

Information note 10, June 2010

THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA): A NEW OBSTACLE TO HUMAN RIGHTS?

Summary

3D → Trade – Human Rights – Equitable Economy beckons the human rights community to monitor ongoing international negotiations aimed at strengthening intellectual property rights (IPR). This information note analyses the Anti-Counterfeiting Trade Agreement or ACTA, which has become the emblem of the maximum protection approach of IPR through the use of offensive implementing strategies. This vision reverses the public interest approach that underpinned IPR originally. This paper argues that if such a vision is realized, through ambiguous rhetoric and aggressive negotiating strategies, the risk is great that the new institutional framework in the making will prevent the realization of human rights, both at the national and international level.

The current framework to enforce IPR

Part III of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO), which regulates the "enforcement of intellectual property rights", provides the current international legal benchmark. It obligates WTO members to provide administrative and legal channels that enable an IPR holder to report violations.¹ The burden of proof lies with the rights holder, who has to provide sufficient evidence to the designated authorities before a procedure against an alleged IPR infringement can take place. Part III of the TRIPS Agreement also imposes some border measures,² limited to the "importation of counterfeit trademark goods or pirated goods infringing copyrights".³ Such measures – the seizure of suspected goods, their withdrawal from distribution channels and penalties for infringers – can only be triggered when the rights holder has provided adequate evidence to the authorities. Only then can

the authorities in charge of border control seize goods suspected of an infringement for a maximum of ten days, while waiting for either party involved to resort to the competent authorities. Finally, Article 41 of TRIPS stipulates that members do not have to provide a judicial system for the enforcement of IPRs distinct from that of law enforcement in general. This section also states that the means to enforce IPR cannot be used to create barriers to trade and that safeguard measures are established to prevent misuse and abuse.

How did ACTA come about and why are there grounds for concern?

For the governments negotiating the ACTA, the measures contained in the TRIPS Agreement are not satisfactory. They believe that it is necessary to negotiate an additional framework that will provide minimum standards to ensure better enforcement of IPR internationally. At a G8 meeting in 2005, the Japanese delegation proposed to negotiate the ACTA. A first round of negotiations took

place in June 2008 between the United States, the European Union, Switzerland, Japan, New Zealand, Australia, Canada, Morocco, Mexico, the Republic of Korea and Singapore.⁴ After strong pressure from civil society and some parliaments, the content of the negotiations was finally made public in April 2010.⁵ According to the title of the treaty, its intention is to curb counterfeiting and piracy. In reality, the agreement seeks to cover a much broader range of issues.

A reading of the negotiating text shows that the text goes well beyond the TRIPS framework outlined above, even though discernible tensions arising from differing positions of the participating countries exist. In particular, the chapter on border measures⁶ aims at shifting the responsibility of enforcing IPR to customs authorities. Since the definitions of counterfeiting and piracy in the text are broad and blurred, the risk is high that the treaty will encompass all IPR, unlike the TRIPS Agreement, where the allowed measures are clearly limited to trademarks and copyrights. In addition, these measures will not only apply to imported goods, but also to exports and goods in transit.

The ACTA therefore stipulates that customs authorities *automatically* seize goods suspected of violating IPRs and inform the rights holder only later. This is fundamentally different from the relevant provisions in the TRIPS Agreement and implies that the state is newly responsible for enforcing private rights, allowing IPR holders to avoid the costs related to monitoring their rights and the burden of providing evidence of rights violations. Moreover, there is neither a safeguard clause against potential abuse in the text under negotiation nor does it include flexibilities related to the unlicensed use of protected goods in specific circumstances.

Clear mismatch between rights and obligations

The ACTA conveys a maximalist vision of IPR based on a mismatch between rights and obligations of right holders. Indeed, the treaty aims to give IPR holders an absolute right; ignoring the fundamental principle that IPR should serve the public interest, which is to help innovation and dissemination of knowledge and technology. This is why the scope of rights granted by any specific IPR should always be limited in favour of this public goal. Hence, each IPR should be analyzed individually because each right relates to different objects and works in a specific manner.⁷ It is essential to fully understand the scope of rights granted to IPR holders and to include obligations and exceptions that prevent the misuse of IPRs in a way that goes against the stated public interest goal. For example, one cannot expect the legal framework governing the means to enforce copyright to be the same as the one seeking to enforce patents.⁸

Certain proposals in the ACTA negotiating text defining piracy and counterfeiting⁹ are confusing and fall into the very trap of imposing a single model for enforcing all existing IPRs. Participating governments justify this approach by using a narrative that mixes safety related arguments – such as public health – with the drive to reinforce the respect for intellectual property – such as combating counterfeiting of trademarks. The result of this narrative is a bewildering framework with application limits that become difficult to grasp. Thus, drugs that are considered generic in one country can become *dangerous pirated or counterfeit drugs that are violating both trademark and patent laws*, and are confiscated while in transit in another country. This is not a speculative example: Indian generic medicines have been seized in European ports while en route to countries in Africa or Latin America,¹⁰ threatening the realization of the right to health in these

countries. This is why we can affirm that the ACTA includes policies that go much beyond the stated objective of IPR enforcement. Moreover, the treaty seeks to realize, in an international agreement, a stricter IPR framework than the one required by TRIPS. This poses a serious threat to realizing human rights in least developed countries, mainly affecting the most underprivileged social classes, which cannot afford the extra costs brought about by reinforced IPR on basic commodities such as drugs or textbooks. The ACTA imposes measures that can be classified as TRIPS-plus. These measures aim at eliminating both the flexibilities and the limitations of IPR provided in TRIPS, reducing the scope of developing countries to apply available flexibilities to establish a legal framework for intellectual property that is adapted, to the extent possible, to their specific needs.

The problem of "forum shopping"

After years of struggle to advance the interests of developing countries against those of multinational companies in key arenas related to IP issues – such as the compulsory licensing of essential drugs introduced in the framework of the WTO Doha round or the Development Agenda of the World Intellectual Property Organization (WIPO) – human rights defenders must reflect upon the processes which have made a treaty such as the ACTA possible. Understanding these processes can help to devise strategies that respond constructively to such maximalist initiatives.

Indeed, once these issues had been placed on the agenda of the WTO and WIPO, the industrialised countries have sought, through different strategies, to short-circuit these negotiations and to continue imposing an IP framework that favours the most powerful players in their respective economies.

→ They have imposed, with varying degrees of success, TRIPS-plus

provisions in bilateral free trade agreements (FTA). For example, the FTA that the EU is currently negotiating with India foresees, *inter alia*, the granting of an exclusive right on the databases used by pharmaceutical multinationals during the authorisation procedure for new drugs for an additional 5 years after the expiry of the patent.¹¹ This measure is intended to handicap Indian generic producers by forcing them to either produce their own data or wait five more years before they can market their cheaper products. Indirectly, this affects the most underprivileged social sectors in developing countries, where generics are often the only ones available.

→ They have used different international fora to pursue TRIPS-plus negotiations by selecting international organizations with institutional structures that guarantee them a position of strength so as to lead the negotiating agenda. This phenomenon, called "forum shopping",¹² has allowed a multitude of international maximalist initiatives to emerge. These include the initiative SECURE of the World Customs Organization and the IMPACT initiative of the World Health Organization.

→ ACTA is the extreme variant of "forum shopping" logic, negotiated within a small group of interested countries. In addition to the measures described above, the ACTA aims at creating a new international organization that is independent from the WIPO and the WTO. Although the ACTA is negotiated behind closed doors, several governments have nevertheless allowed the strongest private sector actors to comment on the content of the negotiating text.¹³ So, today, we are confronted with a document that merely reinforces the rights of IPR

holders to the detriment of the public interest.

How to react to these developments?

It is important to fight the ACTA and other initiatives that seek to impose a maximalist approach on IPR. We must therefore make the case for an international environment that includes considering *the means of enforcing the obligations* that IP owners have towards society. In particular, they must safeguard the interests of the most deprived population groups. It is necessary to include limitations, flexibilities and exceptions in every single IP right to avoid abuse and to enable developing countries, especially LDCs, to develop an IP system that fulfils its basic needs of health, education and nutrition. Human rights defenders can play an important role in this process regarding at least two points:

→ Human rights can and should be used as indicators to illustrate the negative impact that a narrow intellectual property framework has with respect to the satisfaction of basic needs. Moreover, it is not necessary to wait for the ACTA negotiations to conclude and the treaty to be ratified to understand that this may have negative impacts on realizing the rights to education, to health and to a healthy and adequate diet. Since the ACTA also targets merchandise in transit, any non-signatory country may be affected as its goods are likely to transit through a signatory country at one stage. Indeed, the generic drugs seized in Europe give an example of the obstacles that such a maximalist framework poses to realizing the most basic human rights. The question therefore is who is the pirate, those that produce a good that satisfies the basic needs of the poor or those who steal the cargo halfway during its journey? In addition, since the draft text does not include an exception for the purposes of research

and education, it may also apply to education and access to information, affecting the circulation of school material and the access to information and cultural content on the Internet.¹⁴ In addition, if the ACTA were to be applied to patents, with their extension into agro-industry, it would likely give even greater control to the private sector to limit seed circulation and hence negatively affecting global food security. Finally, once the treaty is approved, its member countries will put pressure on their trading partners in a bid to have them join the treaty¹⁵ at a time when its contents are already defined.

→ Human rights can also provide a means to curb the phenomenon of "forum shopping". Indeed, the member states of the United Nations have all signed at least one convention on human rights, pledging to work towards their realization both nationally and internationally. Human rights defenders therefore should and can remind the concerned states of their obligations by using the relevant human rights monitoring mechanisms, requesting states to respond and defend their negotiating positions on intellectual property and to seek consistency with their human rights obligations. For example, Switzerland and two EU members, the Netherlands and Germany, will be under scrutiny at the forthcoming session of the Committee on Economic, Social and Cultural Rights (CESCR) in November 2010, followed by New Zealand in February 2011.

Conclusions

Our era is still marked by high inequality in the realization of economic, cultural and social rights in different regions of the globe. Intellectual property plays an important role in maintaining these inequalities because it may limit access to

essential goods that are necessary to realize these rights. For a large part of the world's population, rising prices caused through implementing stringent provisions on intellectual property become an insurmountable barrier. Thus, patents contribute to limiting access to essential medicines or food for parts of the world's population. Similarly, copyright law may hinder the dissemination of educational materials. In addition, patents hamper technology transfer to developing countries, while at the same time allowing the North to appropriate the traditional knowledge and resources of these regions.

It is high time to consider introducing obligations, flexibilities, exceptions and limitations to combat the spread of IPR so that the latter cease to be an obstacle to the overall realization of human rights. Does Article 7 of TRIPS not say: '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'?¹⁶ To maintain this balance, such multilateral negotiations should consider the public interest of each IPR, using human rights as reference to find the right balance. Instead, the ACTA acts as an exclusive club that strives for increasing the rights granted to IPR holders unilaterally. It should also not be forgotten that developed countries have always enjoyed enormous leeway to adapt their own IPR systems to their development goals while developing.¹⁷ Suffice it to recall that Switzerland allowed patenting of drugs only about 35 years ago. Another example is the United States, which has long provided IPRs to nationals importing new technologies patented elsewhere and unknown in the States. These same acts, now qualified by developed countries as acts of "intellectual

piracy", laid the very foundations of their economic development.

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¹ TRIPS, Articles 41-62, WTO, 1994

² TRIPS, Section IV, Part III, WTO, 1994

³ TRIPS Art.51, WTO, 1994

⁴ The United Arab Emirates also participated in the negotiations, but withdrew later.

⁵ See for example the initiative PublicACTA: <http://publicacta.org.nz/> or the positions taken by various parliaments of the contracting parties: <http://www.michaelgeist.ca/content/view/4737/125>

⁶ The ACTA is not limited to border measures. It also includes IPR violations on the Internet and in broadcasting. For more information see <http://www.michaelgeist.ca>, <http://www.laquadrature.net>

⁷ For more information on the confusion generated by the concept of intellectual property rights: <http://www.gnu.org/philosophy/not-ipr.html>

⁸ Within a specific IPR, one should also consider whether to differentiate the type of protection relative to different goods covered. For example: should the copyright covering computer software have the same scope as the one protecting a publication?

⁹ According to the text leaked in March, these proposals can be attributed to the United States, Japan, the European Union and Mexico

¹⁰ See <http://www.evb.ch/fr/p25015680.html>, <http://www.evb.ch/fr/p25016127.html> and http://www.southcentre.org/index.php?option=com_content&task=view&id=1072&Itemid=279&lang=en

¹¹ For more information see <http://www.bilaterals.org/spip.php?article17423>

¹² For more information and examples see: Sell, S., "The global IP UPWARD, Anti-counterfeiting and piracy enforcement efforts: the state of play", George Washington University, June 2008

¹³ The Office of the USTR consulted private companies and private sector associations on the contents of the ACTA. For more information see: <http://www.keionline.org/node/660>

¹⁴ Not addressed in this paper is the treaty chapter on means of enforcing IPR on the web. For more information see www.laquadrature.net, www.michealgeist.ca, www.keionline.org

¹⁵ For example by requesting ACTA membership as a prerequisite in new free trade agreements, rather than in technology transfer agreements

¹⁶ TRIPS Article 7, WTO, 1994

¹⁷ Note that Article 8 of TRIPS provides, within the limits prescribed by the agreement, that states have the right to adjust their IPR system to avoid endangering public health, food security and public interest in sectors that are vital to socio-economic development.

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Websites useful for monitoring progress of ACTA negotiations:

Squaring the Net www.laquadrature.net

Michael Geist's blog www.michaelgeist.ca

Knowledge Ecology International www.keionline.org

IP-Watch www.ip-watch.org

Acronyms:

ACTA : Agreement on Anti-Counterfeiting in Trade

CESCR : Committee on Economic, Social and Cultural Rights

EU : European Union

FTA : Free Trade Agreements

G8 : Group of Eight (Canada, France, Germany, Italy, Japan, Russia, UK, United States)

IPR : Intellectual property rights

LDCs : Least developed countries

TRIPS : Agreement on trade-related intellectual property rights

WTO : World Trade Organization

WIPO : World Intellectual Property Organization