

Calling for an open and international dialogue

The Internet Society's statement on the text for the proposed Anti-Counterfeiting Trade Agreement (ACTA)

Introduction

The Internet Society would like to formally thank the governments engaged in the negotiation of the *Anti-Counterfeiting Trade Agreement* (ACTA) ("the ACTA participants") for releasing the text dated 3 December 2010.

We encourage each country to make the text available to its citizens in their language/s so that they may have an opportunity to consider the terms of the proposed agreement and its potential implications.

The Internet Society, a member of the broader Internet community, wishes to take this opportunity to provide our preliminary perspective on those parts of the proposed agreement which pertain to the Internet, Internet governance, Internet technologies, Internet intermediaries and/or Internet users. In general, while the proposed ACTA text has improved over the April 2010 version, the Internet Society remains concerned about its potential impact on the development and legitimate use of the Internet. We also repeat our call for greater transparency and true multistakeholder participation, including at the level of local implementation of the ACTA agreement.

The Internet is an extraordinary platform for innovation. It has benefitted from broad participation in both the development and use of Internet technology, services, applications and policy. The Internet's openness has been critical to its development and continued success. Openness is the key to continued innovation and investment in the Internet and all the associated social, economic, and cultural benefits it brings.

The history of the Internet's development demonstrates that technology can be used for beneficial, and sometimes unforeseen, purposes. The Internet Society believes, therefore, that legal frameworks should support the open and unrestricted development of Internet technologies and should not limit the development and use of technologies for legitimate purposes.

The process

The public release of the proposed text of a multi-national trade agreement is a milestone on the path to greater transparency in governmental decision-making. However, this is no ordinary trade agreement as it contains matters which fall within the scope of Internet Governance. According to the World Summit on Information

Society (WSIS), the fundamental principle of Internet governance is that it be **multistakeholder**. Paragraph 68 of the Tunis Agenda for the Information Society states:

... We also recognize the need for development of public policy by governments in consultation with all stakeholders.¹

Many international and inter-governmental organisations have formally recognised the value of direct multistakeholder participation in the development of principles, guidelines etc. that affect the Internet. As one particularly good example at the global level, we would point to the steps taken by the Organization for Economic Cooperation and Development (OECD) to include the Internet technical community and civil society in their Internet related policy work since the June 2008 Seoul Ministerial Meeting on the Future of the Internet Economy. The Internet Governance Forum (IGF) is another good example.

In this regard, we note that a number, if not all, of the ACTA participants held public consultations and meetings with some stakeholders. However, there was limited scope for interactive discussion and direct contribution to the development of the text for the proposed agreement as is envisaged by the WSIS principles.

We are disappointed that the ACTA participants only released two versions of the agreement under negotiation throughout the eleven formal rounds of negotiations - one after the eighth round and one after the final round. We are also disappointed that the ACTA participants did not adopt a truly open, transparent and inclusive multistakeholder approach to the development of the substance of the proposed agreement at least with respect to those terms which pertain to the Internet.

Deciding how to appropriately enforce intellectual property rights ("IPR") in an online environment is an important and relevant issue for many stakeholders, not just governments. The combined insight, experience and expertise of all stakeholders – government, business, content owners, online service providers, content distributors, civil society, Internet users, the Internet technical community, academia and others – is needed to develop appropriate and measured solutions to address the challenging issue of online IPR infringement while also ensuring that the Internet continues to grow, evolve and reach new users.

Enforcement of IPR in the Digital Environment

While it appears that the proposed ACTA does not require parties to the agreement to impose Internet-focused IPR enforcement measures such as suspension of Internet access, traffic shaping, blocking, content identification and filtering, it does require that:

"..enforcement procedures ..are available ... so as to permit effective action against an act of infringement of intellectual property rights which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements" (article 27(1)).

¹ www.itu.int/wsis/docs2/tunis/off/6rev1.doc

Yet, the proposed agreement makes no attempt to articulate what is not an acceptable IPR enforcement measure other than to say that such measures must be implemented in a way that is consistent with each party's law, preserves fundamental principles such as freedom of expression and privacy, and avoids the creation of barriers to legitimate activity (article 27(2)).

We believe that ACTA was a missed opportunity for countries with strong legal frameworks and leading digital economies to take a leadership position in this controversial area by specifying what enforcement measures would *not* be appropriate. We are concerned about the consequences that may result if some countries take an overly broad interpretation of the agreement, thereby limiting Internet access and innovation.

We assume the role of assessing whether parties' IPR enforcement measures are consistent with ACTA will fall to the proposed ACTA Committee², but under the proposed agreement only parties to ACTA (governments) will be represented on the Committee. Other affected stakeholders will have no right of representation and no guarantee that their expertise and advice will be sought.³ Further, unless the Committee decides otherwise by consensus, all decisions of the Committee must be taken by consensus⁴, so it may prove difficult for parties that disagree with a party's approach to reach a decision that that party's IPR enforcement measures are not appropriate.

Injunctions against third parties

We are also concerned that the proposed agreement may encourage parties to use injunctions against third parties (i.e. non-parties) as an enforcement tool with very little guidance as to their appropriate use. Indeed, the provision (article 8(1)) has a broadly stated purpose, namely "to prevent goods that involve the infringement of an intellectual property right from entering the channels of commerce" that is only qualified with "where appropriate" which is undefined. Further, such injunctions may have the effect of imposing penalties, either financial or otherwise, on those third parties.

Cooperative efforts within the business community

We caution against any measures which would have the effect of transferring the responsibility for enforcement to private entities. For example, article 27(3) states:

"Each party shall endeavor to promote cooperative efforts within the business community to effectively address ... copyright or related rights infringement ...".

² Article 36(3)(c) states "The Committee may decide to make recommendations regarding implementation and operation of this Agreement, including by endorsing best practice guidelines related thereto"

³ Article 36(3)(b) states "The Committee *may* decide to seek the advice of non-governmental persons or groups" (emphasis added)

⁴ Article 36(4) states "All decisions of the Committee shall be taken by consensus, except as the Committee may otherwise decide by consensus. The Committee shall be deemed to have acted by consensus on a matter submitted for its consideration, if no Party present at the meeting when the decision is taken formally objects to the proposed decision"

The business community is neither equipped nor the appropriate group of entities to be determining culpability and the appropriate remedies for online copyright infringement. Due process and judicial oversight must remain paramount.

Widespread distribution

The inclusion of the phrase “the unlawful use of measure of widespread distribution for infringing purposes” as a possible category of IPR infringement in article 27(2) combined with the statement in the preamble “[n]oting that the proliferation of counterfeit and pirated goods as well as of services that distribute infringing material ...” seems to indicate that the ACTA participants intend to extend enforcement measures to tools which allow infringement.

Enforcement measures which focus on methods of infringement (e.g. peer-to-peer protocols) rather than infringement itself risk adversely affecting the development and use of technologies for legitimate purposes.

Online service providers

The proposed agreement would permit parties to provide their competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement (see Article 27(4)).

We note that “online service provider” is neither defined nor limited to particular classes of providers. We also note that the subscriber may or may not be an infringer.

We are concerned that the application of this article may disclose personal data about innocent parties to private parties (right holders). In any enforcement of IPR in the online environment, it is imperative that non-infringers (e.g. Internet subscribers, Internet users, online service providers and others) are not adversely affected by those enforcement measures.

Technological measures

Technology can be used for beneficial, and sometimes unforeseen and surprising, purposes. That is the essence of innovation in the Internet environment. We believe that legal frameworks should support the open and unrestricted development of Internet technologies.

Institutional arrangements

Should ACTA proceed, we strongly urge all parties to adopt mechanisms for active, timely and direct multistakeholder participation in the local implementation of its terms. In this regard, we consider that article 28(4) is insufficient.

Further, under the category of transparency in article 30, we encourage the negotiating parties to add measures for the provision of assistance to wrongly accused persons.

As a general point, we question the merits of establishing a new international forum on international IPR issues (the ACTA Committee), particularly one which does not

by default provide for direct and active multistakeholder participation. Furthermore, the forum is sought to be established after the substantive discussions have taken place and terms have been agreed. Should ACTA proceed outside the World Trade Organization or the World Intellectual Property Organization, we call upon the parties to adopt a truly multistakeholder mechanism responsible for ensuring the fair, proportionate and appropriate implementation of the agreement.

Going forward

No doubt the discussions the negotiating parties have had in the formal rounds of negotiations have been useful in exploring these complex and controversial issues. However, the Internet Society believes that further and more inclusive discussions are needed on these complex issues before binding agreements are reached, not least because the solutions proposed may become precedents for mechanisms dealing with other Internet governance issues. We recommend that the World Intellectual Property Organisation (WIPO) be invited to play a role in leading these further discussions to ensure a more open, transparent and inclusive approach to these issues.

About the Internet Society

The Internet Society is an independent non-profit organisation, founded in 1992 to provide leadership in Internet related standards, education and policy. It is a principles-based organisation, dedicated to ensuring the open development, evolution and use of the Internet for the benefit of people throughout the world.

The Internet Society is the organisational home of the Internet Architecture Board (IAB) and the Internet Engineering Task Force (IETF) - an open consensus-based group responsible for defining Internet protocols and standards.

The Internet Society is accredited with Consultative Status with the United Nations Economic and Social Council and Observer Status with the World Intellectual Property Organization. It has formal and strong working relationships with other UN organisations such as UNESCO, UNECA and the ITU, as well as governmental and inter-governmental organisations, for example, the OECD, CITELE and APEC.

The Internet Society has more than 100 organisational members, more than 40,000 individual members and over 80 chapters around the world. To better serve the regional Internet community, the Internet Society has created regional bureaus in Africa, Latin America, Asia, North America and Europe. Further, the Internet Society has established a Next Generation Leaders Programme to nurture future Internet leaders to address the critical technology, policy, business, and education challenges that lie ahead.

This global and diverse community continues to deploy efforts in a wide range of areas, working to enhance their contribution to the development of Internet-related public policy solutions around the world. Through its sponsored events, developing-country training workshops, tutorials, public policy, and regional and local chapters, the Internet Society serves the needs of the growing global Internet community.

For more information see www.InternetSociety.org