrictive laws could provide more effective protection, because they would enable entire segments of the population currently operating outside the copyright system altogether to comply with limited, realistic rules.”).

⁴² Carlos M Correa, *Enforcing Border Measures: Importation of GMO Soybean Meal from Argentina*, in *INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES* 81 (Li & Correa eds. 2009).

Spain, and United Kingdom and made damages claims against European importers of the meal. The claims were based on alleged violation of the patent because it was alleged that the patented DNA sequences would, or could, survive in the meal, even though the meal could not be used to grow a new crop of beans. None of cases brought by Monsanto have succeeded, with a number of setbacks by courts that have rejected the claim that the patent could prevent the importation of an end product of the patent. However, in the interim, the customs officials had seized and delayed the shipments and charged the importers detention fees.

Even if patents are excluded from the ACTA section on border measures, patent holders will be enabled to obtain the range of other remedies required by ACTA. As the actions of Monsanto in respect of Argentinian soy meal shows a strategic use of alleged intellectual property rights, even when those rights are not ultimately held by courts to apply to products further along a value chain to the object of the rights, can create considerable barriers to market entry by developing country farmers.

The campaign shows the potential of border measures for anti-competitive action. Intermediaries such as importers are likely to avoid such conflicts even if the law is not clear, switching to new sources, most likely those who have made strategic use of broad border measures. The result is for developing country farmers who lack the resources to fight sophisticated legal battles on foreign terrain is that they will lose markets for their goods, with potentially devastating effects on rural economies.

VII. CONCLUSION

The impact of ACTA on developing countries is intended to be far reaching, taking into its scope different types of intellectual property, including a range of measures including civil and criminal penalties, border and information gathering requirements, and mandatory government speech in favour of entrenched intellectual property regimes. As a consequence, it is not possible to fully describe the likely impact of ACTA. However, an examination of other instances of the enforcement agenda, of which ACTA is merely one vehicle, leaves little doubt about the consequences for the world's poor if ACTA proceeds.

Table 1 lists some of the likely impacts of ACTA on development:

Table 1. Likely Effects of ACTA on Development		
Short Term	Medium Term	Long Term
<ul style="list-style-type: none"> • Interception in transit of medicines • Anti-competitive blocking of exports to developed countries • Pressure to prevent infringement that gives access to learning materials • Pressure to adopt ACTA type measure pre signature of ACTA 	<ul style="list-style-type: none"> • Recruitment of some Developing Countries to support ACTA • Diversion of resources to “enforcement” • Decreased access to knowledge due to measures in force in developed countries • Disruptive restructuring of global trade routes • Decreased access to export markets/growing barriers to international trade • Recruitment of public and private security sector as new enforcement constituency 	<ul style="list-style-type: none"> • Undermining of fragile civil liberties and rule of law • Local political economies of rent seeking “enforcement” • Institutionalization of enforcement agenda • Loss of policy space remaining under TRIPS • Restrictions on access to medicines, access to learning materials and technology transfer cause development failure leading to political instability

Many of the effects cannot be avoided by developing countries simply by refusing to accede to a treaty resulting from the ACTA process but instead will directly from implementation of ACTA itself by the club of drafting countries. Some of the effects, such as undermining the WIPO Development Agenda and sidelining the World Intellectual Property Organisation and the World Trade Organisation, are already under way. The most immediate impact of ACTA is that the leadership of many of the world's largest democracies, including Brazil and India, are shut out of the ACTA process while it is being negotiated even though it will be imposed on them later. That the treaty is being negotiated largely in secret makes it difficult for developing countries with limited resources to track the process, and even harder to respond to it through diplomatic channels.

In the short term developing countries will continue to experience the effects of the enforcement through the interception of goods in transit including generic medicines. In the medium term developing countries would come under increasing trade pressure to adopt wide ranging “anti-counterfeiting” measures which threaten access to medicines and access to learning materials. In the long term developing countries would come under increasing pressure to agree to ACTA and in so doing devote scarce resources to furthering the commercial interests of a small but exceptionally powerful group of multinational corporations, depriving their poorest inhabitants of access to medicines and learning materials.