



In Focus

Expert commentary & opinion

The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Global Policy Implications

Abstract

The United States, the European Communities (EC) and its Members States and host of other developed countries as well as Mexico intent to conclude an Anti-Counterfeiting Trade Agreement (ACTA). The stated purpose of the Agreement is to establish a common standard for intellectual property (IP) rights enforcement to combat global infringement of IP rights. Formal negotiations, according to reports, are set to start in the week of 2nd June 2008 in Geneva, Switzerland. The proposal for a new trade treaty on IP, at time when there are many questions regarding the impact of IP rights on development, access to knowledge, global trade competition and consumer interests, has obviously led to some sharp criticism of ACTA. The justification for the treaty, the process for negotiations and the potential impact of a treaty of this nature are among the many questions that have been raised. A small number of countries, driven by a narrow set of industrial interests, are proposing to tackle a global problem by developing a tool with global reach while excluding the majority of the world population from the discussion. In this issue of IQsensato's "In Focus" we look at the global policy implications of the proposed treaty. We conclude that so far the proponents of the treaty can be said to be engaged in "counterfeit policy-making" and that there is need for global action to challenge this type of policy-making on such a critical subject.

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1. Introduction

In October 2007 the United States Trade Representative, Ambassador Schwab, announced a major new initiative to “fight counterfeiting and piracy” of intellectual property (IP) rights. The initiative would involve concluding a plurilateral Anti-Counterfeiting Trade Agreement, now commonly referred to as ACTA, between the United States and a number of countries (dubbed “nations committed to strong IP rights protection”). These countries include Australia, Canada, the European Communities (EC) and its 27 Member States, Japan, South Korea, Mexico, New Zealand and Switzerland.

In a Fact Sheet posted on the website of the Office of the United States Trade Representative (hereinafter USTR) on the day of the announcement (23 October 2007) the goal of ACTA is to establish a common standard for IP rights enforcement to combat global infringement of IP rights. The Agreement, the USTR Fact Sheet states, could contain provisions on: international cooperation in capacity building and technical assistance and cooperation between enforcement agencies; best practices; and substantive matters including criminal enforcement, border measures and internet distribution and information technology. A USTR Discussion Paper, published on Wikileaks on 22 May 2008 (http://wikileaks.org/wiki/G-8_plurilateral_intellectual_property_trade_agreement_discussion_paper), provides additional details on each of these components of the proposed treaty. The European Commission, in its own Fact Sheet states that it envisions ACTA as a leadership agreement. This means that ACTA, in the view of the EC, will set a positive example for nations that “aspire to strong IPR protection”.

Recent reports indicate that formal, but secret, negotiations on the Agreement will start this week in Geneva (see e.g., Monica Ermert in Intellectual Property Watch - <http://www.ipwatch.org/weblog/index.php?p=1071>). These reports also indicate that the intention is to conclude the treaty by the end of 2008.

The spectre of a new trade treaty on IP, at a time when there are increasing questions regarding the impact of IP rights on development and the public interest across the globe, has obviously led to some sharp criticism of ACTA. The justification for the treaty, the process for negotiations, lack of transparency and the impact of the proposal on consumers are among the many questions that have been raised by commentators and analysts such as Michael Geist (<http://www.michaelgeist.ca/content/blogsection/0/125/>), Knowledge Ecology International (http://www.keionline.org/index.php?option=com_content&task=view&id=169&Itemid=1), and IP Justice (<http://ipjustice.org/wp/campaigns/acta/>), as well as commentators and journalists in a number of media reports.

The proposed treaty, if concluded, will have far-reaching policy and practical implications not only among the initial plurilateral parties but also in many other countries around the world. As is often the case, the policy implications for developing countries are likely to be disproportionate. In this “In Focus” issue, we examine the policy and practical implications of a treaty of this nature, challenge some of the fundamental ideas behind the proposal and offer some ideas on how to ensure that the proponents, who claim to be interested in tackling a global problem, can be held accountable. In the main, we argue that the idea of ACTA constitutes ‘counterfeit policymaking’ and that the treaty, as proposed, would pose important global threats to legitimate trade, development and consumer interests.



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2. Remember TRIPS? Why ACTA is a Story of “Counterfeit Global Policy-making”

In 1994, the United States, the EC and its Member States and other developed countries, convinced the world that we needed a new trade treaty on IP in recognition of “the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods” among other reasons. That treaty, which became part of the Agreement Establishing the World Trade Organization (WTO), is called the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Riding on the very same arguments as the ones being advanced to support ACTA, these countries had pushed for extensive standards on enforcement under TRIPS. As a result, Part III of the TRIPS Agreement, which deals with IP enforcement, makes up about 30% of all the TRIPS provisions. In particular, this part contains detailed enforcement provisions on: general enforcement obligations (Section 1 – Article 41); civil and administrative procedures and remedies (Section 2 – Articles 42 - 49); provisional measures (Section 3 – Article 50); special requirements related to border measures (Section 4 – Articles 51- 60); and criminal procedures and penalties (Section 5 – Article 61). In essence, in 1994 the WTO adopted an Anti-counterfeiting Trade Agreement called TRIPS. Why then do we need another ACTA? To this question, the EC, in its Fact Sheet (http://ec.europa.eu/trade/issues/sectoral/intell_property/fs231007_en.htm) responds thus:

“The proliferation of intellectual property rights (IPR) infringements poses an everincreasing threat to the sustainable development of the world economy. It is a problem with serious economic and social consequences. Today, we face a number of new challenges: the increase of dangerous counterfeit goods (pharmaceuticals, food and drink, cosmetics or toys, car parts); the speed and ease of digital reproduction; the growing importance of the Internet as a means of distribution; and the sophistication and resources of international counterfeiters. All these factors have made the problem more pervasive and harder to tackle.”

Counterfeiting is obviously a problem with global implications and requires a global response. The international framework for such a response does exist – TRIPS – and its application is backed by global bodies (WTO and the World Intellectual Property Organization – WIPO). Statements such as the EC’s, attempting to justify ACTA, thus beg the question:

What is the real aim of ACTA? Is this not a case of “counterfeit global policy-making?”

The proposed treaty clearly represents a case of “counterfeit global policy-making”. This is because: (1) Its justifications, considering the existence of TRIPS, are dubious if not fraudulent; (2) it seeks confrontation, particularly with developing countries as opposed to cooperation and ignores the efforts by the latter group of countries to implement TRIPS in resource-poor settings; (3) it circumvents legitimate multilateral forums such as WTO and WIPO to avoid global accountability adopting the discredited “you are with us or against us” attitude; and (4) it is burdened with a huge democratic deficit in the countries where the idea has originated.



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3. The Trade Implications of ACTA

The proposal for ACTA represents the latest phase in the efforts by the proponents to sugar-coat protectionism, anti-competitive behaviour and greed, as legitimate global policy. Earlier phases have included TRIPS-plus enforcement provisions in bilateral and regional free trade agreements (FTAs) and economic partnership agreements (EPAs), pressure through the United States Special 301 procedures as well as political and economic bullying such as that applied to Thailand for using compulsory licensing to obtain essential medicines.

While medicine and food safety are cited as key justifications for ACTA, at the core of the campaign are basic trade interests of the countries involved. Indeed, the greater focus on IP rights enforcement by the United States, the EC and others is a predictable reaction in a dynamic global economy. The WTO TRIPS framework as well as the FTAs and EPAs that these countries have been pushing in recent years are all built around a static view of their comparative advantage in knowledge goods and services. The rules have therefore been designed to lock-in the 1994 'technology exports and imports equation' in perpetuity. The current efforts to ratchet-up IP enforcement are therefore largely part of a defensive strategy to maintain a trade advantage. This strategy raises concern for developing countries and may in fact be detrimental to the broader societal interests in the developed countries themselves as well as in Mexico. The safety and security concerns that are being touted as justification for ACTA are for the most part the excuse. The proposed rules and approaches in ACTA are therefore more likely to lead to trade distortion, to disadvantage of consumer interests and dynamic competition, than to establishing a meaningful framework to address medicine and food safety and to tackle crime.

4. Tackling "Counterfeit Policy-making" on IP Enforcement: Global Opportunities for Action

The proposed ACTA is neither the first nor the last attempt to use "counterfeit policy-making" to advance the interests of a few industrial groups in a few countries in the name of tackling a global problem. The problem of counterfeiting requires a global solution developed through legitimate multilateral processes involving all key players with the attendant democratic scrutiny at the national level. ACTA, however, constitutes an exclusive club solution developed through questionable plurilateral processes involving narrow economic interests. For this reason, the idea of ACTA must not go unchallenged. Though a small group of interests and countries are involved, the resultant rules will impact the whole global economy with important consequences for countries, industries and businesses as well as consumers. What appears as plurilateral in the beginning will quickly become a global standard through FTAs and EPAs and through political and economic pressure. A number of global opportunities exist to shine search lights in the dark rooms in which ACTA is being negotiated. Some of these include:

4.1 The WTO Council for TRIPS

One of the ideas that inspired the TRIPS Agreement, as stated in its Preamble was the desire by WTO Members "to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade". ACTA, as proposed, has the real potential of creating barriers to legitimate trade in the name of



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IP rights enforcement. Since the countries involved are Members of the WTO, there is reasonable cause for other WTO Members, particularly developing countries, which are seen as the 'nations not committed to the strong enforcement of IP rights', to worry. The issue of ACTA and other previous efforts such as the USTR's special 301 procedures is therefore a legitimate matter to be addressed by the Council for TRIPS.

A communication to the Council for TRIPS asking for a discussion of the trade distorting implications of the proposed ACTA could be one of the means by which other WTO Members can bring the ACTA proponents to account. A discussion in the Council for TRIPS will ensure that any trade distorting implications of ACTA are properly understood and WTO compatibility of the proposed actions tested.

4.2 The WIPO Development Agenda

The implications of egregious IP enforcement practices was one of the areas of major debate during the negotiations on the establishment of a development agenda for WIPO. At the conclusion of the discussion in WIPO, the Member States, including the ACTA proponents, agreed:

"[45.] To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations", in accordance with Article 7 of the TRIPS Agreement."

Hence, the WIPO Development Agenda provides an important platform for checking the ACTA proposal against the societal interests to foster sustainable development and to promote technological innovation and transfer of technology. This is the place where the USTR assertion that ACTA would help encourage innovation and creativity and improve consumer health and safety can be tested.

4.3 WHO: Challenging Doggy Definitions and Cynical Use of Health

The World Health Organization (WHO) stands in a special position with respect to ACTA and similar IP rights enforcement efforts. Health and food safety have been touted at critical reasons why there is need for expanded efforts on counterfeits. This was reflected at the 61st World Health Assembly (WHA) which ended on 24 May 2008. The debate on a proposed resolution on counterfeit medicines and on the global strategy for essential health research, however, demonstrated that while counterfeit medicines pose a major global health and safety threat, attempts to address the problem using IP based motivations is perverting well intentioned efforts to tackle the problem.

With the counterfeit medicines resolution having failed pass at the WHA there is now an opportunity for the WHO and its Members to challenge doggy definitions of counterfeit medicines and products and stop the cynical use of health and safety concerns for raw commercial interests. The continuation of discussions in WHO provides an opportunity to



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develop a commercial interest-neutral definition of counterfeit medicines and to ensure that efforts claimed to be aimed at tackling the health impacts of counterfeit medicines are aimed at serving that purpose.

4.4 FTAs and EPAs

Bilateral and regional trade negotiations involving the United States and/or the EC and other ACTA proponents provide another important opportunity to challenge the “counterfeit policymaking” on IP rights enforcement. This is particularly the case with respect to developing countries such as the African, Caribbean and Pacific (ACP) Group of countries which are involved in negotiations with the EC and its Member States. Though the ACP countries mainly find themselves on the defensive when negotiating IP enforcement, they can also use the process to address the problems of initiatives such as ACTA. In this context, these countries could for example propose that the EC and its Member States to adopt provisions on IP enforcement that:

- Prohibit the EC and its Member States from seeking or imposing additional unilateral measures and demands on IP enforcement in the manner in which the United States has used the Special 301 procedures;
- Preserve the TRIPS flexibilities on IP enforcement;
- Are demonstrated to have a positive correlation with efforts to encourage transfer of technology and promote competition; and
- Address anti-competitive enforcement practices by IP rights holders.

A case for such an approach, has recently been made by Musungu in a paper titled “Developing a Positive Agenda on IP Enforcement in EPAs: Lessons for CEMAC Region from the ECCARIFORUM EPA” (http://www.iprsonline.org/ictsdlDialogues/2008-04-28/2008_04_28_documents.htm).

4.5 Policing the Police and Border Guards: Democratic Accountability at WCO and Interpol

Riding on the claim that counterfeiting and piracy is intimately linked to organised crime and tax evasion, the World Customs Organization (WCO) and Interpol have become major conduits for the promotion of private IP rights through enforcement initiatives. The full impact of the expanded activities of WCO and Interpol in this area remains unknown. However, it is clear that there are significant resource diversions, overreach and a perversion of the objectives of these security and safety agencies. As is well known in all democracies, the police also need to be policed otherwise they quite easily become trigger happy, killing the very people they are supposed to protect, torturers and criminals in the name of fighting crime. There is also a danger that without democratic scrutiny, security and safety agencies can become private security for narrow interests. In this regard, care must be taken to ensure that WCO and Interpol do not become private armies for narrow industrial interests.

Time has therefore come to focus on enhanced democratic accountability at WCO and Interpol to ensure that their work is focused on ensuring security and safety of global citizens as opposed to endangering the freedoms and security of consumers and legitimate businesses.



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5. Conclusion

Though ACTA is claimed to be a plurilateral treaty its stated intention is to change global rules relating to IP rights enforcement. As a result, the conclusion of such a treaty will have important policy and practical implications affecting global trade and efforts to improve access to medicines, food, culture and education. The proponents of ACTA therefore need to be subjected to a higher level of responsibility and accountability.

So far, the countries involved initiative can be said to have engaged in “counterfeit global policymaking”. This, as this piece demonstrates, is because the justifications of the proposed treaty are dubious if not fraudulent (the interests of a limited set of industrial groups is being sold as an effort aimed at enhancing health and food safety, security and tax collection); the push for the treaty is driven by confrontation as opposed to cooperation; the process adopted circumvents legitimate multilateral forums such as WTO and WIPO to avoid global accountability; and the treaty idea suffers a huge democratic deficit in the countries where the idea has originated.

In order to hold the ACTA proponents to their claim that they are acting on behalf of global interests, efforts need to focus on utilizing a number of existing global opportunities. These include using the Council for TRIPS, WIPO, WHO, FTAs and EPAs as well as WCO and Interpol as platforms to scrutinize ACTA’s justifications, objectives and substantive provisions as well as its potential impact on trade, international transfer of technology and consumer interests.

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