

Discuss the international implications of the *Anti-Counterfeiting Trade Agreement* and critically analyze the process and proposals of the agreement in its current context.

I. Introduction

The growth of technology in the modern age and its unparalleled advance has rapidly altered the transfer of technology between countries around the world. At the core of this advance is the increasing proliferation of technological innovation and the precipitous development of digital systems which have catalyzed the rate of technology distribution across global borders. Evidently, as a corollary of this rapid technology transfer stems the overarching concern from intellectual property right ('IPR's') holders about the adequate level of enforcement and protection of intellectual property in the global economy. The access and value of such knowledge is particularly relevant in developing knowledge-based economies where 'expertise, innovation, quality and creativity are the main factors for success'.¹ In this regard and as the socioeconomic divide between the developed and developing world closes, the efficiency and effectiveness of existing judicial mechanisms has been questioned.²

The majority of such criticism stemmed from the Second *Global Congress on Combating Counterfeiting and Piracy* ('GCCP') 2005 in Lyon, France where Japan 'proposed for a new international treaty on counterfeiting and piracy'³ which was termed the *Treaty on Non-Proliferation of Counterfeits and Pirated Goods*.⁴ Japan's interest in raising the spectre of such an agreement originated from the then Prime Minister Junichiro Koizumi who aimed to

'[e]stablish Japan as a nation built on a platform of intellectual property ... and enhance measures such as speeding up patent examinations, reform of the justice system in the area of patents, and reinforced measures against counterfeit and pirated copies.'⁵

Such an aim spring-boarded Japan's policy considerations in the area and a new intellectual property framework was developed which led to the establishment of the Intellectual Property Strategy Headquarters.⁶ The aim of this Headquarters was to spearhead intellectual property development and protection in Japan and abroad given the country's heavy reliance on the global economic benefits of it.

¹ Australian Department of Foreign Affairs and Trade [hereinafter ADFAT], *ACTA: Summary of Key Elements Under Discussion*, http://www.dfat.gov.au/trade/acta/summary_of_discussions.html, Viewed 2nd September 2010.

² *The Lyon Declaration*, <http://www.ccapcongress.net/archives/Lyon/files/OutcomesStatement20051115.pdf>, Viewed 2nd September 2010.

³ *Ibid*, Pg 1.

⁴ *Ibid*.

⁵ Prime Minister Junichiro Koizumi, *General Policy Speech by Prime Minister Junichiro Koizumi to the 156th Session of the Diet*, January 31st 2003, <http://www.mofa.go.jp/announce/pm/koizumi/speech030131.html>, Viewed 2nd September 2010.

⁶ Peter Drahos, *The Global Governance of Knowledge: Patent Offices and their Clients*, Cambridge University Press, London, 2010, Pg 163.

Consequently, at the conclusion of Second GCCC conference, the attending party's agreed to *The Lyon Declaration*⁷ which essentially recognised that existing enforcement and protection provisions contained within the *Trade-Related Aspects of Intellectual Property Rights Agreement*⁸ were ineffective and that 'more effective legislation and enforcement'⁹ was needed. The Second GCC also requested an undertaking by the Organization for Economic Co-Operation and Development¹⁰ to assess the approximate cost of counterfeit and piracy in the global economy for future review. The proposal was not significantly considered¹¹ again until the Third GCCC in January 2007 in Geneva in which the conference's outcome statement provided the first indication that all major attending countries would consider Japan's proposal.¹²

In June 2007, the OECD provided a detailed report, *The Economic Impact of Counterfeiting and Piracy*,¹³ commissioned at the Second GCCC which was the first detailed economic impact study conducted in respect to counterfeiting and piracy. The report concluded that

'international trade in counterfeit and pirated products could have been up to USD \$200 billion in 2005 ... this total does not include domestically produced and consumed counterfeit and pirated products and the significant volume of pirated digital products being distributed via the Internet.'¹⁴

Evidently, while such extreme figures draw considerable attention, they must be taken into consideration with the broader global context and juxtaposed against those assumptions tabled in the OECD report which notably provided that the 'data has significant shortcomings'¹⁵ and 'the conclusions reached can only act as a crude indicator of the role of counterfeit and pirated products in international trade'.¹⁶ Furthermore, some commentators¹⁷ have suggested that such figures are inflated and do not account for price elasticity as 'multiplying produce price in the legitimate market by the estimated number of copies'¹⁸ simply assists the rationale for legislative modernization by the representative interested party

⁷ *The Lyon Declaration*, <http://www.ccapcongress.net/archives/Lyon/files/OutcomesStatement20051115.pdf>, Viewed 2nd September 2010.

⁸ *Agreement on Trade-Related Aspects of Intellectual Property Rights* [hereinafter TRIPS Agreement], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1197 (1994).

⁹ *Ibid* 7, Pg 2.

¹⁰ Organization for Economic Co-Operation and Development [hereinafter OECD], <http://www.oecd.org/>, Viewed 3rd September 2010.

¹¹ It is noted that Japan attempted to reintroduce the proposal at G8 in Gleneagles, 2005 but only successfully achieved a combined statement from parties dubbed *Reducing IPR Piracy And Counterfeiting Through More Effective Enforcement*, http://www.g7.utoronto.ca/summit/2005gleneagles/ipr_piracy.pdf, via Australian Department of Foreign Affairs and Trade, *An International Proposal for a Plurilateral Anti-Counterfeiting Trade Agreement (ACTA)*, <http://www.dfat.gov.au/trade/acta/discussion-paper.html>, Viewed 3rd September 2010.

¹² Global Congress on Combating Counterfeiting and Piracy, *Shared Challenges, Common Goals*, http://www.ccapcongress.net/archives/Geneva/Files/Congress%20Recommendations_Geneva%20Jan%202007.pdf, Viewed 3rd September 2010, Pg 3.

¹³ OECD, *The Economic Impact of Counterfeiting and Piracy*, <http://browse.oecdbookshop.org/oecd/pdfs/browseit/9208041E.PDF>, Viewed 3rd September 2010

¹⁴ *Ibid*, Pg 13.

¹⁵ *Ibid*, Pg 95.

¹⁶ *Ibid*.

¹⁷ S. Macdonald, T. Turpin, *Fair Copy? A look at the anti-counterfeiting lobby*, <http://www.dime-eu.org/files/active/0/MacdonaldTurpinPAPER.pdf>, Viewed 3rd September 2010.

¹⁸ *Ibid*, Pg. 17.

bias. Indeed, the rationale in this regard has been historically shown to conclude that

“... the more serious the counterfeiting problem is perceived to be, the more the dealer expects not only itself, but also the manufacturer and government to bear greater obligation for correcting the situation.”¹⁹

Consequently, after the release of the OECD June report, on 23rd October, 2007 the United States, Japan and the European Community publicized their intention²⁰ to undertake formal negotiations in respect to a new plurilateral legislative instrument – the *Anti-Counterfeiting Trade Agreement*.²¹ The United States provided that the primary justification for such an agreement was the fact that

‘Global counterfeiting and piracy steal billions of dollars from workers, artists and entrepreneurs each year and jeopardize the health and safety of citizens across the world.’²²

Indeed, the purported basis for the statement ‘health and safety of citizens across the world’²³ was the purported correlation²⁴ by the International Anti-Counterfeiting Coalition (‘IACC’) between counterfeit, piracy and terrorist organizations such that it provided evidence existed which suggested an

‘increasing influx of organized crime and terrorists into the lucrative under world of product counterfeiting and copyright piracy. These notorious organizations operate vast networks of counterfeit product distribution channels, and are often heavily involved in other criminal activity such as drug trafficking or money laundering.’²⁵

Of course, no quantifiable figure was placed on the level of ‘influx’ except to highlight that a risk existed. Importantly, the United States also provided that the supposed agreement would not involve any changes to the international obligations under the TRIPS Agreement but rather ‘the goal is to set a new, higher benchmark for enforcement that countries can join on a voluntary basis’.²⁶

¹⁹ Olsen, J. and Granzin, K, *Gaining retailers’ assistance in fighting counterfeiting: conceptualization and empirical test of a helping model*, Journal of Retailing, 1992, 68, 1, Pg 90-109.

²⁰ Office of the United States Trade Representative, *Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes*, <http://www.ustr.gov/ambassador-schwab-announces-us-will-see-new-trade-agreement-fight-fakes>, Viewed 6th September 2010.

²¹ Consolidated Text, *Anti-Counterfeiting Trade Agreement Final Deliberative Draft* [hereinafter ACTA Final], http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf, 2nd October 2010, Viewed 6th October 2010.

²² Ibid 20.

²³ Ibid.

²⁴ US Committee on the Judiciary – Subcommittee on Courts, The Internet and Intellectual Property, *International Copyright Piracy: A Growing Problem With Links To Organized Crime And Terrorism*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:85643.wais, Viewed 6th September 2010.

²⁵ Ibid.

²⁶ Ibid 20.

Evidently, the negotiating parties of ACTA did not believe that the World Trade Organizations ('WTO') TRIPS agreement has been satisfactory in protecting and enforcing IPR's. Part of the justification²⁷ for the creation of ACTA is the current lack of enforcement provisions contained within all World Intellectual Property Organization²⁸ ('WIPO') treaties including the Paris²⁹, Berne³⁰ and Rome³¹ Conventions. The most recent leaked copy of ACTA³² ('10th Round ACTA') from the Washington DC, United States 10th Round negotiations is significantly different to the final Deliberative ACTA Draft³³ ('Final ACTA') released at the conclusion of the Tokyo, Japan 11th Round negotiations on the 2nd October 2010 such that the final document has scaled back the preamble. This suggests that the major parties have succumbed to the demands of other negotiating parties to the agreement such that the Final ACTA preamble proposes

'that effective enforcement of intellectual property rights is critical to sustaining economic growth across all industries and globally and that the proliferation of counterfeit and pirated goods ... undermines legitimate trade and the sustainable development of the world economy, causes significant financial losses for right holders and for legitimate businesses, and in some cases, provides a source of revenue for organized crime and otherwise poses risks to the public.'³⁴

The utilization of 'enforcement of intellectual property rights' in the first line of the ACTA pre-ambule is formidable opening language in comparison to existing WIPO and WTO agreements. Such language elucidates a clear intention by the negotiating parties that ACTA will attain considerably stronger protection and enforcement over IPR's above any such existing regulatory mechanisms in the global IP environment. Further, it seemingly projects an ominous warning to non-negotiating countries of ACTA regarding the expected future standard of IPR protection.

²⁷ ADFAT, *Summary of Key Elements Under Discussion*, http://www.dfat.gov.au/trade/acta/agenda_tokyo.html, Viewed 8th September 2010.

²⁸ World Intellectual Property Organization, <http://www.wipo.int/portal/index.html.en>, Viewed 6th September 2010.

²⁹ *Paris Convention for the Protection of Industrial Property*, Mar. 20, 1883, revised at Stockholm July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305 [hereinafter 'Paris Convention'].

³⁰ *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, as last revised in Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter 'Berne Convention'].

³¹ *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter 'Rome Convention'].

³² August 2010 DC Round [hereinafter 10th Round ACTA], *Anti-Counterfeiting Trade Agreement*, http://keionline.org/sites/default/files/acta_aug25_dc.pdf, Viewed 8th September 2010.

³³ Consolidated Text [hereinafter Final ACTA], *Anti-Counterfeiting Trade Agreement Final Deliberative Draft*, http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf, 2nd October 2010, Viewed 6th October 2010.

³⁴ *Ibid*, Pg. 2.

Relevantly, from the period of October 2007 until September 2010 more than 10 rounds³⁵ of negotiations have taken place in respect to ACTA. The final 11th round negotiations concluded on 2nd October, 2010 and the proposed Final ACTA text was released with many provisions still yet to be finalized. The Tokyo 11th Round outcome statement provided rhetoric in this regard such that

‘Participants in the negotiations constructively resolved *nearly all substantive issues* ... (and) agreed to work expeditiously to *resolve the small number of outstanding issues*,’ the United States, Japan, the European Union and other participating countries said in a joint statement ... The *United States and the EU have been at odds* on one element of the pact: Europe's demand that it also include protection for its traditional food names like Parmesan cheese as well as for its fashion and car designs.’³⁶
[emphasis added]

Consequently, this paper intends to provide a holistic overview of the latest available ACTA draft release and the relevant implications such an agreement may have on existing global intellectual property regimes. It will provide a considered opinion on the procedural transparency of the process in which ACTA has been negotiated and will provide commentary on the implications of ACTA in the digital economy with a strong emphasis on the consequences for consumption and utility of resources over the Internet. It also considers the breadth of the criminal enforcement and protection provisions that the ACTA will impose when juxtaposed against existing provisions in TRIPS. It will conclude with an opinion on the balance between both the holders and users of intellectual property and whether ACTA should be ratified as a treaty around the world.³⁷

³⁵ ADFAT, *ACTA: Proposed agenda - 11th Round of Negotiations*, http://www.dfat.gov.au/trade/acta/agenda_tokyo.html, Viewed 8th September 2010.

³⁶ Reuters, *Joint Statement from all the negotiating parties to ACTA*, 2nd October 2010, <http://www.reuters.com/assets/print?aid=USTRE6910AO20101002>, Viewed 2nd October 2010.

³⁷ It is noted that the majority of this paper was compiled and researched prior to the final draft being released on 6th October 2010.

II. Rationale, Accountability and Transparency

The ACTA has been shrouded in secrecy and shielded from fundamental democratic legislative processes that all negotiating parties of ACTA would seemingly otherwise uphold.³⁸ The rationale for such secrecy when negotiations first began in October 2007 was entirely unclear and led to widespread concern in the international community regarding the lack of transparency.³⁹ This led to considerable speculation⁴⁰ about the content of ACTA and what the implications of the agreement potentially meant both for negotiating and non-negotiating countries broader populace. Many commentators⁴¹ subsequently concluded early that the fundamental problems with ACTA were a lack of transparency and accountability, undemocratic processes, a lack of representation, restricted public involvement and questionable reliance on data.⁴²

The lack of transparency was a position enforced on negotiating countries by the United States and was typified by the Electronic Frontier Foundations request under the *US Freedom of Information Act*⁴³ ('US FOIA') in early 2009 for information pertaining to ACTA which was subsequently rejected⁴⁴ on the grounds that ACTA documents contain 'information that is properly classified in the interest of national security pursuant to Executive Order 12958'. The US Executive Order 12,958⁴⁵ allows any material to constitute classified material when "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security".⁴⁶ The United States insisted that such a position be adopted by all parties to the ACTA throughout the entire negotiating process. Such an onus ultimately led to increased fragmentation by the conferring ACTA parties – particularly in the European Union – regarding the lack of transparency and public debate over ACTA. The increased focus on the lack of government transparency also helped to lead the European Parliament to pass a resolution dubbed the *Treaty on the Functioning of the European Union*⁴⁷ which detailed the need for increased transparency and accountability in government dealings.

Despite the passing of this supposed 'increased transparency' treaty in Europe, a subsequent public access request initiated by the Foundation for Free Information Infrastructure ('FFII') for detailed information regarding ACTA negotiations was subsequently rejected by the EU Council of Ministers on the grounds that 'the requested document falls within the sphere of

³⁸ The expected democratic values purported to exist in first-world countries such as United States, Japan, EU, England and Australia.

³⁹ Michael and Louise Blakeney, *Stealth legislation? Negotiating the Anti-Counterfeiting Trade Agreement*, Int T.L.R., Pg 91.

⁴⁰ Michael Geist, *The ACTA Threat to the Future of WIPO*, <http://www.ip-watch.org/weblog/2009/04/14/the-acta-threat-to-the-future-of-wipo/>, 14th April 2009, Viewed 10th September 2010.

⁴¹ Robin Gross, *IP Justice Whitepaper on the proposed ACTA*, IP Justice, 25 March 2008, http://ipjustice.org/wp/wp-content/uploads/IPJustice_ACTA-white-paper-mar2008.pdf, Viewed 10th September 2010; Public Knowledge, *Anti-Counterfeiting Trade Agreement*, <http://www.publicknowledge.org/anti-counterfeiting-trade-agreement>, Viewed 10th September 2010.

⁴² Ibid 41 –Pg. 6.

⁴³ *United States Freedom of Information Act*, Title 5 U.S.C, § 552.

⁴⁴ Electronic Frontier Foundation, *Government Blocks Release of Documents on Secret IP Enforcement Treaty*, <http://www.eff.org/press/archives/2009/01/29>, Viewed 10th September 2010.

⁴⁵ Executive Order No. 12,958, United States Federal Register, <http://www.archives.gov/federal-register/executive-orders/1995.html>, Viewed 10th September 2010.

⁴⁶ James Love, Knowledge Ecology International in conjunction with the Electronic Frontier Foundation, http://www.keionline.org/misc-docs/3/ustr_foia_denial.pdf, Viewed 10th September 2010.

⁴⁷ Official Journal of the European Union, *The Treaty of the Functioning of the European Union*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>, Viewed 10th September 2010.

international relations and that the protection of the invoked interest would be impaired if the document were to be disclosed.⁴⁸ Such an outcome further increased the level of pressure by the European Parliament to release the ACTA documents which forced the April 2009 release of the *ACTA Summary of Key Elements Under Discussion*⁴⁹ by the negotiating parties. This document provided the official stance for the consistent lack of transparency such that

‘it is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation. This allows delegations to exchange views in confidence facilitating the negotiation and compromise that are necessary in order to reach agreement on complex issues’⁵⁰

Evidently, such a statement invoked an even louder outcry from numerous public interest groups who suggested that both the European Union and the United States had not taken such secretive stances during the negotiations at numerous other international forums including numerous WIPO and WTO agreements.⁵¹ The Electronic Frontier Foundation provided a detailed comparison of other such international forums and the stances of ACTA members noting that

‘transparency is considered desirable in a wide range of global norm setting cases, including those involving intellectual property. Only in bilateral trade negotiations has such extreme secrecy been common.’⁵²

Of course, this report raised the increasingly obvious question as to why the ACTA – or, indeed, any future IPR agreement – was being negotiated in a closed plurilateral environment with only specific conferring members being invited, while international mechanisms – such as the WIPO or WTO that were explicitly designed for such a purpose – were being entirely ignored. The author proposes the answer to the question is seemingly a two-limbed one.

i. *The First Limb*

The first proposed limb stems from the June 2006 attempt at the WTO TRIPS Council meeting by the European Union to discuss a proposal it had prepared regarding the *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*⁵³ which purported to ‘identify a limited number of countries on which the efforts of the Commission in the framework of the present strategy should be concentrated’. Additionally, the Strategy

⁴⁸ The European Ombudsman, *Complaint 90/2009/(JD)OV made by Mr Ante WESSELS to the European Ombudsman*, <http://register.consilium.europa.eu/pdf/en/09/st08/st08355.en09.pdf>, Viewed 11th September 2010.

⁴⁹ Australian Government – Department of Foreign Affairs and Trade, *Summary of Key Elements Under Discussion*, http://www.dfat.gov.au/trade/acta/summary_of_discussions.html, Viewed 11th September 2010.

⁵⁰ *Ibid.*

⁵¹ Electronic Frontier Foundation, *ACTA is secret. How transparent are other other global norm setting exercises?*, http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf, Viewed 11th September 2010.

⁵² *Ibid.*, Pg 1.

⁵³ European Commission Directorate General for Trade, *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf, Viewed 11th September 2010.

provided a ‘Specific Action’ which suggested that the European Union was of the view that

‘[t]he current implementation of TRIPs requirements in national laws has proven to be insufficient to combat piracy and counterfeiting, and that the TRIPs Agreement itself has several shortcomings’⁵⁴

Such a proposal was vehemently rejected by prominent developing countries such as Brazil, China and India who complained that enforcement issues were handled by the Dispute Settlement Body and not the TRIPs council.⁵⁵ It was subsequently raised again in an October 2006 meeting and co-sponsored by Switzerland, Japan and the United States but was again rejected by developing nations.⁵⁶ The response from developing nations was natural and expected, since as any increase in the obligations of an already onus TRIPs agreement carried

‘the implied threat that countries failing to provide “adequate” protection of intellectual property rights ultimately could be found not to be in compliance with TRIPs.’⁵⁷

The enforcement provisions were again raised by the same parties in the subsequent TRIPs meeting in June 2007 but the developing nations position was again carried forward with a cohort of developing nations finally stating that ‘enforcement could not be a permanent agenda item in the council’.⁵⁸ Subsequently, in October 2007, the ACTA negotiations started and no further enforcement provisions have been raised at TRIPs meetings.

Notably, changes to the primary WIPO governed treaties including the Berne, Paris and Rome Conventions were met with an even greater level of resistance from developing nations across the same time period primarily due to the lack of robust enforcement provisions in these agreements. The WIPO Advisory Committee on Enforcement⁵⁹ (‘ACE’) mandate is ‘defined as technical assistance and coordination’⁶⁰ and its purpose has been consistently reduced by the demands of developing nations.⁶¹ Such harmonious reduction in enforcement provisions through both the WTO and WIPO forums evidently spearheaded the first limb of

⁵⁴ European Commission Directorate General for Trade, *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf, Viewed 11th September 2010, Pg. 6.

⁵⁵ Intellectual Property Watch, *TRIPs Council issues still alive for WTO Ministerial*, <http://www.ip-watch.org/weblog/2005/10/28/trips-council-issues-still-alive-for-wto-ministerial/>, Viewed 11th September 2010.

⁵⁶ WTO, Joint Communication from the European Communities, United States, Japan and Switzerland and the United States, *Enforcement of Intellectual Property Rights*, <https://www.ige.ch/e/jurinfo/documents/j110120e.pdf>, Viewed 11th September 2010.

⁵⁷ Intellectual Property Watch, *Developed Countries Seek To Elevate Enforcement Measures In TRIPs Council*, <http://www.ip-watch.org/weblog/2006/10/25/developed-countries-seek-to-elevate-enforcement-measures-in-trips-council/>, Viewed 11th September 2010.

⁵⁸ Intellectual Property Watch, *TRIPs Meeting: Boost To IP Issues As Part Of Resumed Trade Talks, US Submits Enforcement Proposal*, <http://www.ip-watch.org/weblog/2007/02/14/trips-meeting-boost-to-ip-issues-as-part-of-resumed-trade-talks-us-submits-enforcement-proposal/>, Viewed 11th September 2010 – Including China, Argentina, Brazil, Cuba and India.

⁵⁹ WIPO, *Advisory Committee on Enforcement*, <http://www.wipo.int/enforcement/en/ace/>, Viewed 11th September 2010.

⁶⁰ WIPO, *Mandate of the ACE*, http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_28/wo_ga_28_7.pdf, Viewed 11th September 2010, Para 114(ii) and 120.

⁶¹ Intellectual Property Watch, *IP Enforcement Work At WIPO Gets Boost From Developing Nations*, <http://www.ip-watch.org/weblog/2009/11/06/ip-enforcement-work-at-wipo-gets-boost-from-developing-nations/>, Viewed 11th September 2010.

reasoning for the abstraction of the ACTA negotiating parties from international forums. The consistent rejection to proposed TRIPS enforcement reform and the increasing ineffectiveness of existing WIPO agreements led the negotiating parties of ACTA to seek alternative means to implement change.

ii. *The Second Limb*

Thus, while the first proposed limb is evidently a breakdown in the utility and function of international forums, the second proposed limb is entirely procedural in nature. The ability to abstract ACTA negotiations from the wider international community alleviates many of the existing problems highlighted in the first limb. Such a strategy evidently allows for selective targeting of negotiating parties, increases the degree of flexibility between negotiating states and ostensibly reduces external influence and pressure. Further, a reduction in transparency mitigates purported relationship-risk of negotiating parties who do not have to reveal their position to non-negotiating ones. A leaked document from the Netherlands presents evidence that a number of countries were entirely supportive of ensuring that the details of the negotiations were not disclosed including the South Korea, Singapore and Denmark.⁶² While the exact reasoning for such continued opposition is not disclosed, one only has to examine the previous internal pressures within these countries during the negotiation of prior international agreements to understand the domestic wide belief that negotiators simply bow to the pressure of formidable foreign powers at the risk of trade exclusion.⁶³ In this regard, the position of many of the proponents⁶⁴ for increased transparency had to be carefully balanced against the valid concerns of emerging economies – particularly in the Asia – due to the high degree of IPR infringement in the region⁶⁵ and the risk that these parties will simply leave the negotiating table.

Further, it is proposed that the second-limb advances the proposition that each of the negotiating parties can unilaterally divulge information to targeted external parties under restrictive confidentiality agreements at will.⁶⁶ Indeed, the United States has been revealed⁶⁷ to have formally released ACTA to numerous external stakeholders – almost all of whom are corporate rights holders – which creates an evident inequality in information transparency and community stakeholder assessment. Such selective targeting weighs decidedly in favour of IPR holders as opposed to consumers of IPRs who are unable to provide commentary or assessment on the ACTA. In this regard, and as stated by Director Gwen Hinze of the

⁶² Michael Geist, *New ACTA Leak: US, Korea, Singapore, Denmark do not Support Transparency*, <http://www.michaelgeist.ca/content/view/4819/125/> via *Dutch Internal ACTA-Documents*, <http://www.bigwobber.nl/2010/02/25/dutch-internal-acta-documents/> Viewed 11th September 2010.

⁶³ Yong-Shik Lee, *The Beginning of Economic Integration Between East Asia and North America? – Forming the Third Largest Free Trade Area Between the United States and the Republic of Korea*, St. John's University School of Law, March 2007, Pg 2.

⁶⁴ Including the United Kingdom, supported by Finland, France, The Netherlands, Sweden, Austria, Hungary, Italy, Ireland, Poland, Belgium and Portugal per Michael Geist, *New ACTA Leak: US, Korea, Singapore, Denmark do not Support Transparency*, <http://www.michaelgeist.ca/content/view/4819/125/>, Viewed 11th September 2010.

⁶⁵ OECD, *The Economic Impact of Counterfeiting and Piracy*, <http://browse.oecdbookshop.org/oecd/pdfs/browseit/9208041E.PDF>, Viewed 11th September 2010, Pg 14.

⁶⁶ Knowledge Ecology International, *White House Shares the ACTA Internet Text with 42 Washington insiders under non-disclosure agreements*, <http://www.keionline.org/node/660>, Viewed 11th September 2010.

⁶⁷ *Ibid.*

Electronic Frontier Foundation,

‘There’s a fundamental fairness issue at stake here ... the negotiating texts and background documents for this trade agreement have been made available to representatives of major media copyright owners and pharmaceutical companies on the Industry Trade Advisory Committee on Intellectual Property. Yet private citizens – who stand to be greatly affected by ACTA – have had to rely on unofficial leaks for any substantive information about the treaty and have had no opportunity for meaningful input into the negotiation process. This can hardly be described as transparent or balanced policy-making.’⁶⁸

Therefore, it is not difficult to conclude that the proposed second-limb has resulted in the structuring of ACTA with a significant degree of preferentialism towards sizeable IPR holders who are strongly advocating for increased protection and enforcement of intellectual property. The exclusionary attitude is not only restricted to the United States but has also been clearly evidenced by other negotiating parties.⁶⁹ Consequently, IPR holders have been provided a definitive advantage in structuring favorable terms in ACTA while the fundamental public interest in the advocating for political and governmental transparency enshrined in the concept of representative democracy⁷⁰ has been largely ignored. The consistent rejection of this core democratic principle removes the opportunity for external stakeholders and agencies to provide useful insight and broader opinion on the ACTA implications both internally and externally to the intellectual property sphere.

i. *The Two-Limbed Outcome*

In the authors view, the most profoundly concerning outcome of this two-limb examination is undoubtedly the abstraction of an international agreement from well-resourced international mechanisms – such as WIPO and WPO – into a specially crafted group of negotiating nations. It is clear that the perceived aim of the founding ACTA nations in fashioning such a group is

‘one of ‘forum shifting’ ... or of ‘forum proliferation’ ... that through incorporation by reference, the laws made in one forum increasingly influence the laws made in another forum.’⁷¹

In this regard, it is proposed that the fundamental purpose of principal ACTA nations is entirely enshrined within the two aforementioned limbs. Firstly, the creation of a new international IPR forum substantially diminishes the utility of existing mechanisms as the largest and most influential nations reduce their involvement and engagement in such

⁶⁸ Electronic Frontier Foundation, *EFF and Public Knowledge Reluctantly drop lawsuit for Information about ACTA*, <http://www.eff.org/press/archives/2009/06/17>, Viewed 11th September 2010; see also Essential Action, *Secret Counterfeiting Treaty Public Must be Made Public, 100 Global Organizations Say*, <http://www.essentialaction.org/access/uploads/ACTA-signon.rtf>, Viewed 24th September 2010.

⁶⁹ Such as Canada as evidenced by Michael Geist, *Public left out of anti-counterfeiting trade talks*, The Star, <http://www.thestar.com/Business/article/468267>, Viewed 12th September 2010 via <http://www.michaelgeist.ca/content/view/4737/408/>.

⁷⁰ For example, in Australia see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 122-123.

⁷¹ Christopher May, *The World Intellectual Property Organization – Resurgence and the Development Agenda*, Routledge, USA, 2007, Pg. 97 at Para 1.

mechanisms. In turn, this

‘sharply reduces the policy space for developing countries to design appropriate policies for their public policy for innovation and economic development. It also would create an additional international intellectual property governance layer atop an already remarkably complex and increasingly incoherent intellectual property regime.’⁷²

Secondly, the purported intention by the largest ACTA signatories of selecting targeting primarily willing countries allows for the imposition of significant trade restrictions upon emerging and developing nations which do not ratify ACTA in order substantially increase the protection and enforcement of IPR’s internationally. As the Electronic Frontier Foundation has poignantly suggested

‘The last 10 bilateral free trade agreements entered into by the United States have required trading partners to adopt intellectual property enforcement obligations that are above those in TRIPs. Even though developing countries are not party to the ACTA negotiations, it is likely that accession to, and implementation of, ACTA by developing countries will be a condition imposed in future free trade agreements, and the subject of evaluation in content industry submissions to the annual Section 301 process and USTR report.’⁷³

To this extent, it is notable that the BRIC group of countries – Brazil, Russia, India and China – are all left out of ACTA negotiations. The most obvious reason for their exclusion is the United States Trade Representative (‘USTR’) Special 301 report which is an annual review of IPR laws, rights and enforcement measures in major countries with respect to US vested interests.⁷⁴ The 301 Report incidentally lists all BRIC countries on its watch list and identifies each nation with a ‘wide range of serious concerns’.⁷⁵ A multitude of other developing and emerging countries are included in the report and some commentators have suggested that ACTA will ultimately form a key component of the Special 301 Report once it is finalized⁷⁶ – a burden which would require significantly higher standards of IPR enforcement for all US trading partners. While such fear advancing notions do adequately serve the status quo for opponents of ACTA, the implications – if eventually held true – will have a profound effect on developing countries which often view adherence to international obligations as appurtenances to foreign investment. In this regard, it would become axiomatic that ACTA would shift the focus in such economies from fundamental intellectual property principles such as technology transfer and innovation to a desire to adhere to higher IPR standards in

⁷² Professor Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play*, George Washington University, http://www.twinside.org.sg/title2/intellectual_property/development.research/SusanSellfinalversion.pdf, Viewed 12th September 2010.

⁷³ Electronic Frontier Foundation, *Anti-Counterfeiting Trade Agreement*, <http://www.eff.org/issues/acta>, Viewed 12th September 2010.

⁷⁴ USTR, 2010 Special 301 Report, http://www.ustr.gov/webfm_send/1906, Viewed 12th September 2010

⁷⁵ *Ibid*, Pg. 1.

⁷⁶ Electronic Frontier Foundation, *In The Matter Of 2010 Special 301 Review: Identification Of Countries Under Section 182 Of The Trade Act Of 1974*, <http://www.eff.org/files/filenode/acta/Special%20301%20PK-EFF%20filing.pdf>. Viewed 17th September 2010.

order to retain foreign investment.⁷⁷ Of course, the evident corollary of increased IPR standards, protection and enforcement is that the core economic cost of living shifts to one that adopts increased IPR licensing which inherently forces a vast increase in the core unit cost of goods and services – a profoundly destructive shift in the pricing equilibrium in poor and developing economies.

Interestingly, this stark picture is already being painted on the 2010 USTR Special Report 301 where not one single African nation is listed on the reports Watch List. Evidently, the question to be posed is why is there such strong adherence of extremely poor African nations to IPR protection and enforcement? The answer is seemingly reflected in the world's most powerful nations sending

‘a clear signal that they viewed IP protection as an integral component of the ‘rule of law’ and ‘good governance’, progress on which was vital to maintaining trade preferences, even in the poorest countries.’⁷⁸

Interestingly, such powerful countries are seemingly oblivious to the realism of whether the requisite standards can even be maintained in such poor economies in the first-place. Perhaps, this provides the ominous sign⁷⁹ that the negotiating parties of ACTA will attempt to ‘negotiate’ the agreements high standards across all current and future trading partners regardless of size and economic stature. Such a notion would be fundamentally cost restrictive to many developing and emerging economies consumers who can ill-afford increased socioeconomic pressures.

III. The Digital Divide

The insurmountable rise of the Internet and its amorphous nature has forced the international community to directly confront a plethora of rapidly expanding issues in respect to copyright, piracy and file sharing in an attempt to co-ordinate a globally united front against digital piracy. To draw perspective, it is useful to analyze the 2009 OECD report on the *Piracy of Digital Content*⁸⁰ which provides that digital piracy is undoubtedly a global phenomenon

‘[o]perating in different jurisdictions with different laws and regulations which hampers the efficiency of enforcement and makes it more difficult and costly. Economies with strong copyright protection report lower rates of piracy, but the risk of penalties without effective enforcement does not seem a strong deterrent’⁸¹

The report highlights the unique market dynamics and the current failings of existing international treaties in respect to the digital environment. Notably, it provides that despite

⁷⁷ Carlos Braga, Carsten Fink, *The Relationship between Intellectual property Rights and Foreign Direct Investment*, <http://www.law.duke.edu/shell/cite.pl?9+Duke+J.+Comp.+&+Int'l+L.+163+pdf> , Viewed 17th September 2010.

⁷⁸ Carolyn Deere-Birkbeck, *Trips Implementation in Francophone Africa*, Oxford University Press, London, 2008, Pg. 269.

⁷⁹ Electronic Frontier Foundation, *In The Matter Of 2010 Special 301 Review: Identification Of Countries Under Section 182 Of The Trade Act Of 1974*, <http://www.eff.org/files/filenode/acta/Special%20301%20PK-EFF%20filing.pdf>. Viewed 17th September 2010.

⁸⁰ OECD, *The Economic Impact of Counterfeiting and Piracy*, <http://browse.oecdbookshop.org/oecd/pdfs/browseit/9309061E.PDF>, Viewed 3rd September 2010.

⁸¹ *Ibid*, Pg. 8.

the existence of a multitude of conventions – such as the Berne, Rome and Paris Conventions and the TRIPS agreement – that digital piracy has remained largely overwhelming.⁸²

While the rationale, accountability and transparency behind ACTA has exposed a multitude of international and domestic complexities raised in Part II of this paper – a vast proportion of commentators have expressed deep concern in respect to what the agreement represents for the digital environment.⁸³ The initial concern stemmed from the leaking of a 2007 document termed the *Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement*⁸⁴ in which a number of digital centric provisions raised the specter of ambiguity in relation to what they inferred. Most notably, consumer advocacy group's expressed an innate fear⁸⁵ that the discussion paper proposed extensive changes to international IPR protection and enforcement powers in the digital environment such that

- 'Criminal enforcement would be imposed for 'significant willful infringements without motivation for financial gain to such an extent as to prejudicially affect the copyright owner (e.g. Internet piracy)'.⁸⁶
- 'Border measures would allow for 'ex officio authority for customs authorities to suspend import, export and trans-shipment of suspected IPR infringing goods'.⁸⁷
- 'Civil liability would extend to 'internet distribution and information technology ... to encourage ISPs to co-operate with rights holders in the removal of infringing material'.⁸⁸

The lack of transparency and clarification by the purported negotiating parties after the disclosure of this discussion paper and the subsequent formal announcement⁸⁹ of the plurilateral agreement only fueled concerns further. To this extent, the overriding fear by consumer advocacy groups⁹⁰ were the increased measures the ACTA proposed against technologies which circumvented copyright protection and enforcement that far exceeded any current standards negotiated under WIPO Internet Treaties.⁹¹ Notably, the proposed ACTA standards⁹² were seemingly based on the US copyright law inducement principles which stem

⁸² OECD, *The Economic Impact of Counterfeiting and Piracy*, <http://browse.oecdbookshop.org/oecd/pdfs/browseit/9309061E.PDF>, Viewed 3rd September 2010, Pg. 8-10, 26.

⁸³ Essential Action, *Secret Counterfeiting Treaty Public Must be Made Public, 100 Global Organizations Say*, <http://www.essentialaction.org/access/uploads/ACTA-signon.rtf>, Viewed 24th September 2010.

⁸⁴ Wikileaks, *Proposed US ACTA plurilateral intellectual property trade agreement (2007)*, <http://file.wikileaks.org/file/acta-proposal-2007.pdf>, Viewed 24th September 2010.

⁸⁵ Essential Action, *Secret Counterfeiting Treaty Public Must be Made Public, 100 Global Organizations Say*, <http://www.essentialaction.org/access/uploads/ACTA-signon.rtf>, Viewed 24th September 2010.

⁸⁶ Ibid 84, Pg. 3.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Office of the United States Trade Representative, *Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes*, <http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes>, Viewed 24th September 2010, Pg. 3.

⁹⁰ A non-exhaustive lists includes the Electronic Frontier Foundation, <http://www.eff.org/issues/acta>; Knowledge Economy International, <http://keionline.org/acta>; Free Software Foundation, <http://www.fsf.org/campaigns/acta>; Free Knowledge Institute, <http://freeknowledge.eu/>; Consumers International, <http://a2knetwork.org/acta>; European Digital Rights (EDRI), <http://www.edri.org/>; Professor Michael Geist, University of Ottawa, <http://www.michaelgeist.ca/tags/acta/>; Viewed 24th September 2010

⁹¹ *WIPO Copyright Treaty*, S. Treaty Doc. No. 105-17, at 1 (1997) 36 I.L.M. 65; *WIPO Performances and Phonograms Treaty*, S. Treaty Doc. No. 105-17, at 18 (1997) 36 I.L.M. 76.

⁹² Consolidated Text, *Anti-Counterfeiting Trade Agreement Final Deliberative Draft*, http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf, 2nd October 2010, Viewed 6th October 2010.

from the US Supreme Court decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*⁹³ in which the Court held that

‘one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.’⁹⁴

Notably, in the Supreme Courts very next statement in this case, their Honours subsequently cautioned the overtly broad application of such a principle and were

‘mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential ... The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose.’⁹⁵

In this regard, deep trepidation was expressed by consumer groups⁹⁶ in respect to the rejection of this narrow application and the otherwise high standard that US based law imposed on numerous negotiating states existing domestic copyright laws despite ‘[n]o internationally agreed standard yet existing’.⁹⁷ This promoted fears⁹⁸ about the purported introduction of global secondary copyright liability standards, mandatory international ‘three-strike automatic disconnection’ or ‘graduated response’⁹⁹ standards for Internet Service Providers (‘ISP’) which would hold ISPs responsible for the actions of their subscribers, US Digital Millennium Copyright Act (‘DCMA’) style take-down notices and increased accountability for anti-circumvention laws and digital rights management software which would vastly affect the open source software movement.¹⁰⁰ Many negotiating countries¹⁰¹ indicated clear opposition to a mandatory ‘three-strikes’ or ‘graduated response’ type enforcement to copyright infringement which suggested that the inclusion of such provisions in the final ACTA were doubtful and largely remained silent in respect to all other areas.

⁹³ *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005); available at http://w2.eff.org/IP/P2P/MGM_v_Grokster/04-480.pdf, Viewed 24th September 2010.

⁹⁴ *Ibid* at 936.

⁹⁵ *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005) at 937; Available at http://w2.eff.org/IP/P2P/MGM_v_Grokster/04-480.pdf, Viewed 24th September 2010.

⁹⁶ Electronic Frontier Foundation, <http://www.eff.org/issues/acta>; Knowledge Economy International, <http://keionline.org/acta>; Free Software Foundation, <http://www.fsf.org/campaigns/acta>; Viewed 24th September 2010.

⁹⁷ Electronic Frontier Foundation, *In The Matter Of 2010 Special 301 Review: Identification Of Countries Under Section 182 Of The Trade Act Of 1974*, <http://www.eff.org/files/filenode/acta/Special%20301%20PK-EFF%20filing.pdf>. Viewed 24th September 2010 at Pg. 6.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ Free Software Foundation, *Speak out against ACTA*, <http://www.fsf.org/campaigns/acta/>, Viewed 25th September 2010.

¹⁰¹ Jacqui Cheng, *Germany Says "Nein" To Three-Strikes Infringement Plan*, *Ars Technica*, February 6th, 2009, <http://arstechnica.com/tech-policy/news/2009/02/germany-walks-away-from-three-strikes-internet-policy.ars>; Howell Llewellyn, *‘Three-Strikes’ off Anti-Piracy Agenda in Spain*, *Billboard.biz*, June 22nd 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3i8071e0d9c25cb6b876d3771fb7e3d102; Viewed 25th September 2010.

When an official first draft text of ACTA was finally released in April 2010 and subsequently leaked again after the 10th Washington, DC Round of negotiations – the digital enforcement and protection provisions became clearer.¹⁰² While it was initially apparent that many of the earlier concerns¹⁰³ had been alleviated in respect to secondary copyright liability standards, mandatory ‘graduated response’ disconnection provisions and a globally unified DCMA style take-down provision – it was not until the release of the Final ACTA draft that the picture crystalized. The Final ACTA reduced prior concerns but its provisions similarly allowed for increased subjectivity and broader interpretation.

For example, Article 2.18(3) of the Final ACTA states

‘Each Party shall endeavor to promote cooperative efforts within the business community to effectively address *at least trademark and* copyright or related rights infringement while preserving legitimate competition and consistent with each Party’s law, preserving principles relating to freedom of expression, fair process, and privacy.’¹⁰⁴

The use of such language as ‘promote cooperative efforts’ is suggestive that ACTA signatories will be increasingly pressured into requiring substantially higher ISP cooperation although the inclusion of ‘at least trademark’ differs from that of the 10th Round ACTA and seemingly attempts to limit obligations. However, as one commentator has suggested in this regard

‘[T]he gambit is to demand a government mandate and then settle for government pressure if an outright mandate turns out to be politically unachievable. This strategy of compelled “voluntary” collaboration ... advocates “government-backed systems of ISP cooperation” and asserts that “government pressure is crucial to producing collective action by all ISPs”.’¹⁰⁵

Evidently, such a top-down layered approach attempts to place an increased onus on signatories to legislate at a domestic level – or the very least, be seen to be actively ‘promoting cooperative efforts’ within the ‘business community’ – even if ACTA does not expressly require it. Importantly, increased evidence¹⁰⁶ already exists in the United States which suggests that the enticement of economic benefits from IPR holders to ISP’s is creating synergistic business relationships. That is, ISP’s gain access to valuable content rights from IPR holders in return for ISP’s forwarding relevant infringement notices to their customers.¹⁰⁷ Of course, whether such relationships are extrapolated into other national environments in the post-ACTA world is increasingly dependent on the level of active involvement from

¹⁰² Consolidated Text, *Anti-Counterfeiting Trade Agreement Final Deliberative Draft*, http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf, 2nd October 2010, Viewed 6th October 2010 at Pg 5.

¹⁰³ Ibid 97 at Pg. 5-6.

¹⁰⁴ Consolidated Text, *Anti-Counterfeiting Trade Agreement Final Deliberative Draft*, http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf, 2nd October 2010, Viewed 6th October 2010.

¹⁰⁵ Associate Professor Annemarie Bridy, *ACTA and the Specter of Graduated Response*, University of Idaho College of Law, PIJIP Research Paper No. 2, 15th September 2010, Pg. 9-10.

¹⁰⁶ Ibid at Pg. 11.

¹⁰⁷ Ars Technica, *Verizon to forward RIAA warning letters (but that’s all)*, http://arstechnica.com/tech-policy/news/2009/11/verizon-to-forward-riaa-warning-letters-but-thats-all_ars, February 13th 2009, Viewed 24th September 2010.

governments in ‘coercing’ such relationships. Traditionally, ISP’s have advocated against such practices because of user backlash surrounding the proposition that their digital activities will be oppressively monitored by ISP’s who are ultimately acting as enforcement agents for large IPR holding corporate entities.¹⁰⁸ In this regard, it may take considerable effort to align the interests of ISP’s and IPR holders without external intervention when the customers of former increasingly demand more anonymity in relation to their online activities.¹⁰⁹

To illustrate how difficult it may be in rationalizing the ACTA digital enforcement provisions into the national law – one only has to look at the possible complexities in the Australian context. It is important to note the consistent statements by the Australian DFAT who have public stated,¹¹⁰ and subsequently formally reiterated,¹¹¹ that ‘Australia has not joined ACTA to drive change in Australian domestic law’.¹¹² In this light, it is difficult to comprehend how such statements can be factually accurate when juxtaposing Article 2.18(3) and 2.18(4) of the Final ACTA against existing Australian copyright laws – particularly given the prominence of ISP liability in the shadow of the decision by Justice Cowdroy in *Roadshow Films Pty Ltd v iiNet Limited* (‘**iiNet case**’).¹¹³ The former presents the construct that ‘competent authorities’ – defined as ‘judicial, administrative, or law enforcement authorities as may be appropriate in the context and in the laws of each Party’¹¹⁴ – can order

‘an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of infringement of at least trademark and copyrights or related rights and where such information is being sought for the purpose of protecting or enforcing at least the right holder’s trademark and copyright or related rights.’¹¹⁵

while the leading Australian ISP authority in the later seemingly rejects the concept of ISP authorization and liability. To provide perspective under Australian copyright law – a person who ‘authorizes’ infringement is treated in the same regard as a person who directly infringes.¹¹⁶ With this in mind, Cowdroy J of the *iiNet* case provided that

‘[T]he mere provision of facilities by which an infringement can occur will not necessarily constitute infringement ... The mere existence of knowledge will not mandate a finding of authorisation either, ‘*[k]nowledge that a breach of copyright is likely to occur does not necessarily amount to authorisation, even if the person having that knowledge could take steps to prevent the infringement*’ .. while [iiNet] has

¹⁰⁸ For example, see the Australian ISP Exetel which provides the relevant steps to in relation to ISP infringement notices; http://www.exetel.com.au/a_copyright_infringement.htm, Viewed 24th September 2010.

¹⁰⁹ See the arguments presented in *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24

¹¹⁰ ITNews, *Australia comes clean on ACTA role*, <http://www.itnews.com.au/News/169254,australia-comes-clean-on-acta-role.aspx>, March 11th 2010, Viewed 24th September 2010.

¹¹¹ ADFAT, *Anti-Counterfeiting Trade Agreement (ACTA)*, <http://www.dfat.gov.au/trade/acta/index.html>, Viewed 24th September 2010.

¹¹² Ibid.

¹¹³ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24.

¹¹⁴ Consolidated Text, *Anti-Counterfeiting Trade Agreement Final Deliberative Draft*, http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf, 2nd October 2010, Viewed 6th October 2010, Pg 4, Article 1.X.

¹¹⁵ Ibid at Pg. 15, Article 2.18(4).

¹¹⁶ *Copyright Act 1968* (Cth) – s36(1A); *Copyright Amendment (Digital Agenda) Act 2000* (Cth) – s101(1A).

accepted that it had general knowledge of copyright infringement committed by [its] users or that infringement was likely to occur on its facilities ... at such a level of abstraction it is very difficult to act on such knowledge in any meaningful way.¹¹⁷

A propos of this case, in the current Australia judicature at least, is that since no legal obligation or duty exists on any person to protect the copyright of a third party¹¹⁸ – then a person remaining ‘indifferent or inactive’ despite being armed with the requisite knowledge that copyright infringement is occurring does not constitute authorization.¹¹⁹ That is, infringement by omission is not infringement at all when no obligation to act exists.¹²⁰ While it is important to note that this decision is currently on Appeal,¹²¹ it provides a judicious perspective into the plausible difficulties ACTA parties will face between the negotiation of an international agreement and its subsequently national ratification. Particularly, as stated in Part II of this paper, when such little transparency has existed for wide commentary on the national implications of the agreement. While the Final ACTA has now been released, it will be some time before wider commentary is provided by the academic and legal communities on such issues.

Interestingly, the United States is still attempting to maintain adequate legal anti-circumvention standards in ACTA evidenced by Article 2.18(5) of the Final ACTA although in a somewhat reduced capacity. In its current context, it broadly mirrors Article 11 of the WIPO Copyright Treaty¹²² (‘WCT’) which provides that signatories must provide adequate legal ‘protection and effective legal remedies against the circumvention of effective technological measures’.¹²³ However, the inclusion of two additional provisions in Article 12.8(6) seeks to define ‘adequate legal protection’ and ‘effective legal remedies’¹²⁴ – thereby reducing the flexibility otherwise afforded in the WCT. Such inclusions would ostensibly seek to directly protect against ‘the unauthorized circumvention of an effective technology measure’ and is evidently structured with sufficient scope that prohibition could occur in the marketing of such devices and even in the absence of copyright altogether.¹²⁵ Notably, the language regarding circumvention of access controls has been removed from the Final ACTA in comparison to the 10th Round ACTA draft – which suggests that the United States has caved to demands of the other negotiating parties regarding technological prevention measures which ‘control access to a protected work.’¹²⁶

¹¹⁷ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at 381, 463-4.

¹¹⁸ That is, under Australian law, a legal obligation is only enforced on the doing of an act without the permission of the copyright holder. See generally the discussion at *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at 487-495.

¹¹⁹ *Ibid* at 492.

¹²⁰ *Ibid* at 487.

¹²¹ Australian Federation against Copyright Theft, *Film Companies to Appeal iiNet Judgement*, 25th February 2010, <http://www.afact.org.au/pressreleases/2010/25-02-2010.html>, Viewed 26th September 2010.

¹²² WIPO Copyright Treaty, adopted Dec. 20, 1996, S. Treaty Doc. No. 105–17, at 1 (1997).

¹²³ *Ibid* at Article 11.

¹²⁴ Consolidated Text, *Anti-Counterfeiting Trade Agreement Final Deliberative Draft*, http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf, 2nd October 2010, Viewed 8th September 2010, Pg 20; Article 2.18(6).

¹²⁵ *Ibid* at Pg 20; Article 2.18(6) including proposed Options 1 and 2.

¹²⁶ Compare Article 12.8(6) of the 10th Round ACTA to Article 12.8(6) of the Final ACTA agreement.

A notable addition to the Final ACTA is the inclusion of Article 2.18(8)¹²⁷ relating to exceptions which provide that ‘each Party may adopt or maintain appropriate limitations or exceptions to measures implementing paragraphs 5, 6 and 7’.¹²⁸ This significantly differs from the exceptions shown in the 10th Round ACTA which provided

‘so long as they do not significantly impair the adequacy of legal protection of technological measures or electronic rights management information or the effectiveness of legal remedies for violations of those implementation measures.’¹²⁹

Again, this reeks of a United States ‘cave-in’ on the negotiating table to convince other negotiating parties that the enforcement of such limitations were useful and infers that there is now ‘no limit language on the scope of exceptions to digital locks’.¹³⁰ In this context, it is clear that the United States has favored lower-bar pragmatism over the alternative high-delay legal complexity in respect to the Final ACTA draft to in an attempt to gain complete negotiating party support – the success of which is yet to be seen.

Thus, the digital ACTA enforcement provisions in their current form – while significantly better than what was originally feared¹³¹ – still remain profoundly concerning for the international digital community. The innate fear is the imbalanced digital divide which is created between ISPs, IPR holders and consumers of both mediums with the unfortunate truth that the later will be principal losing party. While the continued rhetoric from official national DFAT bodies is the insistence that no changes will occur at a national level – a recent public ACTA discussion in Sweden suggests otherwise.¹³² In this regard, the complete lack of transparency has significantly undermined the effectiveness of the digital ACTA negotiations and presents significant national operational conflicts with domestic law that currently have little public commentary. Relevantly, it will take many more months and require extensively wider public commentary before the true appropriateness of the ACTA digital rights provisions are established.

IV. Criminal Sanctions

Every current major WIPO and WTO agreement including the Paris, Berne and Rome Conventions – and to a lesser extent the TRIPS agreement – are primarily silent on the need for criminal sanctions in respect to IPR enforcement. Notably, the majority of existing criminal enforcement provisions contained within major international IPR treaties adopt a flexible and adaptable approach which preserves national sovereignty and allows for autonomy in determining the most applicable manner and mode of IPR enforcement. For example, Article 16 of the Berne Convention provides that ‘[i]nfringing copies of a work shall be liable to seizure in any country ... [and] shall take place in accordance with the

¹²⁷ Final ACTA, Article 2.18(8).

¹²⁸ Ibid.

¹²⁹ 10th Round ACTA, Article 2.18(9).

¹³⁰ Professor Michael Geist, *ACTA Ultra-Lite: The U.S. Cave on the Internet Chapter Complete*, <http://www.michaelgeist.ca/content/view/5352/125/>, October 2010, Viewed 6th October 2010.

¹³¹ Electronic Frontier Foundation, *In The Matter Of 2010 Special 301 Review: Identification Of Countries Under Section 182 Of The Trade Act Of 1974*, <http://www.eff.org/files/filenode/acta/Special%20301%20PK-EFF%20filing.pdf>. Viewed 26th September 2010.

¹³² Internet Industry Association, *Notes from Meeting with ACTA Negotiators*, <http://www.ii.net.au/index.php/component/content/article/1/844-notes-from-meeting-with-acta-negotiators.html>, 5th July 2010, Viewed 24th September 2010.

legislation of each country'.¹³³ Equivalently, Article 9(3) of the Paris Convention provides that 'seizure shall take place at the request of the public prosecutor, or any other competent authority ... in conformity with domestic legislation of each country'.¹³⁴ These provisions present optionality and appreciate that some developing or emerging countries do not have the judicial or administrative functions capable of implementing such laws within their existing national frameworks.

Notably, the nature of criminal IPR enforcement is changing since the advent of Part III – Article 61 of the TRIPS agreement which currently embodies the principal standard for international criminal IPR enforcement. Article 61 only provides that the minimum criminal requirements expected to satisfy TRIPS obligations are for 'willful trademark counterfeiting or copyright piracy on a commercial scale'. In this regard, it has been commented¹³⁵ that the minimum requisite criminal standard required under TRIPS is inherently flexible and involves a two-limb test of 'willfulness' and 'commercial scale'. The United States has long protested against the flexibility of TRIPS Article 61 and considers the application of criminal procedures should be for *all cases* involving 'willful' infringement on a 'commercial scale' – an aspect the US considers China has failed to adhere to.¹³⁶ Relevantly, it is not difficult to understand the reasoning behind the somewhat overzealous criminal provisions proposed in ACTA for criminal enforcement of IPR breaches. Article 2.14 of the Final ACTA exemplifies the US position by stating each party

'shall provide for criminal procedures and penalties to be applied *at least* in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale ... commercial scale includes at least those infringements carried out in the context of commercial activity for direct or indirect economic or commercial advantage'¹³⁷ [emphasis added]

The inclusionary change of 'at least' resets the *de minimus* obligations in respect to the Article 61 of TRIPS and infers that *all cases* must be relevantly acted upon – including the addition of both 'copyright' and 'related rights piracy'. Further, the use of 'commercial scale' has led to some commentators to suggest that the utility of the term is

'[t]hus reduced to the quantitative element of demanding a significant amount infringements or, *alternatively*, to a qualitative element requiring a purpose of commercial advantage or financial gain ... [In TRIPS, the WTO Dispute Panel¹³⁸] has demanded both a quantitative and qualitative element'¹³⁹

¹³³ Berne Convention – Article 16(1) and (3).

¹³⁴ Paris Convention – Article 9(3).

¹³⁵ Xue H, *An Anatomical Study of the United States versus China at the World Trade Organisation on Intellectual Property Enforcement*, European Intellectual Property Review, 2009, No.6, 292-299.

¹³⁶ Professor Peter K Yu, *The Trips Enforcement Dispute*, <http://www.peteryu.com/publications.htm>, Viewed 2nd October 2010, Pg. 7.

¹³⁷ Final ACTA – Article 2.14(1).

¹³⁸ World Trade Organisation (2009), Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – IPRs)*, (WT/DS3262/R), 26 January 2009, <http://bit.ly/cZgKe9>, Viewed 2nd October, Annex A-4 at [10].

¹³⁹ Henning Grosse Ruse-Khan, *From Trips to ACTA: Towards a New 'Gold Standard' in Criminal IP Enforcement?*, Max Planck Institute, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1592104, Viewed 2nd October 2010, Pg. 14.

In this context, the inclusion of ‘commercial scale’ in ACTA may have interpretative implications for countries which are bound by both TRIPS and ACTA. This is because the former sets the lower interpretative standard while the later removes the flexibility afforded to both the qualitative and quantitative elements of ‘commercial sale’ and restricts a country to the quantitative aspect only. Additionally, Article 2.14(2) provides that criminal procedures are required for the

‘willful importation and domestic use, in the course of trade and on a commercial scale labels or packaging to which a mark has been applied without authorization which is identical to ... a trademark registered in its territory.’¹⁴⁰

This provision suggests that it is only the ‘willful importation and domestic use ... on a commercial scale’ of unauthorized trademarks which propels an otherwise ‘normal’ trademark offence into the realm of a criminal one.

It is contended that such provisions will significantly increase the economic cost of protection and enforcement of IPRs and will radically shift the enforcement expectation from its traditional source – being IPR holders who are currently responsible for the relevant discovery and procedural aspects of IPR enforcement – onto national governments. This will increase government accountability in locating and prosecuting IPR infringers in order to fulfill the requisite international obligations under ACTA. This increasing government cost burden is a common by-product of escalating the level of IPR enforcement mechanisms and radically changes the behavior of private litigants as a result. Such changes are particularly devastating in developing or emerging economies where ‘human and financial resources are scarce, and legal systems not well developed, the opportunity costs of operating the system effectively are high.’¹⁴¹ This has led to some suggestions that ACTA provisions will cause undue strain on the opportunity cost of government as it

‘[s]hifts the costs of protecting the private profit of the IP industry onto the public and this inevitably means that whatever scarce resources are available to fund genuine public benefit projects will be even scarcer.’¹⁴²

Direct evidence of such change is already available in the United States following the post-September 11 increases in security spending which have seen a general reduction in other areas of law enforcement.¹⁴³ In this regard, increasing the criminal enforcement provisions may significantly alter existing obligations under TRIPS and have substantial implications on the executive, administrative and judicature of many developing and emerging nations.

¹⁴⁰ Final ACTA – Article 2.14(2)(a).

¹⁴¹ IP Commission, *Integrating Intellectual Property Rights and Development Policy - Report of the Commission on Intellectual Property Rights*, Sept. 2002, http://www.iprcommission.org/papers/pdfs/final_report/Ch1final.pdf, Viewed 2nd October 2010, Pg. 15.

¹⁴² Robin Gross, *IP Justice Whitepaper on the proposed ACTA*, IP Justice, 25 March 2008, http://ipjustice.org/wp/wp-content/uploads/IPJustice_ACTA-white-paper-mar2008.pdf, Viewed 10th September, Pg. 6.

¹⁴³ Peter K. Yu, *Six Secret (And Now Open) Fears of ACAT*, <http://www.peteryu.com/publications.htm>, Viewed 2nd October 2010, Pg. 40.

V. Conclusion

The fundamental purpose of a democratic government and its executive is the unequivocal view that transparency is an essential precondition for political accountability and for discouraging corruption and other forms of wrongdoing. The central meaning conveyed in the words ‘freedom of information’ is the opportunity for an open and transparent government whose citizens have reasonable access to information which ultimately affects their future.¹⁴⁴ It is in this regard that ACTA seemingly strikes directly at the heart of the deep-seated democratic principles of political transparency and responsibility by actively blocking the free flow of information and public wide commentary on a significant international agreement. Indeed, while it is accepted that many of the ACTA negotiating parties have attempted to utilize existing international forums to advocate for IPR reform – the abstraction of an international agreement through forum proliferation seemingly diminishes the international spirit of collaboration and devalues the purpose of existing international intellectual property mechanisms.

While it is undoubtedly accepted that IPR reform is a requisite and critical issue in the modern world – particularly for nations who are heavily IPR dependent – for the promotion of economic development, the fostering of creativity, the transfer of technology and the assurance that IPR holders are rewarded for their efforts – the manner and mode in which such reform is achieved is pivotal to the ultimate success of any international cooperation. Unfortunately, as has been presented throughout this paper, the ACTA is founded entirely on the withdrawal of core democratic values and imposition of demands by powerful economic nations whose vested interests rest in maximizing economic profitability at the significant cost of substantially harming non-negotiating party relations. Indeed, the deliberate exclusion of the world’s largest developing and emerging economies is evidence enough to reveal the dark underbelly of the true intention of key ACTA parties – to suspend the risk of future trade restrictions above their heads until they ratify the agreement. In this light, when coupled with the significant socioeconomic harm that ACTA laws will impose on consumers and the damage it has already caused through the reduction of utility of existing international intellectual property mechanisms – the author concludes that ACTA negotiations should be entirely restarted with a broader approach or, if left the agreement is left in its final current form, completely abandoned.

Word Count – 7,421

[including non-referencing footnotes]

¹⁴⁴ In the Australian context, see *Moirra Patterson, Freedom of Information and Privacy in Australia*, LexisNexis Butterworths, Sydney, Australia, 2005, Pg. 2.

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