

**ANTI-COUNTERFEITING TRADE  
AGREEMENT EFFECTS ON DIGITAL  
TRADEMARK AND COPYRIGHT PIRACY**

**By Daniel Bain**

The Internet Age has brought an unprecedented sharing of knowledge and information across the globe. People now have the ability to acquire almost anything with a single keystroke. These same internet and technological advances have also allowed for pirates and counterfeiters to easily copy and distribute digital media such as music, movies, and written works. Because copyright and counterfeiting laws differ from country to country, it is nearly impossible for one country to regulate piracy in other countries with more lenient laws. Currently, several countries have come together to draft the Anti-Counterfeiting Trade Agreement (ACTA) to alleviate problems created by easy access to global trading. ACTA is poised to update, inter alia, intellectual property laws at the both the international and national level. More specifically, ACTA would update the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) at the international level and improve the Digital Millennium Copyright Act (DMCA) at the domestic level

**INTERNATIONAL EFFECT OF ACTA**

In June 2008, negotiations began concerning ACTA and involved Australia, Canada, the European Union, Japan, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore, Switzerland and the United States. The agreement would create an international body similar to the World Intellectual Property Organization as a response “to the increase in global trade of counterfeit goods and pirated copyright protected works.”<sup>1</sup> The agreement provides additional enforcement rights to the law enforcement branches of specific countries. Some of these rights include giving parties the authority to require an online service provider to disclose information that identifies the infringing internet account.<sup>2</sup> The agreement also mandates enforcement of any party circumventing technology security measures, or anyone who induces, enables, facilitates, or conceals an infringement of copyright or trademark. A final draft of the agreement in principle was announced in November 2010 and is currently being reviewed by the drafting parties.

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<sup>1</sup>*Anti-Counterfeiting Trade Agreement*. NEW ZEALAND MINISTRY OF ECONOMIC DEVELOPMENT, [http://www.med.govt.nz/templates/ContentTopicSummary\\_34357.aspx](http://www.med.govt.nz/templates/ContentTopicSummary_34357.aspx) .

<sup>2</sup> *Anti-Counterfeiting Trade Agreement*, §2.18. (2010), available at [http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc\\_146699.pdf](http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf) .

## DOMESTIC EFFECTS OF ACTA

ACTA will have a significant impact within the United States on digital copyright and trademark law. The effects of domestic digital copyright and trademark laws are extensive. The current Digital Millennium Copyright Act (DMCA) does not require intermediaries to monitor or filter their internet services. Further, *Zeran v. AOL* indicates that internet service providers cannot be held liable for the actions of their users.<sup>3</sup> ACTA would require providers to keep a closer eye on their customers internet use for potential copyright violations. It would also allow the U.S. government and other parties, with reasonable grounds, to order a person's internet usage records.<sup>4</sup> Today, some major Internet service providers are preparing to begin more stringent monitoring consistent with ACTA's requirements. In June 2011, major internet service providers, including AT&T, Verizon, and Time Warner Cable, announced a plan to crackdown on copyright infringers by limiting bandwidths, websites, and suspending their accounts.<sup>5</sup>

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<sup>3</sup> *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997).

<sup>4</sup> Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, YALE J. INT'L L. (2009).

<sup>5</sup> Yale Anderson, *Major ISPs agree to "six strikes" copyright enforcement plan*, ARS TECHNICA.  
<http://arstechnica.com/tech-policy/news/2011/07/major-isps-agree-to-six-strikes-copyright-enforcement-plan.ars>

Because third parties such as internet service providers (ISP) may be liable for excessive infringement by their users, ACTA may serve as an effective tool to counter internet piracy. This is because ACTA may require ISP registering to regulate internet traffic that infringes on copyright and trademark. In practice, this would mean that copyright infringers whose websites are based in a nation which is not a party to ACTA may have their internet access blocked and be unable to reach people who are based in nations that are a party to ACTA.<sup>6</sup>

## ENFORCEMENT OF ACTA

Criminal enforcement is another key aspect of ACTA that will radically change the U.S. copyright and trademark landscape. Currently, trademark and copyright law are reserved for civil courts. Criminal enforcement would only occur in the most blatant infringement cases. If enacted, ACTA would set out criminal enforcement policies that would apply to any willful infringement of copyright or trademark when used commercially. For trademark law, criminal enforcement would apply to any case in which one infringes on a commercial mark that is identical to or cannot be distinguished from another trademark and is

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<sup>6</sup> ACTA: A Global Threat to Freedoms, FREE KNOWLEDGE FOUNDATION.,  
<http://freeknowledge.eu/acta-a-global-threat-to-freedoms-open-letter> .

intended to be used for the same product or service. Additional enforcement also applies to websites that violate trademark law to gain a commercial advantage.

In terms of copyright law, criminal enforcement would be applied to any person who sells pirated copyrighted material or indirectly benefits from such a sale. Indirect economic benefits could include advertisement revenue for a website that displays pirated material that is copyright protected. Further, the agreement allows for criminal penalties for the unauthorized copying of movies – even without commercial incentive - in a movie theater.<sup>7</sup> Such criminal penalties could include imprisonment and monetary fines.<sup>8</sup>

## CHALLENGES AND CONSEQUENCES OF ACTA

Many in the United States are concerned about the possible consequences that ACTA will have on internet and personal freedoms. One major concern is the fact that China will not be a signatory to the agreement. Because China leads the world in digital piracy, ACTA would only have a limited effect on the piracy problem without China as a signatory. Second, others believe that by attacking peer to peer servers it will be much harder to

distribute free software and unprotected works.<sup>9</sup> There has been outspoken discourse from the legal community as well. A group of 75 academics and lawyers wrote a letter to President Obama with their concerns. They worry that ACTA will interfere with the “fundamental rights and liberties” of individuals.<sup>10</sup> The group is concerned about the privacy of U.S. citizens if an individual’s internet activity will be monitored. The group does not support the potential widespread internet filtering that internet services providers would have to implement. An additional concern is that if ACTA is enacted it will be more difficult to share academic and scientific papers. Moreover, copyright infringers would not only have to be concerned about lawsuits from copyright owners but also from government agencies. Another sweeping change is the fact that third parties can be held liable for being intermediaries for copyright and trademark violators. This will require internet service providers to monitor users’ activities and possibly filter certain internet sites and traffic to sites containing peer to peer file sharing and torrents.

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<sup>9</sup>*Speak out against ACTA*, FREE SOFTWARE FOUNDATIONS, <http://www.fsf.org/campaigns/acta/>.

<sup>10</sup>*Over 75 Law Profs Call for Halt of ACTA*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, <http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta> .

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<sup>7</sup> Anti-Counterfeiting Trade Agreement, §2.14. (2010).

<sup>8</sup> Anti-Counterfeiting Trade Agreement, §2.15. (2010).

## CONCLUSION

Although not an absolute solution, ACTA would noticeably reduce copyright and trademark piracy. ACTA could, however, potentially limit a citizen's internet privacy and risk hampering global information sharing. In the months to come before ACTA is signed, it will be important for the legal community to determine if these auxiliary protections for copyright and trademark are worth restricting the virtually unlimited freedom that currently exists on the internet.

### **About the Author**

Daniel Bain ('13) is a second year law student at The Ohio State University Moritz College of Law where his studies focus on intellectual property law (IP). Mr. Bain wrote this article while working as the 2011 IP Summer Associate at Gonzalo Law LLC in Cleveland, Ohio.