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# The Anti-Counterfeiting Trade Agreement: An updated analysis

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**The Anti-Counterfeiting Trade Agreement: An updated analysis**  
**Kimberlee Weatherall<sup>1</sup>**  
**November 2009**

It's that time again. Anti-Counterfeiting Trade Agreement ("ACTA") negotiators are gathering again, this time in South Korea.<sup>2</sup> ACTA has been off the radar for a little while now, overshadowed by other IP developments: the debate over patents in the US as *Bilski* does to the US Supreme Court,<sup>3</sup> three-strikes proposals in the UK<sup>4</sup> and France (by way of the HADOPI law);<sup>5</sup> and the iiNet litigation in Australia over ISP responsibility for the BitTorrenting of their customers.<sup>6</sup> In fact, looking around the key sources of information on ACTA, there has been little by way of discussion or updates since sometime in 2008, apart from some ongoing controversy over transparency, including a lawsuit brought by a group of non-government organizations seeking the release of information, and, more recently, revelations that in the US, some 42 people from various organizations outside the usual rightsholder groups, including NGOs and technology-related corporate interests (Google, eBay and others) have been shown (parts of) the negotiating text, subject to a Non-Disclosure Agreement (NDA).<sup>7</sup>

The present author has previously discussed some issues to watch in the ACTA negotiations,<sup>8</sup> and the international context for these negotiations has been considered in

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<sup>2</sup> This is the 6<sup>th</sup> meeting since negotiations proper commenced in October 2007.

<sup>3</sup> In *Bilski v Kappos* (Case 08-964; cert granted 6/1/2009), the US Supreme Court is considering what constitutes patentable subject matter for the first time since the early 1980s: thus raising =squarely controversial issues such as the patentability of software and business methods.

<sup>4</sup> On 28 October 2009, *The Guardian* reported that the UK's business secretary, Lord Mandelson, had announced that the UK would release a Bill in late November which would include rules for warning internet users engaged in copyright infringement, with a possible 'final resort' of terminating internet access, with the laws to be effective from 2011: *The Guardian*, "Lord Mandelson sets date for blocking filesharers' internet connections", 28 October 2009.

<sup>5</sup> The 'HADOPI' law, or more correctly, the *loi favorisant la diffusion et la protection de la création sur Internet*, is a French law which sets up a 'three strikes' system whereby copyright infringers can, following warnings, have their internet access suspended. The law has been subject to various problems and challenges; most notably in June 2009 when the Constitutional Council of France struck down those parts of the law which would have allowed sanctions against those accused, but not proved before any independent tribunal, of infringing copyright. Most recently, a revised version (requiring judicial review before suspension of internet service) was approved by the Constitutional Council.

<sup>6</sup> In these proceedings (NSD1802/2008, Roadshow Films Pty Ltd ACN 100 746 870 & Ors v iiNet Ltd ACN 068 628 937), 34 film studios and owners of copyright in various films and television shows have sued iiNet, Australia's third largest internet service provider (ISP) alleging that iiNet has authorized copyright infringement by failing to prevent or warn customers who iiNet had been informed were using BitTorrent to distribute those films and television programs. The case is being heard in Australia in October and November 2009, with judgment expected in the new year.

<sup>7</sup> "USTR Seeks Advice On ACTA Internet Chapter Proposal", *Inside US Trade*, 18 September 2009.

<sup>8</sup> Kimberlee Weatherall, 'The Anti-Counterfeiting Trade Agreement: What's it all about?' (2008) Available at: <http://works.bepress.com/kimweatherall/18>.

detail elsewhere.<sup>9</sup> This updated note outlines what is publicly known about the negotiations and the purpose of the agreement in order to provide information for interested members of the public, particularly Australians.

## 1 History to date

Negotiations for the ACTA are being conducted by a small number of mostly developed countries, lead, it would seem, by the US,<sup>10</sup> the European Union, Japan, and Switzerland. Representatives from New Zealand, Canada, Mexico, Australia, South Korea, and Singapore. A first round of pre-negotiation technical discussions was held on 4 October 2007. Australia decided to participate in February 2008.<sup>11</sup> Further informal pre-negotiation discussions were held in January, with negotiating rounds in June, July, October and December 2008, and July 2009. A 6<sup>th</sup> round was held in November 2009.

The idea for the agreement, according to the Australian Department of Foreign Affairs and Trade (‘DFAT’), has roots in the 2004 Global Congress on Combating Counterfeiting,<sup>12</sup> although it is better seen as part of a more general push by IP owners and representative bodies to increase the focus on, and resources devoted to, IP enforcement in a range of different contexts and through a range of different international institutions.<sup>13</sup> The declared goal is “to provide a high-level international framework that strengthens the global enforcement of intellectual property rights.”<sup>14</sup>

It might seem strange, at first glance, to hold negotiations on prevention of counterfeiting amongst a group of countries *not* including the major *sources* of counterfeit goods, most notably China. There are, however, two things worth noting. First, developed countries acting alone can take quite significant actions, particularly through border measures. Second, the method adopted here is perhaps a more formalized version of the expanding “circles of consensus” by which the text of TRIPS was negotiated,<sup>15</sup> in which small groups of “like-minded” countries negotiating to a point of consensus among themselves, before expanding negotiations to include larger groups of countries. As described by Drahos and Braithwaite, in this process text agreed in smaller groups gains a certain amount of force or momentum which would not exist if the larger group started with a relatively blank slate and proposals from all side. The very existence of ‘pre-negotiation’ discussions suggest use of this method, and various participants have commented that the

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<sup>9</sup> Susan K. Sell, “The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play”, June 9, 2008

<sup>10</sup> See US Trade Representative, Press Release October 23, 2007, “Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes”, available at <http://www.ustr.gov>.

<sup>11</sup> See the press release by Simon Crean (Minister for Trade), 1 February 2008, [http://www.trademinister.gov.au/releases/2008/sc\\_012.html](http://www.trademinister.gov.au/releases/2008/sc_012.html). The decision followed the release of a discussion paper in late 2007, available at <http://www.dfat.gov.au/trade/acta/discussion-paper.html>

<sup>12</sup> DFAT discussion paper, available at <http://www.dfat.gov.au/trade/acta/discussion-paper.html>.

<sup>13</sup> See Sell, above n2 (outlining the other institutions in which this push is going on). There are any number of declarations regarding counterfeiting from the last few years: eg the declaration following the 2005 G8 Summit, or discussions within the World Customs Organization

<sup>14</sup> \*\*\*

<sup>15</sup> On this method see Peter Drahos with John Braithwaite, *Information Feudalism* (Earthscan 2002), 137-139

ACTA will constitute “a new, higher benchmark for enforcement *that countries can join on a voluntary basis*”.

## 2 Criticisms of ACTA

Why then has ACTA generated so much criticism? To date, there are two broad critiques of ACTA. One is procedural: that the process by which ACTA is being negotiated is problematic. The second is substantive: that particular issues that may end up in ACTA will cause public policy problems in the future. In this section, I address these in turn.

### 2.1 *The procedural critique*

In relation to procedure, there are a number of legitimate concerns with the way ACTA is being approached. The first problem is the lack of transparency.<sup>16</sup> The negotiations, such as they are, have been largely conducted in secret: so much so that participants have apparently signed confidentiality agreements.<sup>17</sup>

No text has been released and it is not publicly known how advanced any text is. In 2008, a “Discussion Paper” (dated 2007) was published on Wikileaks (hereafter referred to as the “Wikileaks Document”).<sup>18</sup> This document appeared written from a US perspective regarding proposals for the negotiations. However, it is not clear (a) how far the Discussion Paper reflects only the “ideal ACTA” envisaged by the USTR, or (b) to what extent it has already been the subject or even basis of discussions. In the lead-up to the November 2009 negotiations, there have been further ‘leaks’ or comments detailed on websites such as the website maintained by Michael Geist.<sup>19</sup> At a broad level of generality, too, the negotiating parties have released various summaries, the latest on DFAT’s website.<sup>20</sup>

At first, even the issues that were ‘on the table’ in the negotiations remained largely confidential, although more recently the negotiating parties have started to release ‘negotiating agendas’, although the text remains secret. Indeed, faced with a Freedom of Information request, even the (otherwise transparency-favouring) Obama Administration in the US told the court that the key ACTA documents were classified for national defense or foreign policy reasons: on the basis that it would compromise negotiations and be viewed negatively by other negotiating partners.<sup>21</sup> This veil of secrecy has inevitably

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<sup>16</sup> This point has been well-made by both William Patry on The Patry Copyright Blog (see 27 May 2008 (“An Offer Countries Can’t Refuse”), 3 June 2008 (“An ACTA Call to Arms: No More Secret Government”) and 6 June 2008 (“Secret Government Part III)) and Michael Geist on his blog (“Government Should Lift Veil on ACTA Secrecy”, 9 June 2008).

<sup>17</sup> According to an IP Watch report, participants have signed confidentiality agreements: see *IP Watch*, 5 June 2008, ‘Speculation Persists on ACTA as First Official Meeting Concludes’, available at <http://www.ip-watch.org/weblog/index.php?p=1082>.

<sup>18</sup> Available at <http://www.wikileaks.org/>

<sup>19</sup> See generally <http://www.michaelgeist.ca>.

<sup>20</sup> Available at [http://www.dfat.gov.au/trade/acta/summary\\_of\\_discussions.html](http://www.dfat.gov.au/trade/acta/summary_of_discussions.html)

<sup>21</sup> ‘NGOs Withdraw ACTA Lawsuit, Blast USTR For Lack Of Transparency’, *Inside US Trade*, 19 June 2009.

generated paranoia on the part of interested groups not consulted, and at times wild speculation regarding the possible contents of the agreement online: with such horrors being imagined as widespread internet service filtering for IP material; customs searches of laptops or other electronic devices for IP infringements; even confiscation of electronic equipment.<sup>22</sup>

Coupled with the concern about secrecy in general is a concern about a lack of balance in the interests who *have* been consulted. Historically, corporate IP-owning interests such as the record and film industries and pharmaceutical industries have been part of the USTR's key advisory group in this space, the Intellectual Property Industry Trade Advisory Committee (ITAC), and, as such, have had privileged access and, it is feared, more influence over agreement text.<sup>23</sup> More recently the USTR has expanded the set of those consulted at least in relation to ACTA: in September 2009 it was reported that the USTR had submitted some text to a group of stakeholders that includes technology companies like eBay, Verizon, and Google, Inc.; the Consumer Electronics Association; and civil society groups Public Knowledge and the Center for Democracy and Technology.<sup>24</sup> This has reduced, but not removed concerns – the most strident critics, namely the Electronic Frontiers Foundation and Knowledge Ecology International were not included, and those consulted signed non-disclosure agreements.<sup>25</sup> There have not been reports of any similar consultations by the negotiating teams of other countries.

The response by negotiators to these concerns is to argue that the negotiations have not been 'secretive' – that they are well known; that negotiators are open to receiving submissions; and that refusing to release the text is part of the normal process of treaty negotiation and necessary to facilitate any kind of agreement being reached. It is no doubt correct to say that agreement will be easier to reach without thousands of eyes scrutinizing every detail of the text. However, implicit in such assurances is that civil society critics can 'trust' the negotiating parties to reach a fair result: that opportunities to comment on text are hence unnecessary. It is hardly surprising that many find these explicit or implicit assurances unconvincing. First, given the level of no-longer-negotiable, domestic-sovereignty-impinging, IP-owner-oriented detail that has emerged from previous 'trade' negotiations (such as the various US bilateral FTAs) protestations that there is 'nothing to worry about' inevitably ring hollow. Second, such assurances are blunted by the knowledge that IP industry groups have privileged access through the USTR's advisory processes.

Further, the *perception* of secrecy is perhaps as important as any reality. Interest groups' perception that the process is unbalanced and secretive is bringing IP into disrepute.<sup>26</sup> IP

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<sup>22</sup> See for example IP Justice White Paper on the Proposed Anti-Counterfeiting Trade Agreement (ACTA), 25 March 2008, available at [http://ipjustice.org/wp/wp-content/uploads/IPJustice\\_ACTA-white-paper-mar2008.pdf](http://ipjustice.org/wp/wp-content/uploads/IPJustice_ACTA-white-paper-mar2008.pdf).

<sup>23</sup> See generally Susan Sell, above n2.

<sup>24</sup> 'USTR Denies Non-Disclosure Agreements Are 'Model' For Future Deals', *Inside US Trade*, 16 October 2009, Volume 27; Issue 40.

<sup>25</sup> Ibid.

<sup>26</sup> See generally Jane Ginsburg, "How Copyright Got a Bad Name for Itself" (2002) 26 *Colum. J. L. & Arts* 61.

already has an image problem: indeed, a common theme at IP-oriented events in recent times has been discussion of the question: “how do we improve people’s perceptions of IP?”<sup>27</sup> In Australia, we even have a whole new body devoted to this, called the “IP Awareness Foundation”, which is apparently seeking to foster positive attitudes towards IP, albeit by somewhat lame initiatives such as their “suggested dinner party conversations”.<sup>28</sup> Laughable as such initiatives may be, they are symptomatic of a real problem. IP law is not readily “self-enforcing”: it depends for its effectiveness on voluntary compliance and support from members of the public, which in turn depends on a public belief that the laws are generally fair.<sup>29</sup> Not only is the secrecy around ACTA contributing to IP’s bad image, it will inevitably be difficult for governments and IP owners to convince the general public that the outcomes are “fair” when the agreement has the appearance of a secret deal brokered with preferential access and influence accorded to IP-owning industries.

Even here, it must be acknowledged that public support is less important to finer procedural details of the way that IP enforcement is managed: for example, the rules governing how customs authorities deal with allegations that certain shipments are counterfeit.<sup>30</sup> To the extent that the ACTA text is limited to those issues only, the impact on the public’s image of IP is less direct. However, most indications to date are that the ACTA will range more broadly into issues like enforcement of copyright in an online context. Here, civil liberties (such as privacy) and non-IP-owning interests (such as internet service providers) are very important.

A second issue is the subject matter of the treaty, and the extent to which that subject matter goes beyond IP law and law enforcement to general matters of civil procedure. It is questionable whether treaties are an appropriate place to make significant alterations in this area. While IP law has long been the subject of treaty and considerable

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<sup>27</sup> Ibid; see also Roya Ghafele, *Perceptions of Intellectual Property: A Review*, A Report for the Intellectual Property Institute, August 2008, available at <http://www.ip-institute.org.uk/pdfs/Perceptions%20of%20IP.pdf>

<sup>28</sup> “Want to talk to friends, family and strangers about film piracy in an engaging way? Here’s how: The following two conversations each begin with an anecdotal story about a popular film, and then provide a supportive argument that explains how movie piracy has negative consequences. The best way to conclude these conversations is with an account of what is being done about piracy, and how everyone can play at active part”: Intellectual Property Awareness Foundation, available at <http://www.ipaf.com.au>.

<sup>29</sup> Ginsburg, above n26.

<sup>30</sup> This is not to say that customs rules do not give rise to important policy questions: that they do is obvious from recent disputes concerning ‘transshipment’ of pharmaceuticals: reports in October 2009 suggest that India has prepared a legal claim, to be brought in the World Trade Organization against the European Commission for seizure of drug consignments of Indian pharmaceutical companies, including Dr Reddy’s and Aurobindo at various European ports: see “India, Brazil to move WTO against EC over drug seizure issue”, *Business Standard* (India), 9 October 2009, available at <http://www.business-standard.com/india/news/india-brazil-to-move-wto-against-ec-over-drug-seizure-issue/75571/on>. There has also been much dispute over the World Customs Organization’s moves to reach agreement on certain IP matters. However, Customs Rules are applied by bureaucrats and do not need to be ‘self-enforcing’ in the way that other IP rules do, hence the public *image* of those rules is less important to IP achieving its goals – albeit still having some relevance to how fairly people perceive IP to operate.

harmonization, civil procedure has not, and varies significantly from country to country. Further, the risk is that ACTA will force changes to civil procedure in signatory countries, *only* in relation to IP: a result that is difficult to justify. As several leading IP scholars noted when the EU IP Enforcement Directive was proposed:

*Procedural law, civil as well as criminal, encapsulates a whole set of balances concerning fundamental freedoms of individuals when they face the operations of the justice system. How much of their private affairs should defendants be obliged to reveal? Who will keep control over the proceedings? Who will decide on the merits, who on the remedial consequences? In procedural law lie the real tests of how punitive, and therefore preventive, legal redress should be. The tests have evolved in different countries out of long experience with their own system, each with its virtues and idiosyncrasies. In large measure they apply to all types of claim, not just to particular fields, such as intellectual property, and that is a highly desirable presumption to be maintained.<sup>31</sup>*

A third issue is fragmentation. As well as the ACTA, IP enforcement is being discussed in the World Trade Organization, the World Intellectual Property Organization, the World Customs Union, and many bilateral trade agreements. There is a risk of confusion, particularly, one would think, for government departments and enforcement bodies. Requiring government officials (such as customs officers or members of government departments) to comply with multiple sources of (slightly varying) regulation is likely to be both inefficient, and counter-productive. What is more important for government – actually encouraging innovation, or box-ticking on their customs processes to check compliance with the multiple different obligations in different treaties? What should money be spent on – grants and assistance for research and artistic endeavour – or yet more forms and processes and institutions and meetings about counterfeiting?

Fourth, there is a real concern that the two-stage negotiation process will hamper the effectiveness of ACTA. Confining negotiations at this stage to a “small number of like-minded countries” will no doubt enable the conclusion of a more detailed agreement. However, the more stringent ACTA, the less likely it becomes that significant countries (such as China, India, Brazil, or Thailand) not included in the initial negotiations will sign up later – at least in the absence of significant incentives.<sup>32</sup> Smaller countries may be convinced to sign the agreement in the context of bilateral trade negotiations with the EU or US. But cooperation from those countries is surely less important to reducing counterfeiting than convincing countries where most counterfeits are produced – like China. To the extent that it is cooperation with these countries that is most likely to achieve the long-term goal of countering counterfeiting, it makes little sense to draft a treaty that will never include these crucial partners.<sup>33</sup>

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<sup>31</sup> William Cornish, Josef Drexl, Reto Hilty, Annette Kur, „Procedures and Remedies for Enforcing IPRS: The European Commission’s Proposed Directive“ [2003] 25 EIPR 447, 448

<sup>32</sup> Of course, it is possible that such countries will see it as advantageous to sign the treaty if local developments reach a point where strong enforcement of IP is a national imperative. However, by that point, the treaty is likely to make little difference

<sup>33</sup> See Robert Burrell and Kimberlee Weatherall, 'Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy' [2008] 2 *University of Illinois Journal of Law, Technology and Policy* 259-319; available also at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1010833](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010833).

There is an answer to this last criticism: that there are benefits in reaching agreement, among a smaller group of like-minded countries, about what an ideal or desirable IP enforcement system would look like: that such agreement will at least ensure that those countries have common procedures and common understandings which will enable more efficient management of IP and less confusion and costs for IP owners when transacting among those countries. Unfortunately, this argument becomes less convincing once you actually pay attention to what happens after detailed agreements of this type have been concluded. Along with a colleague, I have elsewhere analysed the implementation of the Australia-US Free Trade Agreement, concluding there that even in areas where the IP chapter was extremely detailed, non-harmonised systems resulted from implementation and the political compromises necessary to pass domestic legislation.<sup>34</sup> We should not expect that the outcomes of ACTA, however detailed, will be any more effective in providing a common system or reduced transaction costs. The impact of domestic implementation on the final shape of systems translated into domestic regulation can not be ignored.

## 2.2 *The substantive critique: proposed scope of the ACTA and some of the issues*

The second set of critiques concerns the potential content of ACTA. Here, discussions inevitably become more uncertain, because the negotiating texts are not available. Nevertheless, we can make some educated guesses about what is likely to be ‘on the table’, by considering (a) texts from US free trade agreements, which have been explicitly cited as a ‘model’ by the US negotiators,<sup>35</sup> supplemented by other (stronger) US provisions and practices;<sup>36</sup> and (b) the European *acquis communautaire*:<sup>37</sup> the assumption being that the EU negotiators will be looking to maintain the *acquis communautaire*, rather than add to it in ways that could necessitate awkward negotiations with the European Parliament.<sup>38</sup> It is necessary to ‘speculate’ in some detail, using this approach, because the ‘new style’ of IP treaty-making engages at a very high level of detail.

In June 2009, partly in response to the criticisms of the process already outlined, the ACTA negotiating parties released a “summary of key elements under discussion” – an

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<sup>34</sup> Ibid.

<sup>35</sup> See USTR Press Release, dated 9 October 2009, entitled ‘Update on USTR Preparation for Upcoming ACTA Round’, which states that “The U.S. approach to the legal framework provisions of ACTA has been to view the IPR enforcement provisions of recent U.S. free trade agreements as a model.”

<sup>36</sup> The USTR has repeatedly stated that there is no intention to alter “the balance of IPR protection and digital rights reflected in U.S. law”: see eg “ACTA Embroiled In Fight Over Internet Rules, USTR Promises Balance”, *Inside US Trade*, 26 September 2008, Volume 26(38).

<sup>37</sup> That is, the current system of EU law as represented by the various IP-related EU Directives.

<sup>38</sup> There have been some interesting differences of approach between the European Parliament and the European Commission on IP, including the rejection by the Parliament of a proposed Software Directive. More relevantly, the Parliament has made significant amendments to both proposed EU IP Enforcement Directives.



agreed summary that all negotiating parties were to publish to their respective publics.<sup>39</sup> According to this document, provisions across a range of areas are being proposed:

1. Civil enforcement: including interlocutory/provisional and remedial powers of the courts; issues of calculation of damages;
2. Border measures: the power of customs authorities to seize allegedly infringing goods; management (and forfeiture) of seized goods, and associated processes for releasing information to IP owners;
3. Criminal enforcement: the scope of criminal sanctions, search and seizure; forfeiture of infringing goods and more;
4. The “internet provisions” – dealing with the role of internet service providers and more;
5. International cooperation: defining means of cooperation among authorities from different countries and information sharing;
6. Enforcement practices: collection of statistics, expertise within authorities; publication of information; promotion of public awareness.

It would take an article of considerably more length than this one to consider what might be on the table across the full range of these areas. What may be worthwhile, however, is a consideration of some of the more controversial possibilities falling under some of these headings.

### *2.2.1 Scope: copyright and trade mark only?*

One issue known to be ‘on the table’ concerns the scope of the agreement: in particular, whether its provisions would cover patents and/or geographical indications. As of late September 2008, it was reported that the US wished to exclude both, while the EU wanted them included.<sup>40</sup> This is hardly surprising given these countries’ respective areas of comparative advantage and known areas of difference in existing fora such as the WTO. In my view, it would be preferable to limit the provisions so as not to apply to patents or geographical indications. Many countries do not, at present, have any history of applying criminal provisions to patent infringement and application of criminal provisions to patent infringement (or design infringement) ought to be the subject of a domestic policy process prior to any international agreement. Similarly, there are good reasons why, to date, many countries have not involved customs authorities in policing patent infringements: most obviously, because in the case of counterfeit copyright and trade mark-infringing goods, the infringing nature of the goods will be clear on the face of the goods in question. Patent infringement will usually be less obvious. Further, Europe’s use of such customs rules in relation to patented goods has in recent times generated much controversy as European authorities have detained drugs in transit, thus

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<sup>39</sup> Published by the USTR at <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/april/acta-summary-key-elements-under-discussion>; and by DFAT (Australia) at [http://www.dfat.gov.au/trade/acta/summary\\_of\\_discussions.html](http://www.dfat.gov.au/trade/acta/summary_of_discussions.html).

<sup>40</sup> “ACTA Embroiled In Fight Over Internet Rules, USTR Promises Balance”, *Inside US Trade*, 26 September 2008, Volume 26(38).

causing India and Brazil to threaten WTO proceedings.<sup>41</sup> Until such controversial matters are worked through, it would be premature to extend protection via international agreement.<sup>42</sup>

### 2.2.2 *Civil Enforcement: Damages and Statutory Damages*

A final matter under the general category of ‘civil enforcement’ worth noting is the question of damages. The ‘Summary of Key Elements under Discussion’ refers to “the definition of adequate damages and the question of how to determine the amount of damages, particularly when a right holder encounters difficulties in calculating the exact amount of damage it has incurred”.<sup>43</sup> Expressed at that level of generality, there are clearly a variety of ways that a provision on damages could be formulated which would not cause serious injustice, because they are subject to the discretion of judicial authorities. For example, Australian Copyright Law has two mechanisms for ensuring adequate damages even in the face of difficulties of calculation: namely, additional (‘exemplary’) damages under s 115(4), and the provision for taking “unproven” electronic infringements into account under s 115(5)-(6).

There is some reason for concern, however, that the US at least will propose a system of statutory (pre-fixed) damages: such provisions are found in many of the US’ free trade agreements.<sup>44</sup> Such systems for statutory damages can render injustice in the individual case, giving awards of damages vastly in excess of any actual damage suffered attributable to the defendant’s act.<sup>45</sup> They can also be used to threaten people into settling cases: against a threatened massive statutory damages award, a small settlement may start to sound attractive.

### 2.2.3 *Customs issues: Seizure and destruction of IPR infringing goods and equipment and materials used to make them*

Another proposal under the heading of ‘civil procedure’ that has drawn much attention is

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<sup>41</sup> see “India, Brazil to move WTO against EC over drug seizure issue”, *Business Standard* (India), 9 October 2009, available at <http://www.business-standard.com/india/news/india-brazil-to-move-wto-against-ec-over-drug-seizure-issue/75571/on>; see more generally above n30.

<sup>42</sup> In Europe, a patent owner (or owner of other specified IP rights) may lodge a written application with the customs authorities, including an accurate and detailed technical description of the goods in question, any information concerning the nature of the alleged fraud and the name and address of the contact person appointed by the right-holder; customs officers may then detain the goods on importation and notify the rightsholder, giving them a chance to institute proceedings to prevent the importation permanently as a result of *Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights*. For an incorporation of these provisions into domestic law see the UK: *Goods Infringing Intellectual Property Rights (Customs) Regulations* 2004 No. 1473.

<sup>43</sup> Above n39

<sup>44</sup> \*\*\*get refs from Exporting Controversy

<sup>45</sup> \*\*\*Tanenbaum from FACTIVA; Jammie Thomas FACTIVA

the idea of empowering authorities, such as police, to seize and destroy IPR infringing goods, and the equipment used to make them. In the popular media, references to “seizure and destruction of IPR infringing goods and equipment” have given rise to wild stories that consumer items, like laptops, MP3 players, and the like, will be subject to random search or forfeiture at the hands of law enforcement agencies or customs.<sup>46</sup> The order for seizure and destruction of IP infringements by judicial authorities is relatively well-established in many countries. Seizure of property – particularly property in the form of equipment used to infringe IP – by enforcement authorities such as police raises much more difficult questions, which have recently been canvassed in Australia.<sup>47</sup>

First, there is the question of what kinds of equipment will be subject to forfeiture: those used to infringe, or only those designed to infringe? This is particularly important because some equipment used to infringe (particularly computers, or storage media) will not make obvious on their face what their use is or whether they have been used to infringe. Under present Australian law, for example:

1. *Courts* may order the destruction of “a device or equipment used or intended to be used for making infringing copies” when a person is otherwise charged with a criminal offence”;<sup>48</sup>
2. *Police officers* must require forfeiture of “each device ... that is alleged to have been made to be used for making an infringing copy of a work”.<sup>49</sup>

In other words, courts, but not the police, may require forfeiture of a general-purpose device (like a general purpose computer or DVD burner). Police may only require forfeiture of a device *specifically designed* for copyright infringement. A broad discretion to require forfeiture of general-purpose consumer electronics devices in the hands of police with limited training would be troubling.

Even forfeiture this restricted, however, is fairly troubling if it is envisaged to be conducted on-the-spot by police officers, because it raises some difficult issues of process much more readily handled by a court than a police officer:

1. What would be the basis required prior to search of a device? Suspicion?

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<sup>46</sup> Not so wild perhaps: in the ‘Summary of Key elements under Discussion (see above n39) one of the elements said to be under discussion in relation to customs is “a *de minimis* exception that could permit travelers to bring in goods for personal use”.

<sup>47</sup> In 2006 Australia introduced a series of new criminal offences into the Copyright Act and a scheme for the issue of infringement notices. In 2007 the Attorney-General’s Department issued Draft Infringement Notice Guidelines which dealt, inter alia, with issues of forfeiture to police officers. The guidelines arguably raised more questions than they answered. For some discussion of the forfeiture issues, see Kimberlee Weatherall, Submission: Draft Guidelines on the Infringement Notices and Forfeiture of Infringing Copies and Devices Scheme, Copyright Amendment Regulations 2006, available at <http://works.bepress.com/kimweatherall/14/>, and Paramaguru, Abi; Vaile, David; Bond, Catherine; Maurushat, Alana “Copyright Infringement Notices Scheme: A Submission to the Attorney-General’s Department” [2007] UNSWLRS 62, available at <http://www.austlii.edu.au/au/journals/UNSWLRS/2007/62.html>.

<sup>48</sup> Copyright Act 1968 (Cth) s 133

<sup>49</sup> Copyright Act 1968 (Cth) s 133B.

Reasonably-based suspicion? Involvement in an overt act of infringement? In order to avoid arbitrary searches and an overbroad discretion which could lead to abuse, it is important that the standard of suspicion be set relatively high;

2. Would forfeit/destruction be effected without any capacity to appeal to a judicial officer?<sup>50</sup>
3. Whose equipment could be forfeited? Forfeiture is a punishment, and, at least in theory, should only be applied where the person whose equipment is to be forfeited is themselves guilty of a crime either directly or as an accomplice (mere negligence ought not to be sufficient). How would any inquiry into ownership be conducted (again, this is something a court can readily canvas, but may be more difficult for law enforcement agencies).

A further issue is proportionality. It would not be proportionate to require forfeiture of a general-purpose device like a DVD burner worth \$4,000 on the basis of one known copyright infringement. Forfeiture ought to be confined to commercial or commercial scale infringement, and there should be an explicit requirement of proportionality. This may be different where it can be shown that the relevant equipment is specifically designed and only suitable for copyright infringement.

And finally, it is important (in any individual country) to give serious consideration to the role of private parties in this process. It is common for representatives of IP owners to be involved in investigation of IP infringement, and to provide expertise. But their involvement in a forfeiture process raises concerns about privatisation of justice and the use by private parties of powers and force which is the monopoly of the state. The role of private parties and IP owners in all these processes must be clearly limited and structured in such a way as to avoid any possibility of abuse.<sup>51</sup>

It is important to note that I am not advocating that all these matters be dealt with in treaty text. On the contrary, many of these concerns can and should be dealt with at a domestic level. It is therefore appropriate to ensure that any treaty language is sufficiently open-textured to allow for full procedural protections and limitations so that forfeiture is only used in appropriate circumstances.

#### *2.2.4 Criminal liability: defining copyright infringement 'on a commercial scale'*

Moving beyond the possible civil provisions, into the area of criminal liability, one question explicitly on the table is the scope of criminal liability for copyright and trade mark infringement. Various US bilateral trade agreements have required that criminal

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<sup>50</sup> Notably the Australian Draft Guidelines on the Infringement Notice Scheme (available here: [http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright\\_CopyrightInfringementNoticeScheme](http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_CopyrightInfringementNoticeScheme)) envisaged a system for storage of forfeited items and eventual destruction, but with capacity to challenge the infringement notice accompanying any forfeiture requirement.

<sup>51</sup> See further Cornish et al, above n21.

sanctions should be applied to “IPR infringements on a commercial scale”.<sup>52</sup> This requirement already applies for most countries, because it is found in TRIPS (Article 61). It seems likely, however, based on past US trade agreements, that the USTR will be proposing that the term “commercial scale” should be redefined to mean:

1. Any IPR infringement for purposes of commercial advantage or private financial gain (no matter how low the number);
2. Significant wilful infringements without motivation for financial gain to such an extent as to prejudicially affect the copyright owner (eg, Internet piracy); and
3. Imports and exports.

Two simple and obvious points can be made about such proposals. First, the redefinition of “commercial scale” to include all infringements for private gain has nothing to do with the kinds of counterfeiting that are said to be problematic by organisations like the OECD. To counter large- scale counterfeiting or piracy, it is not necessary to criminalise single acts of infringement, especially single acts for ‘private financial gain’. Such individual acts are unlikely to be the subject of transborder enforcement or even local enforcement by international IP owners.

Second, clear distinctions ought to be drawn between different *kinds* of infringement. There is all the difference in the world between obviously pirate/counterfeit, identical copies of movies or whole CDs or books which act as full substitutes for the authorized original, and infringements which involve new creativity on the part of the infringer but stray over that sometimes unclear line between acceptable borrowing and infringement. Is there any cause for criminal provisions to apply, say, to the famous Verve song, Bittersweet Symphony, which was said to infringe copyright in a Rolling Stones song. There was copying (of a memorable riff), it was certainly on a commercial scale – anyone feel like sending a famous band to jail? What about a book published with, say, quotes that are too long from existing work – an arguable, but failed, fair dealing? We are, of course, unlikely to see criminal prosecutions in such cases, but the point is a general one: *good faith commercial parties can be caught by overly broad drafting*. There should be some attempt to define what kinds of infringement we are targeting – and it should be the kinds of copying done by the “dudes at markets” – not commercial parties who overstep a very vaguely drawn line.<sup>53</sup> At the very least, any treaty text should clearly empower governments to exclude from criminal provisions, and from any customs procedures and suspensions, ordinary commercial practices and parties acting in good faith for ordinary commercial purposes.

A further matter for consideration is the wording of the provision. One difference between this suggestion in the Wikileaks Document and for example the US-Australia FTA is the presence of the word “private financial gain”. Inclusion of the word “private” here arguably carries the connotation that even purely personal (non-commercial) gain

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<sup>52</sup> eg AUSFTA Article 17.11.26.

<sup>53</sup> Discussing this further, see Cornish et al above n21.

(for example, avoiding paying the full cost of a DVD) would be sufficient to give rise to criminal liability.<sup>54</sup> This would, for most countries, be a significant departure from past approaches. Extension of criminal liability to such circumstances would be contrary to the approach of the Australian Parliament, as embodied in the *Copyright Amendment Bill 2006* (Cth). In that case (following public protests and concern) there was a concerted effort to remove those offences from the Act which might have given rise to the possibility of criminal liability for purely “private” acts (acts occurring within the home and without even the public distributive effect of, say, the uploading of material to Internet sites). Again, it is not at all clear why the definition needs to be so broad. If the target is organised crime and large scale counterfeiters (being the dangerous ones), then it would be sufficient to apply the provisions to (a) copies for trade or commercial purposes or (b) mass non-commercial infringement (of the large scale internet piracy kind).

Europe, too, has tended to exclude such acts. The EU Directive on Enforcement of Intellectual Property Rights suggests that “acts carried out by end-consumers acting in good faith” are excluded from acts “on a commercial scale”.<sup>55</sup> Further, the European Parliament amended a proposed Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights to provide a definition of „infringements on a commercial scale” to mean “any infringement of an intellectual property right committed to obtain a commercial advantage” and to exclude “acts carried out by private users for personal and not-for-profit purposes.”<sup>56</sup>

As for the reference to “imports and exports”, it is important that (a) this reference be understood either not to apply to cases where a person brings something in to the country for personal use, or (b) that the reference at least allow countries to exclude such acts. Extending criminal (or indeed any) liability to personal acts would be a significant change to Australian law. Notably too the present reference to imports and exports makes no reference to a requirement of knowledge (unlike some of the other proposals). It is difficult to know how much to read in to this. But while Australian criminal law is currently experimenting with criminal liability without knowledge (via the introduction, in late 2006, of strict liability offences, into the Copyright Act), it would be a mistake to “lock in” criminal liability without intention until it is determined whether that approach is successful and just.

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<sup>54</sup> In the US, under the No Electronic Theft Act (“NET Act”), „financial gain” is further defined to include „receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works: 17 U.S.C. §101

<sup>55</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004, corrigendum at OJ L 195, 2.6.2004 at 0016), Recital 14.

<sup>56</sup> Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of *Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights*, OJ C 74 E/527, 20.3.2008, Art 2. Note that the proposed directive is currently on hold: the proposal of the Commission was amended by the European Parliament; the proposal is currently with the Commission.

### 2.2.5 'Deterrent-level penalties'

The Wikileaks Document and subsequent discussions have referred to requiring the establishment and imposition of deterrent- level penalties and/or other measures to promote deterrence.

The use of the term “imposition” is troubling. TRIPS Article 61 requires that remedies *available* should include imprisonment and/or monetary fines sufficient to provide a deterrent. TRIPS Article 61 contains no treaty-level requirement that such penalties be *imposed*.<sup>57</sup> Notably too, this language could be even stricter than the language in AUSFTA, which requires only that criminal penalties must be *provided* and that the parties will *encourage* judicial authorities to impose deterrent-level fines. It is not clear how, consistent with the doctrine of separation of powers, any executive government in a democracy could direct the courts to ensure that deterrent penalties “were imposed”. Deterrence is one factor relevant in criminal offence sentencing, but not the only one.<sup>58</sup>

### 2.2.6 Internet Distribution and Information Technology

The key issue in relation to this area is the level of detail proposed.

As stated in the Wikileaks document, for some countries, which are not parties to the WIPO Copyright Treaty or WIPO Performances and Phonograms Treaty (collectively, the “Internet Treaties”), these undertakings might be relatively significant, as they incorporate the WIPO Internet Treaty provisions.

But for countries which are signatories to the Internet Treaties, at this level of generality an ACTA would be relatively untroubling. “Safeguards from liability” could be complied with by having a doctrine of authorisation of infringement that forbids ISPs from actively encouraging copyright infringement. “Procedures enabling right holders who have given effective notification of a claimed infringement to expeditiously obtain information identifying the alleged infringer” could refer to ordinary court processes for discovery of identity. And “remedies against circumvention of technological protection measures used by copyright owners and the trafficking of circumvention devices” adds little to the WIPO provisions.

However, the devil is, as always, in the detail. Some matters to watch for:

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<sup>57</sup> This fact may well have been important in determining the nature of the current US proceedings against China in relation to IP laws. The US has not alleged, and was not consistent with TRIPS able to allege, that China was deficient in the imposition of penalties – although there is no shortage of private parties arguing that China is thus deficient.

<sup>58</sup> It may also be worth noting that in the past, when the idea of „sentencing guidelines” or „sentencing guideline judgments” were recommended by a Parliamentary Committee in the Copycats Inquiry (House of Representatives Standing Committee on Legal and Constitutional Affairs, Cracking Down on Copycats: enforcement of copyright in Australia (2000), Recommendation 5) the government response to the report noted that the Acting Chief Justice of the Federal Court of Australia „responded on behalf of the Court pointing to a potential constitutional impediment and a number of fundamental difficulties in the proposal” .

1. Whether “cooperation in removal” of copyright-infringing material is expanded to include (or understood to include) requirements for filtering of copyright material or active termination of internet users (the so-called “graduated response” or “three strikes” proposals);<sup>59</sup>
2. Whether “expeditious means” of obtaining information requires “means without judicial process”. Australia’s Federal Court arguably is “expeditious” (or can be). But unsupervised *private* systems for sharing customer details, without the necessity for independent (judicial or administrative) assessment of the case for infringement, would be much more problematic and raise significant privacy concerns.

It would be particularly concerning if “three strikes” or “graduated response” type provisions (those requiring termination of the internet service to repeat infringers) were included in ACTA. Such provisions have not been enacted internationally, they do not represent a consensus approach; they have been actively opposed in many countries. This would, in fact, be lawmaking by treaty-making. At this stage, if individual countries want to experiment with such provisions, or if private parties (ISPs) want to experiment, that might show whether such approaches are effective. But requiring, as a matter of treaty law, provisions which have not been proven effective to reduce infringement in any country would be troubling indeed.

Such measures would be particularly troubling in Australia, where we have, working through the court system, a case addressing the current ISP safe harbours. Australia should not agree to any terms that would interfere with that judicial process, and must retain domestic policy freedom to address any implications emerging from that court case.

### *2.2.7 Customs Measures: Costs of seizure and storage*

The Wikileaks Document appears to suggest that there should be “allocation of liability for storage and destruction fees between the importer/exporter, rightholder, and government agency (so as not to place unreasonable burdens on right holders).” Notably the proposed European Directive on Criminal Measures includes a similar provision – with bearing the costs of storage of seized goods being suggested as a possible penalty for criminal IP offences.<sup>60</sup>

However, notably this is not the approach under current Australian law, which provides

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<sup>59</sup> For a summary of the problems with such a policy, see: <http://www.lawfont.com/2008/02/18/notice-and-terminatethree-strikeshere-we-go-again/>.

<sup>60</sup> Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of *Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights*, OJ C 74 E/527, 20.3.2008, Art 4.2(h).



for recovery of costs from the IP owner.<sup>61</sup> To the extent that infringers are ordered to pay costs, the effect would be that the *Commonwealth* would bear the risk that infringers do not pay. Given the relatively high rate of non-appearance in counterfeiting cases, it is readily imaginable that this risk is not a low one.<sup>62</sup> This represents a shift of the burden of enforcement from IP owners to the state, and has resource implications which should be considered.

### 3 Recommendations

For delegates from countries like Australia, Singapore, and South Korea,<sup>63</sup> It would be easy for these delegations to take the attitude that signing up to a quite detailed ACTA is relatively costless and perhaps even beneficial, on the basis that:

1. They have already signed up to relatively stringent standards via their bilateral agreement with the US, and
2. Given that, in general, for an IP-importing country stricter IP standards will tend to impose costs, it is advantageous for an already-bound Australia to encourage other countries to bind themselves to similarly stringent standards.

This would be a mistake, for a number of reasons, including the following:

1. It is likely that the ACTA will fail to achieve its stated ends, for the reason given above;
2. These countries will most likely receive little benefit, and may endure further costs, from the further consolidation of stringent IP standards, on the basis that such provisions have significant costs for an IP-exporting country.<sup>64</sup> Although they are currently a party to stringent standards, those standards are found only in one bilateral agreement. Further consolidation of such standards at a plurilateral level only further decreases their flexibility and increases the number of trade partners who may complain of their failure to meet such standards;
3. From a pragmatic perspective, to the extent that strong IP standards are not a matter of local policy priority to a country,<sup>65</sup> that country's agreement to such standards should be made conditional on benefits in areas more directly related to its national economic interest. In other words – why give agreement to this away

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<sup>61</sup> Copyright Act 1968 (Cth) s135AA, 135AJ. As a result of amendments in late 2006, the CEO of Customs has a discretion to request an undertaking to pay costs, and the discretion to decide not to seize goods unless such undertaking is provided

<sup>62</sup> See Jason Bosland, Paul Jensen and Kimberlee Weatherall, „Trade Mark and Counterfeit Litigation in Australia“ [2006] Intellectual Property Quarterly 347-377.

<sup>63</sup> Notably too, New Zealand has expressed a strong desire to negotiate a bilateral FTA with the US: see NZ Ministry of Foreign Affairs and Trade, *The Case for a Model Free Trade Agreement between the United States and New Zealand* (last updated January 2007), available at <http://www.mfat.govt.nz/Foreign-Relations/North-America/0-nz-us-fta.php>.

<sup>64</sup> See generally Keith Maskus, *Intellectual Property Rights in the Global Economy* (2000).

<sup>65</sup> Note that the perspective proposed here is the Australian perspective generally: not the perspective of those industries most in favour of such provisions

outside a general trade round where benefits may be demanded in return?

The Wikileaks Document, and subsequent discussions, make no mention of procedural or other protections for defendants or any steps which might be taken to balance the rights of IP owners with the rights of those accused of IP infringement. Both TRIPS, and the EU Proposed Directive on Criminal Measures, provide some possible models. While TRIPS obligations will continue for any party to a possible ACTA, nevertheless it may be worth re-stating basic protections, for example:

1. Parties shall ensure that the misuse of threats of criminal sanctions is prohibited and made subject to penalties;<sup>66</sup>
2. Parties shall ensure that procedures concerning the enforcement of intellectual property rights shall be fair and equitable.<sup>67</sup>
3. It is understood that this agreement does not create any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.<sup>68</sup>
4. Where measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.<sup>69</sup>
5. The Parties agree that this Agreement does not override existing procedural protections for defendants in civil and/or criminal law. Parties retain their right to introduce new procedural protections for defendants.
6. The Parties agree that nothing in this agreement is intended to interfere with their rights to introduce new exceptions to IP rights.
7. The Parties agree that the measures in this agreement, intended to establish international standards for enforcing intellectual property rights in order to fight more efficiently the growing problem of counterfeiting and piracy. The intended focus is on counterfeiting and piracy activities that significantly affect commercial interests, rather than on the activities of ordinary citizens or the

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<sup>66</sup> Modelled on Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, OJ C 74 E/527, 20.3.2008, Art 7.

<sup>67</sup> TRIPS Art 41.2.

<sup>68</sup> TRIPS Art 41.5.

<sup>69</sup> Modeled on the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004, corrigendum at OJ L 195, 2.6.2004 at 0016), Article 7.4

ordinary commercial activities of legitimate businesses. The Parties may take steps to ensure that the remedies and measures provided herein are not used to target or hamper the activities of ordinary citizens and legitimate businesses.

Drafting text along these lines, while preserving the freedom to include further exceptions and protections for civil liberties, would both assist parties to present the completed text as a balanced one, *and* forestall future arguments that civil-liberty-protective provisions introduced by a country are *inconsistent* with ACTA.

Another matter worth monitoring would be issues of presumptions. Recent US Free Trade Agreements have included provisions requiring certain presumptions in civil and administrative proceedings. In some agreements, those presumptions go beyond those provided under Australian law. For example, in the US-Korea agreement, there is a requirement that „[i]n civil and administrative proceedings involving patents, each Party shall provide for a rebuttable presumption that a patent is valid“ (US-Korea Free Trade Agreement, Art 18.10.3).

#### **4 Some conclusions**

This discussion of the possible issues of detail in a possible ACTA text illustrate a very important point. The kinds of matters that ACTA appears to be raising, at least in negotiations, are subject to very important questions and issues of detail. But importantly– these are not the kinds of things that can be negotiated into a treaty text. It is critical that, if ACTA is to be negotiated and concluded, and signed, the language of the treaty must be sufficiently open- textured that it can be accepted by a range of countries with different legal systems and differing enforcement priorities and levels of development. As noted above, ACTA will be ineffective if it is drafted in such a way that other important countries will be unable to accept its provisions. In addition, ACTA will be detrimental to an individual country“ s own interests if it is drafted in such a way as to require that country to give up or modify long-standing procedural rules and protections in relation to IP only.

Further, ACTA must not be drafted as a one-sided document. It must includes necessary protections for defendants, those accused of infringement, and third parties like ISPs. A one- sided document will not only be detrimental to domestic policy processes but will exacerbate the belief by individuals and non-negotiating countries that it is not a considered or fair agreement. That will be detrimental to gaining cooperation in observance of copyright.

Finally, as already noted above, the ACTA text before conclusion is opened up to consultation to a broad range of parties: rightsholders, consumer groups, public sector institutions, ISPs and similar entities, and experts on civil and criminal procedure. Without their input, unintended consequences may occur and the agreement will lack any kind of legitimacy.