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# Conflicts at the Intersection of ACTA & Human Rights: How the Anti-Counterfeiting Trade Agreement violates the right to take part in cultural life

## **Keywords**

intellectual property, Universal Declaration of Human Rights, World Trade Organization

# Conflicts at the Intersection of ACTA & Human Rights: How the Anti-Counterfeiting Trade Agreement violates the right to take part in cultural life

by Robert Ellis\*

## I. INTRODUCTION

After several iterations, the closed-door sessions for the Anti-Counterfeiting Trade Agreement (“ACTA”) have reached a final agreement among the Nation States who intend to sign on.<sup>1</sup> On its surface, the agreement seeks to counter the increase in the global trade of counterfeit goods and pirated copyright-protected works.<sup>2</sup> Opponents of the agreement argue that the language of the text well exceeds the scope of counterfeit goods and copyright protections.<sup>3</sup> The agreement threatens to impose an international legal framework that may serve to violate fundamental human rights across various fields of discourse: by increasing the scope of enforcement through redefinition of accepted terminology, creating criminal penalties for actions currently not punishable as a criminal offense, and directly contravening principles of the United Nations’ General Comment No. 21 regarding primacy of the right to take part in cultural life.<sup>4</sup>

Legal scholars, public interest advocates, and promoters of free culture have helped carve out the field of intellectual property and human rights. Academics

like Laurence Helfer,<sup>5</sup> Susan Sell,<sup>6</sup> and Peter Yu<sup>7</sup> have provided frameworks for approaching the protection of intellectual property issues as a human right. Their various theories examine the many ways intellectual property rights and human rights can conflict and coexist, and what elements should retain primacy when conflicts occur. Other human rights advocates have promoted a balanced approach to intellectual property systems like copyright, providing protection to the author while ultimately allowing the public domain to thrive from an ever-replenishing catalog of works that enter the domain.<sup>8</sup> Finally, international agreements, like the World Trade Organization’s (“WTO’s”) Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) and the Universal Declaration of Human Rights (“UDHR”) have directly incorporated the role of intellectual property as a cultural right and an element of cultural life, designating it “essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.”<sup>9</sup>

The latest draft of ACTA, released in December 2010, is touted as a final agreement among the parties.<sup>10</sup> The terms of ACTA violate many of the terms these parties are obligated to uphold in other international agreements. In particular, a State’s strict adherence to ACTA violates its obligation to respect, protect, and fulfill the universal right to take part in cultural life, as defined in the UN’s General Comment

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1. *Joint Statement on the Anti-Counterfeiting Trade Agreement (ACTA) from all the negotiating partners of the agreement*. European Commission, Press Release, (Nov. 15, 2010) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1504&format=HTML&aged=0&language=EN&guiLanguage=en> [hereinafter Joint Statement on ACTA].

2. *Anti-Counterfeiting Trade Agreement*, European Commission, (Dec. 3, 2010). [http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc\\_147079.pdf](http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf) [hereinafter ACTA].

3. On September 9, 2010, 377 members of the European Parliament adopted *Written Declaration 12*, which demanded greater transparency and stated that ACTA “should not force limitations upon judicial due process or weaken fundamental rights such as freedom of expression and the right to privacy.” *European Parliament vs. ACTA: Rejection is the Only Option* (Sept. 8, 2010) [http://www.laquadrature.net/en/european-parliament-vs-acta-rejection-is-the-only-option#footnote3\\_sz2kd8y](http://www.laquadrature.net/en/european-parliament-vs-acta-rejection-is-the-only-option#footnote3_sz2kd8y).

4. ACTA, *supra* note 2, at 13.

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5. Laurence Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 DAVIS L. REV. 971 (2007).

6. Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Privacy Enforcement Efforts: The State of Play*, IQsensato Occasional No. 1, Geneva (2008).

7. Peter Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 DAVIS L. REV. 1039 (2007).

8. World Intellectual Property Organization Copyright Treaty, S. Treaty Doc. No. 105-17 (1997); 36 ILM 65(1997).

9. U.N. ECON & SOC. Council [ECOSOC], *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art 15, Para.1(a) of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/21 (Nov. 20, 2009) [hereinafter General Comment No. 21].

10. Joint Statement on ACTA, *supra* note 2.

No. 21. ACTA's heavy-handed approach exposes individuals to unfair and repressive intellectual property enforcement measures. State parties to the agreement must amend their national laws and regulations, and disregard elements of ACTA altogether, in order to comply with existing obligations and provide adequate and balanced intellectual property support and protection.

This Article begins by defining the right to take part in cultural life as determined by the UDHR and the UN's General Comment No. 21. It then looks at some of the common reasons why conflicts arise where intellectual property rights and human rights intersect. What follows is an examination of the obligations imported upon member nations to respect, protect, and fulfill human rights. After providing a history of the creation of ACTA, this Article will then examine three areas in which parties to ACTA will be required to amend national regulations while disregarding certain provisions within ACTA in order to remain in compliance with the UDHR.

First, the Article will focus on how ACTA's expansive scope violates the State's "obligation to respect."<sup>11</sup> ACTA's expansive scope threatens to undermine existing multilateral processes provided by the WTO and the World Intellectual Property Organization ("WIPO"). For example, ACTA reinterprets the definition of "commercial scale" to mean "any activity carried out for a direct or indirect economic or commercial advantage,"<sup>12</sup> while the WTO determined that the definition meant a particular level of activity.<sup>13</sup> The ramification being that the redefinition of this term greatly increases what potentially can be enforced against. States have an obligation to respect one's right to take part in culture.<sup>14</sup> This obligation requires that appropriate laws and policies be designed to expand access to knowledge and opportunities for participation, emphasizing the participatory dimension of all people.<sup>15</sup> State

parties that adopt ACTA must also implement other regulations that define the primacy of terms and definitions that must be applied to allow a balancing of enforcement measures with already existing national protection guidelines.

Next, the Article will examine how ACTA's criminal enforcement measures violate a State's "obligation to protect."<sup>16</sup> ACTA's criminal measures go well beyond existing regulations of parties to the agreement. In examining the differences between ACTA's criminal impositions and the existing penalties imposed by parties like the European Union ("EU"), the case will be made that the recommended enforcement measures greatly exceed those that currently exist. These excessive enforcement measures have the potential to directly affect individuals' access to knowledge and participation in culture. Only by amending existing national laws and disregarding provisions within ACTA can the member States uphold their obligation to protect human rights by taking steps to prevent third parties from interfering with the right of everyone to take part in cultural life.

Finally, this Article examines how States uphold their "obligation to fulfill"<sup>17</sup> the right to take part in cultural life by defining the primacy of rights where human rights and intellectual property rights collide. ACTA is all about enforcement, with little balance provided to protect the right of the individual to take part in cultural life. States that adopt ACTA and are obligated by the UDHR to fulfill the right to take part in cultural life must require that human rights attributes take precedence over other protections offered under ACTA's intellectual property system. This includes the protection of non-human-rights attributes of intellectual property rights—meaning that in areas where human rights and intellectual property intersect and conflict, the States must uphold the primacy of human rights.

This Article concludes having shown that parties to ACTA must undertake further local legislative measures to ensure they remain in compliance with existing international treaties and agreements, and at the same time must flatly reject certain ACTA provisions. Neglecting to do so and incorporating ACTA without such counter-measures will result in a direct violation of the UDHR and the States obligation to protect, respect, and fulfill the individual's right to take part in cultural life.

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11. General Comment No. 21, *supra* note 9, at para 48.

12. ACTA, *supra* note 2, at 13.

13. The WTO Dispute Settlement Body adopted this determination based on a report addressing claims against China brought by the United States for violating the TRIPS agreement. The report concluded that "commercial scale" activity implies a certain size threshold and not a qualitative assessment of the purpose of the activity. See *Report of the Panel, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, para. 7.577, WT/DS362/R (Jan. 26, 2009), [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm).

14. General Comment No. 21, *supra* note 9, at para 4.

15. International Covenant on Economic, Social and Cultural Rights, Article 15.4 (1976) [hereinafter ICESCR].

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16. General Comment No. 21, *supra* note 9, at para 48.

17. *Id.*

## II. HUMAN RIGHTS AND INTELLECTUAL PROPERTY FRAMEWORKS

The UN's General Comment No. 21 provides the framework for understanding the fundamental right of everyone to take part in cultural life. It describes cultural life as "the interactive process whereby individuals and communities...give expression to the culture of humanity."<sup>18</sup> This process includes everything from the creation of new forms of expression through innovation and authorship, to the consumption and enjoyment of those forms of expression.<sup>19</sup> This human rights framework differs markedly from the rules and regulations of intellectual property. Intellectual property focuses on the rights of the author and on the economic interests in intellectual creations with the protection of private property.<sup>20</sup> The framework of human rights, however, attributes protection both to an author's moral and material interest,<sup>21</sup> as well as to all individuals' right to access and participate in culture. Article 15 of the ICESCR states that it is the right of everyone to "take part in cultural life," "enjoy the benefits of scientific progress and its applications," and "benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author."<sup>22</sup> Though listed separately, these three elements relate to one another,<sup>23</sup> providing an even and balanced protection for cultural authors to create and innovate and for individuals to participate in that cultural innovation through access to cultural goods.

## III. THE RIGHT TO TAKE PART IN CULTURAL LIFE

The right to take part in cultural life is comprised of three main components, the right to participate in, have access to, and be able to contribute to cultural life.<sup>24</sup> To "participate in cultural life" requires that individuals are free from constrictions that prevent interaction with culture—whether as a creator

or consumer, as an individual or collectively.<sup>25</sup> Access to cultural life requires that individuals possess a means of engaging with the cultural tools and information that will allow for both creation and consumption.<sup>26</sup> Finally, being able to contribute to cultural life requires that individuals be granted the means to build upon and extend the limits of cultural goods, whether through innovation as a new creator, or by expanding the boundaries of what is possible through consumption.<sup>27</sup>

## IV. AT THE CROSSROADS OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY

Cultural life may take many forms. It includes artifacts of popular culture, both high and low forms of artistic expression, traditional culture and knowledge, and digital culture.<sup>28</sup> It is at the nexus of digital culture where the human rights and intellectual frameworks often collide. The understanding of intellectual property within a human rights framework, and vice versa, is a relatively new development. There is a difficulty when attempting to combine the two frameworks, and several factors lead to an impasse that often arises between human rights advocates and proponents of intellectual property law.

First, the two disciplines consist of a vastly different vocabulary and philosophical approach for describing and understanding each associated framework.<sup>29</sup> Intellectual property advocates use utilitarianism and economic theories to evaluate the benefits and drawbacks attributable to those who create intellectual property and those who consume it.<sup>30</sup> Human rights advocates, on the other hand, discern between the duties of State parties to respect and promote inalienable individual freedoms outside of solely strict economic constructs.<sup>31</sup>

Second, parties on both sides feel threatened by the rhetoric of the other, with a sense that the other is invading its territory in an attempt to usurp the fundamental tenets it upholds.<sup>32</sup> For example, the intellectual property community casts a wary eye upon human rights requests to "respect, protect, and fulfill"

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18. General Comment No. 21, *supra* note 9, at para 12.

19. More specifically, the Comment defines the concept of culture as "encompass[ing]... ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology..." See General Comment No. 21, *supra* note 9, at para 13.

20. Yu, *supra* note 7, at 1084.

21. *Id.* at 1080.

22. ICESCR, *supra* note 15, at Article 15.

23. Lea Shaver & Caterina Sganga, *The Right to Take Part in Cultural Life: Copyright and Human Rights*. 27 WISCONSIN INT'L L. J. 637, 641 (2009).

24. General Comment No. 21, *supra* note 9.

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25. *Id.*, at para 15(a).

26. *Id.*, at para 15(b).

27. *Id.*, at para 15(c).

28. Shaver & Sagna, *supra* note 23, at 644.

29. LAURENCE HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 11 (2010).

30. *Id.*

31. *Id.*

32. *Id.*



fundamental human rights because such rhetoric could easily be exacerbated in such a way as to interfere with free markets and global intellectual property regimes.<sup>33</sup> On the other hand, the human rights community fears that intellectual property advocates argue protection to an extreme, making elements of intellectual property protection—like copyrights and trademarks—human rights themselves in an effort to maximize profits and protections.<sup>34</sup>

Finally, the hodge-podge nature of international legislation, agreements, and obligations that bind State parties on varying degrees of issues and among varying overseeing bodies breeds conflict through the uncertainty of potential intellectual property and human rights outcomes.<sup>35</sup> As a result, intergovernmental bodies, like the WTO, are forced to decide controversial issues amid numerous laws, treaties, and norms that result in resolutions with varying degrees of success and consistency.<sup>36</sup> As human rights issues become more common within the realm of intellectual property disputes, these disparate and uncertain forums may lead towards further contentions at the crossroads of human rights and intellectual property.<sup>37</sup>

Despite the different reasons behind the arrival of conflicts, some standard must be in place to ensure that the fundamental elements of both frameworks are taken into account. Such a system would seek to balance the economic interests of the authors of intellectual property works, while understanding the importance of promoting and upholding fundamental human rights, including the right of the individual to participate in, access, and contribute to cultural life. When one framework expands too far into the realm of another, a decision of which framework will receive primacy will need to be determined.

## V. ACTA

### A. Developing ACTA: Enhanced IP Enforcement, Secrecy and Public Outrage

ACTA claims to seek to combat the proliferation of counterfeit and pirated goods through international cooperation of enforcement measures.<sup>38</sup> The agreement not only takes aim at physical

counterfeit goods, but also extends to intellectual property infringement in the digital environment.<sup>39</sup> It creates a new governing structure, outside of existing organizations like the United Nations, the WTO, and WIPO, which grants parties to the treaty the right to create rules and regulations supporting stricter enforcement measures than previously existed.<sup>40</sup> ACTA provides for both civil and criminal enforcement of intellectual property infringement that occurs on a commercial scale, but the agreement does a poor job of exactly defining the scope of commercial sale.<sup>41</sup>

The seeds of what would later become ACTA were initially sown at the July 2005 “Group of 8” meeting, where Japanese representatives suggested developing a new enforcement regime focused on battling piracy and counterfeiting.<sup>42</sup> The suggested enforcement regime would be stricter than enforcement frameworks that existed at the time, and the rationale behind the new regime sought to counter organized crime, quell threats against economic security, and remedy lost tax revenue.<sup>43</sup> Throughout 2006 and 2007, Canada, the European Union, and Switzerland took part in preliminary talks.<sup>44</sup> Official negotiations started in June 2008, adding Australia, Mexico, Morocco, New Zealand, the Republic of Korea, and Singapore to the list of member parties.<sup>45</sup> The negotiations reached “an agreement in principle” in October 2010,<sup>46</sup> with the final text of the agreement released in December 2010.<sup>47</sup>

ACTA’s development was most notably criticized because of its secrecy.<sup>48</sup> The negotiations

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39. *Id.* at 15.

40. *Id.* at 8.

41. MICHAEL BLAKENEY, INTERNATIONAL PROPOSALS FOR THE CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: INTERNATIONAL CONCERN WITH COUNTERFEITING AND PIRACY 15, 16 (2009).

42. Sell, *supra* note 6, at 6.

43. *Id.*

44. European Commission: Trade, *The Anti Counterfeiting Trade Agreement: Fact Sheet*. Revised January 2009, [http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc\\_142039.pdf](http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142039.pdf).

45. *Id.*

46. Ministry of Economy, Trade and Industry, *On the Agreement in Principle on the Anti-Counterfeiting Trade Agreement (ACTA)*. Press Release, (Oct. 2, 2010), [http://www.meti.go.jp/english/press/data/20101002\\_01.html](http://www.meti.go.jp/english/press/data/20101002_01.html)

47. ACTA, *supra* note 2.

48. See *Euro Parliament Threatens Court Action Over ACTA Secrecy*, THE REGISTER, (Mar. 2, 2010), [http://www.theregister.co.uk/2010/03/12/european\\_parliament\\_acta\\_resolution/](http://www.theregister.co.uk/2010/03/12/european_parliament_acta_resolution/). See also ACTA is Secret. *How Transparent are Other Global Norm Setting Exercises? (Sic)* KEI ONLINE (July, 21 2009), [http://www.keionline.org/misc-docs/4/attachment1\\_transparency\\_ustr.pdf](http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf).

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. ACTA, *supra* note 2, at 1.

took place behind closed doors. Members to the agreement, and anyone granted permission to even lay eyes upon drafts of the text, were bound to secrecy by a non-disclosure agreement.<sup>49</sup> The importance of this lack of transparency should be clearly stated. The members to this plurilateral agreement, which comprised of governmental and private interests, who were configuring a new, much stricter intellectual property enforcement regime to bind State parties and other members alike to enforcement measures that included enhanced criminal penalties, occurred without seeking any input or dialogue with public interest groups, neutral third parties, or the public at-large. This became a point of contention over time, with countries calling for greater transparency regarding the negotiations. Members of the European Parliament, for example, signed a declaration in September 2010 demanding the publication of the negotiation documents.<sup>50</sup> This is notable because the European Union was a member to the agreement, and yet the lack of transparency barred even the European Parliament from being privy to the details of ACTA negotiations.

Even though the negotiations took place secretly for nearly three years, drafts of the agreement were leaked to the public in 2008, 2009, and 2010.<sup>51</sup> Public interest advocates scoured over these drafts and riled against the harsher elements of the agreement. Of particular concern in an earlier draft of the agreement was a provision requiring that Internet Service Providers (“ISPs”) take a role in monitoring their networks for infringing content, and then take steps to ban users responsible for the infringing content from the networks.<sup>52</sup> Civil liberties advocates were up in arms

regarding this provision. They argued that having such a role hoisted upon ISPs would essentially vitiate all privacy and anonymity online and would functionally alter the very fabric of the Internet. This particular provision did not make it into the final text of the agreement. Whether this was due to public backlash or to the wishes of the party members is unknown due to the complete lack of transparency under which negotiations took place.

#### B. Looking Forward: The Crossroads of ACTA and Human Rights

With the release of the final ACTA text, there is much debate as to how ACTA applies within a human rights analysis. As can be expected, there is much consternation at the crossroads where ACTA and human rights intersect, and justifiably so. While ACTA seeks to provide better protection for the authors of intellectual property, it does so without seeking to attain the balance inherent in the intellectual property legal framework. To put it simply, ACTA provides all of the enforcement without any of the balancing of rights between authors and consumers. As a result, not only does ACTA weaken the core framework of intellectual property—namely copyright; it also charges headlong into the realm of the human rights framework, trampling on what the UN and members of the ICESCR have all agreed is the fundamental human right to take part in culture. The remainder of this Article will describe how State parties who sign onto the agreement will be in violation of the fundamental human right to take part in cultural life, and offer suggestions as to how to remedy such violations.

#### VI. STATE REQUIREMENTS REGARDING THE RIGHT TO TAKE PART IN CULTURAL LIFE

Each human right imposes three obligations upon State parties to *respect*, *protect*, and *fulfill* that right.<sup>53</sup> In regards to the right to take part in cultural life, each state is obligated to respect, protect, and fulfill every individual’s right to do so. The obligation to respect requires that the State avoid interfering with

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49. See Michael Geist, *ACTA Guide, Part Three: Transparency and ACTA Secrecy* (2009), [http://www.erikjosefsson.eu/sites/default/files/ACTA\\_confidentiality\\_statement.pdf](http://www.erikjosefsson.eu/sites/default/files/ACTA_confidentiality_statement.pdf) (describing the secrecy of the ACTA negotiations, as well as links to the confidentiality statement).

50. *MEPs Try Again to Force ACTA Transparency*, THE REGISTER, (Sept 10, 2010), [http://www.theregister.co.uk/2010/09/10/acta\\_meps/](http://www.theregister.co.uk/2010/09/10/acta_meps/)

51. See *Proposed US ACTA Multi-lateral Intellectual Property Trade Agreement (2007)* WIKILEAKS (May 22, 2008), [http://mirror.wikileaks.info/wiki/Proposed\\_US\\_ACTA\\_multi-lateral\\_intellectual\\_property\\_trade\\_agreement\\_\(2007\)/index.html](http://mirror.wikileaks.info/wiki/Proposed_US_ACTA_multi-lateral_intellectual_property_trade_agreement_(2007)/index.html); see also USTR (PDF), *The Anti-Counterfeiting Trade Agreement – Summary of Key Elements Under Discussion* (last visited April 22, 2011), <http://www.ipo.gov.uk/acta-summary.pdf>; *Anti-Counterfeiting Trade Agreement Informal Predecisional/Deliberative Draft: 1 July 2010* (July 1, 2010) (last visited April 8, 2011), [http://www.laquadrature.net/files/201001\\_acta.pdf](http://www.laquadrature.net/files/201001_acta.pdf); *ACTA Final Agreement* (Nov. 16, 2010) (last visited Jan. 22, 2011), <http://commondatastorage.googleapis.com/leaks/Anti-Counterfeiting%20Trade%20Agreement.pdf>.

52. *Anti-Counterfeiting Trade Agreement Consolidated Text PUBLIC Predecisional/Deliberative Draft: April 2010 Prepared for*

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*Public Release*, [http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc\\_146029.pdf](http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf)

53. U.N. ECON & SOC. Council [ECOSOC], *General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)*, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) at para 28. [hereinafter General Comment No. 17] (emphasis added).

the right of an individual to engage in taking part in cultural life. The obligation to protect requires that appropriate measures be taken to prevent third parties from interfering with others' access to take part in cultural life. The obligation to fulfill requires that States put into place programs and other beneficial measures to allow individuals to take part in cultural life.<sup>54</sup>

## VII. WHERE ACTA AND THE RIGHT TO TAKE PART IN CULTURAL LIFE COLLIDE

The December 2010 release of the final text of ACTA presents a problem to the 160 State parties who are also members to the ICESCR.<sup>55</sup> While the ICESCR obligates State parties to the Covenant to respect, protect, and fulfill the individual's right to take part in cultural life, ACTA runs directly counter to those obligations by allowing third parties to interfere with the individuals' access to take part in cultural life and by preventing State parties from enacting positive measures to allow individuals to take part in cultural life.

### A. ACTA Violates the States Party's Obligation to Respect the Right to Take Part in Cultural Life

Under Article 15 of the ICESCR, member nations are required to respect an individual's right to take part in cultural life. This means the State party must refrain from inappropriately limiting enjoyment of an individual's right to take part in cultural life.<sup>56</sup> This includes refraining from enacting legislation that serves to constrain that right.<sup>57</sup> The expansive scope and ill-defined terms of ACTA, however, do just that.

Article 23.1 of ACTA, entitled "Criminal Offences," states:

"Each Party shall provide for criminal procedures and penalties to be applied at least in case of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial

advantage."<sup>58</sup>

The final text of the agreement provides no further definition or specificity as to what "commercial scale" really means. As a result, the agreement essentially creates a non-existent limit regarding enforcement for alleged intellectual property infringement, whether by means of counterfeiting or copyright. This broad, non-definition exceeds the scope of what is reasonable, and theoretically may encompass a range of currently legal activities that allow individuals to take part in cultural life. For example, someone who downloads an image, song, or video from the Internet could arguably be said to have "gained a commercial advantage" by virtue of not having paid for the item. As a result, the State party has the ability to serve criminal penalties upon the individual. Such threats of enforcement, and even the existence of the possibility of such harsh measures, serve to inappropriately constrain the individual's right to take part in cultural life and interact with any content, whether infringing or not.

Member nations who are parties to both the ICESCR and ACTA are faced with a dilemma: how can they uphold the individual's fundamental right to take part in culture, while at the same time adhering to the heavy-handed enforcement measures espoused by ACTA?

International law and human rights scholar Laurence Helfer recommends distinguishing between the protective and restrictive dimensions of human rights in the intellectual property context.<sup>59</sup> The protective dimension requires that states focus on the rights of individuals and groups to enjoy the economic benefits of their creations.<sup>60</sup> The restrictive dimension, on the other hand, "refrains from bad faith and arbitrary interferences with intellectual property rights that the state itself has previously granted or recognized."<sup>61</sup>

As applied to ACTA and the ICESCR, Helfer further emphasizes the importance of process, transparency, and predictability.<sup>62</sup> Examining the process in which ACTA was written and achieving higher levels of transparency and predictability would go a long way towards achieving the balance of the

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54. *Id.*; see also Shaver & Sagna, *supra* note 23, at 652.

55. Status of ICESCR, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

56. General Comment No. 21, *supra* note 9 at para 48.

57. *Id.*

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58. ACTA, *supra* note 2, at 13.

59. HELFER & AUSTIN, *supra* note 29, at 17.

60. *Id.*

61. *Id.*

62. *Id.*



protective and restrictive dimensions.<sup>63</sup> Unfortunately, ACTA lacked a visible process from its beginning, and its vague terms and definitions provide little-to-no predictability as to how it may be applied. As a result, the member nations to the ICESCR should take a human rights primacy approach and honor the earlier treaty. Failure to do so will result in further conflict, whereby competing treaties and governmental bodies will continue to foment discord that has been exacerbated with the finalization of ACTA.

#### B. ACTA Violates the States Party's Obligation to Protect the Right to Take Part in Cultural Life

Under Article 15 of the ICESCR, the duty to protect requires that State members take steps to prevent third parties from interfering with an individual's right to take part in cultural life. This includes not only freedom from restrictive laws, but also from technological barriers.<sup>64</sup> The expansive scope of ACTA's criminalization measures serves as an overbroad interference by a third party preventing individuals from taking part in cultural life.

The approach towards criminalizing intellectual property infringement is not necessarily a new one, especially on a local level.<sup>65</sup> The attempted international harmonization of criminalizing intellectual property infringement, however, is notably disturbing. A 2006 report from the Max Planck Institute for Intellectual Property, Competition, and Tax Law recommended that attempts at enabling criminal prosecution for private individual stakeholders' interest should be rejected.<sup>66</sup> One primary reason for this is that such an approach does not work within democratic societies. In a democratic society, the State is the only entity with a monopoly on the use of force. Private parties, like those championing intellectual property interests and who have taken part in ACTA

negotiations,<sup>67</sup> should not be able to use criminal prosecution as a tool against infringement by other individuals.<sup>68</sup>

Placing the power of criminal enforcement within the purview of private parties to ACTA violates the ICESCR obligation to protect the individual's right to take part in cultural life. Instead, it allows third parties to directly and undemocratically interfere with that right through non-legitimate access to harsh criminal enforcement measures.

To prevent this violation of the State member's obligation to protect, parties to ACTA must again establish the primacy of the ICESCR. Only by recognizing ACTA as secondary to, and in violation of, the ICESCR can a member State properly assure that it is upholding its obligation to protect the individual's right to take part in cultural life.

#### C. ACTA Violates the States Party's Obligation to Fulfill the Right to Take Part in Cultural Life

Under Article 15 of the ICESCR, the obligation to fulfill the right to take part in cultural life requires that member States adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures. This may also include the promotion of educational, cultural, and informational policies that promote access to knowledge.<sup>69</sup> ACTA's requirements, especially in regards to the enforcement of the criminalization of intellectual property infringement,<sup>70</sup> would limit member States' ability to create better legislative solutions and business models that would assist in reaching the obligation to fulfill the right of every individual to take part in cultural life.

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67. Private industry involvement in counterfeit and intellectual property enforcement formation has occurred since 2004 at the first annual Global Congress on Combating Counterfeiting. Hosted by the World Customs Organization and Interpol in Geneva, the Congress was sponsored by an industry group representing, among others, Coca Cola, Daimler Chrysler, Pfizer, Proctor and Gamble, American Tobacco, Phillip Morris, Swiss Watch, Nike, and Cannon. See Aaron Shaw, *The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it)*, 2 KESTUDIES 1 (2008).

68. Hilty, *supra* note 66 ("[E]ven if criminal procedural law were equally applicable to all members..., democratically legitimized control would be lacking, as proprietors of IP rights do not hold a public office and are therefore not bound by internal directions issued by the prosecuting authority. The obligation of Member States to delegate functions within the conduct of criminal investigations to private parties in such a diffuse manner is therefore *incompatible* with the fundamental structure of democratic society.").

69. Shaver & Sagna, *supra* note 23, at 658–59.

70. ACTA, *supra* note 2, at 13.

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63. *Id.* at 16–18.

64. Shaver & Sagna, *supra* note 23, at 656–57.

65. See The Intellectual Property Enhanced Criminal Enforcement Act of 2007. H.R. 3155 (2007). See also European Parliament Amendment 10-124, *Amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property right*. [http://www.google.com/url?sa=t&source=web&cd=1&sqi=2&ved=0CByQFjAA&url=http%3A%2F%2Fwww.europarl.europa.eu%2Fmeetdocs%2F2004\\_2009%2Fdocuments%2Fam%2F646%2F646383%2F646383en.pdf&cei=c2k7TffrCcP3gAfusIXoCA&cusg=AFQjCNE TuRdAH5N6kZvO-USqbFQDI5WdSQ](http://www.google.com/url?sa=t&source=web&cd=1&sqi=2&ved=0CByQFjAA&url=http%3A%2F%2Fwww.europarl.europa.eu%2Fmeetdocs%2F2004_2009%2Fdocuments%2Fam%2F646%2F646383%2F646383en.pdf&cei=c2k7TffrCcP3gAfusIXoCA&cusg=AFQjCNE TuRdAH5N6kZvO-USqbFQDI5WdSQ).

66. Dr. Reto Hilty, *Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law to the proposal for a directive of the European Parliament and the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights*, 37 INT'L REV. OF I.P. & COMP. LAW 973 (2006).

ACTA requires that each party develop specialized expertise within its authorities to achieve the necessary levels of enforcement in the agreement.<sup>71</sup> Furthermore, it imports into local legal systems measures to enable enforcement that may run counter to existing legislation. For example, in a letter from Alberto Silva at Knowledge Ecology International to the Mexican President Felipe Calderon Hinojosa, Silva detailed the impact that ACTA's ex-officio actions may have on the country.<sup>72</sup> Ex-officio actions empower border officials with the ability to detain suspect goods on their own initiatives on the basis of intellectual property infringement without the need of a prior court order. In particular, Silva cited that should Mexico become a member to the agreement, the ex-officio actions would apply to Mexican authorities even without implementation of local law. It would ultimately create new and expanded ex-officio actions by custom, judicial, and criminal prosecutor authorities, which would then likely increase government spending to protect private interests. At the same time, these actions would in no way promote cultural education nor access to knowledge. Instead, as in the earlier examples, it would only serve to do the opposite. The harsh increased enforcement measures would stifle the adoption of new legislative matters addressing the member States' obligation, and would do nothing to educate and inspire other individuals to actively take part in cultural life.

As in the earlier examples, the intersection between ACTA and the right to fulfill must defer to the primacy of the human rights. Due to ACTA's closed-door development, complete lack of transparency, and unpredictability, there is little solution to be found in merging the competing needs of the two agreements. Instead, provisions within ACTA must be dismissed by the member States in favor of legislative initiatives that are not so heavy-handed, but instead balance the needs of the intellectual property creators and those who seek to enrich their lives through involvement in cultural life.

#### VIII. CONCLUSION

As this Article has demonstrated, conflicts arise where intellectual property and human rights intersect and collide. While the conflict can be due to varying

regime frameworks, differing vocabularies, or mistrust in the opposing viewpoint, in the instance of ACTA the conflict comes about because of the nature of the agreement. ACTA's years-long closed-door negotiations process, vague and ill-defined language, and hyper-strict enforcement techniques all serve to undermine any hopes of a consensus upon which ACTA and human rights may come to terms. Not only does the agreement threaten the delicate balance of intellectual property rights' fundamental tenets by vastly promoting enforcement with no advances in enriching the public domain of intellectual property goods, the agreement threatens to regress and subjugate the human rights framework. Normally, when conflicts of this nature occur, looking to the record of the negotiations and the elements of transparency allows for some common ground to be attained. In this instance, there is no record because of the closed-door negotiations. There is no transparency for the same reason. What remains is an overbearing agreement that seeks to blatantly place intellectual property rights above those of fundamental human rights.

What is needed in this instance is new local intellectual property measures that focus not only on enforcement, but also on the other side of the intellectual property coin—enriching the public commons (especially in regards to copyright). Such internationally-harmonized yet locally driven measures would take into account both the needs of the author and the needs of the individual. It would be one step closer to the point where human rights discourse and the intellectual property framework may find greater common ground.

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71. *Id.* at 18.

72. Letter to President Calderon, President, Mexico, from Mr. Alberto Cerda Silva, Research Associate, Knowledge Ecology International, (Aug. 10, 2010), [http://keionline.org/sites/default/files/Letter2Government\\_of\\_Mexico.pdf](http://keionline.org/sites/default/files/Letter2Government_of_Mexico.pdf).