

**The ACTA
and the Plurilateral
Enforcement
Agenda**

Genesis and Aftermath

Edited by
Pedro Roffe and Xavier Seuba

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Sustainable Development

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THE ACTA AND THE PLURILATERAL ENFORCEMENT AGENDA

The Anti-Counterfeiting Trade Agreement (ACTA) is the most important effort undertaken to lay down a plurilateral legal framework for the enforcement of intellectual property rights. With the view to learn more about the origins of this treaty, the process leading to its conclusion and its implications for lawmaking in this field, *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* analyses in great depth both the context and the content of the agreements. In order to attain this objective, a large and diverse group of experts – renowned scholars, policy makers and civil society actors – who represent different perspectives on the necessary balance between intellectual property enforcement and other economic and social interests have been gathered together. This book is the most comprehensive analysis of ACTA, and of its relation with ongoing initiatives to improve enforcement of intellectual property and norms pertaining to a range of international legal regimes, conducted so far.

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Foreword

Ricardo Meléndez-Ortiz

Intellectual property policies have existed for decades and in some instances for centuries. Until recently, however, they have been largely the domain of specialists, practitioners and producers of intellectual property rights (IPRs), and thus relatively insulated from the kind of debate common in most areas of public policy. IPRs are principally conceived as a tool to encourage innovation, but as firms perceive their intangible assets as crucial to the protection of their global competitiveness, their intellectual property (IP) interests have increasingly shifted towards stronger protection, to the detriment of any sustainable balance between private and societal interests.

It is against this background that the current debate on the enforcement of IPRs has emerged. Although the achievement of more effective IPR enforcement was already one of the main driving forces behind the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), it increasingly appears that TRIPS – while being an important milestone – did not represent a conclusive and satisfactory response to what is perceived as a significant rise in levels of counterfeiting and piracy. In this context, recent years have witnessed an unprecedented proliferation of initiatives relating to enforcement of IPRs. Perhaps the most conspicuous and exposed attempt has been the proposed move towards the Anti-Counterfeiting Trade Agreement (ACTA).

A number of countries and civil society groups opposed to ACTA have resisted such a move on the basis that tinkering with rules on enforcing IPRs can have profound effects on the regulation of knowledge goods and flows in our knowledge-based economies. As issues of competitiveness, innovation, access to knowledge, technological development and, more importantly, sustainable development are at stake, ACTA is too large an issue to avoid analysis. The plurilateral agreement, aimed at providing the means for the enforcement of IPRs, has been the subject of much controversy as the appeal of IPRs risks losing some of its shine if these rights cannot be enforced.

In light of the current limited amount of in-depth empirical study attributed to ACTA, resulting in the amplification of distinctly polarised perspectives, this book attempts to contribute to the fostering of a more informed and constructive discussion. With the view to learn more about the origins of ACTA, the process leading to the conclusion of the agreement and its implications for lawmaking in this field, the International Centre for Trade and Sustainable Development (ICTSD) has convened a diverse group of experts to draw lessons from what ACTA represents as a normative IP experiment. This book represents a compilation of different perspectives and approaches to legislation on enforcement issues as well as different standpoints on the necessary balance that should prevail in conceiving normative approaches in this area. Participants in this project include academics, policy makers and civil society actors, and, consequently, the corresponding styles of the book chapters differ, reflecting the respective profile of each author. It is these different styles and perspectives which add immense value to this unique compilation of papers around the “ACTA” phenomenon.

To ensure consistent treatment of the different issues and with a view to depict the most comprehensive portrait of ACTA, its origins, process, outcome and consequences, the book begins with a conceptual introduction to the plurilateral enforcement agenda before splitting into five distinct parts: (I) The Final Act: Its Main Features and Contents; (II) Domestic Legislative Challenges; (III) Impact on Related Processes; (IV) Views from Stakeholders: Lessons; and (V) What Lies Ahead ACTA.

Part I opens with an overview of ACTA followed by a comprehensive and detailed analysis of the agreement. It is noted that although ACTA attempts to build on the TRIPS Agreement, much has been transplanted, including the unanswered questions left over from TRIPS. In their critique of the agreement some note that although ACTA provides a framework for the enforcement of IPRs, it fails to ensure the presence of explicit checks and balances. ACTA's inability to fully reconcile itself with TRIPS also provides a source of discomfort for many who cite their concerns over the implementation of the agreement. Authors within this part note that provisions on the criminal enforcement of ACTA are problematic and extend to the increasingly digital medium in which much trade is carried out.

Part II of the volume highlights some of the domestic challenges faced by different countries (United States, Australia, Brazil and Africa) concerning the implementation of ACTA. The secretive nature of negotiations is picked up on by authors in this part, and many recognise that there was very little by way of consultation with civil society groups, leading to the talks being characterised by a “country club” approach. In light of this model for setting international standards, there is a concern raised among the authors that the evolution of the ACTA agreement has somewhat damaged the image of the efforts put on the enforcement of IPRs and highlighted

the political nature of the discussions instead. A note of hope is sounded from some quarters, however. As initiatives similar to ACTA are spreading, albeit in a regional or other limited context, the movement of IP into the arena of trade has itself created a norm whereby enforcement is no longer considered unusual.

As the trade of third parties to the ACTA agreement will be effected by the treaty, ACTA clearly has the ability to effect multilateral trade and inform future IP law negotiations. Part III identifies these touch points where ACTA and its associated processes have had an impact on other IP negotiations across the globe. Perhaps unsurprisingly ACTA has already influenced the negotiations of the Trans-Pacific Partnership agreement, with some hoping that it will contain language on copyright exceptions, for example, which will lead to more balanced copyright regimes. The need for policy coherence is emphasised within this section and is especially brought to light when ACTA is compared to East African enforcement legislation at the IP, trade and public health nexus. In making suggestions as to where future gains concerning IP law at a bilateral level may be made, this section also makes a valuable contribution to where we can pick up valuable evidence to inform future decisions.

On the subject of lesson leaning, Part IV contains views on ACTA from a range of stakeholders and spectators. Some within this section view ACTA as an extremely important step in the fight against piracy and counterfeiting, despite the firmly held opinion of others that the process has been a failure with regards to both international policy making and IPR protection. Suggested causes for this failure range from a lack of leadership from politicians to the deliberate spread of misinformation by activists. On balance, however, it is more generally agreed, at least within this part, that better attempts to provide fair and impartial information on IP agreements and their effects are required.

The final part of this volume seeks to analyse the broader sociopolitical context behind ACTA in order to gain useful insights into how the agreement's evolution can further inform future negotiations concerning IP freedoms and rights within the realm of trade. It is clear that ACTA tells us about the dynamics of IP lawmaking at the present time, and there are lessons to be learnt from the defeat of ACTA – largely that IP law needs to be fair and be seen as fair for both sides. In addition, a different negotiating approach is required to ensure that the credibility of related institutions is not undermined. The ACTA text as it stands, and with its rejection by a number of countries, means that some nations may be better off. However, there are still calls within this volume for alternatives to protect against losses incurred as a result of the trade of counterfeit goods. Against strong criticism from some in this book, optimism still shines through. It may still be possible to achieve the necessary protection of IPRs at a multilateral level with the recognition that this may involve compromise. The ACTA process has resulted in a lost opportunity.

An overarching question raised in this book and the distinctive contributions made by several scholars, policy makers and stakeholders relate to the role of plurilateral agreements in addressing new and emerging challenges raised by the globalization of trade in intangible goods and services.

Plurilateral attempts in multilateral forums such as the World Trade Organization (WTO) have been the exception and not the rule. Their relevance and contextual place in the organisation have been controversial. They are seen by some as a practical solution to experiment with new disciplines in the absence of consensus and precisely as a way forward to overcome the stalemate in the current trade round instead of leaving these matters to be dealt with in bilateral or regional free trade agreements. There are, however, views that consider that this type of arrangement erodes the multilateral trading system and the legitimacy of one of its fundamental principles – that of the most favoured nation.

Throughout this book there is a discernable concern that ACTA parties are trying to avoid the established fora for IP agreements, namely the World Intellectual Property Organization or the WTO – and thereby threatening the established multilateral framework. ACTA, in this respect, would be part of a ‘forum-shifting’ strategy which seeks to promote offensive interests in IP outside the scope of specialised organisations. It is also the concern of many that for ACTA to be meaningful, a critical mass of countries, specifically a significant number of developing countries at whom, in many respects, the principles and norms of ACTA are targeted, must participate. ACTA parties have refuted such criticisms, arguing that ACTA would complement existing international IP agreements and fora rather than undermine them.

In any case, the ACTA experiment constitutes in this respect an important lesson for future negotiations of this sort. There is no doubt that much more reflection is required on how plurilateral agreements could truly advance the trade agenda in an inclusive manner. This book makes an important contribution to this reflection.

A central tenet of ICTSD’s Program on Innovation, Technology and Intellectual Property, launched in July 2001, has been that in a knowledge-based economy, a better understanding of innovation and IP-related issues is imperative for informed policy making in virtually all areas of development. Our focus has been on ensuring a proper balance between the different interests at stake in designing appropriate IP regimes that are supportive of sustainable development objectives and compliant with international commitments. An additional central objective has been to facilitate the emergence of a critical mass of well-informed stakeholders in developing countries – including decision makers and negotiators as well as actors in the private sector and civil society – able to define their own sustainable human development objectives in the field of innovation and IP and effectively advance them at the national and global levels.

This book, and its respective parts, is the result of recent work undertaken by ICTSD and is characterised by the continuous search for an objective and evidence-based analysis of the different issues at stake. At ICTSD we strive for the development of an IP system that is responsive to the needs of sustainable development whilst acknowledging and remaining open to a range of diverse opinions. The participatory nature of this volume, involving a wide variety of stakeholders with divergent views and perspectives, reflects the priorities of ICTSD and has been an enriching experience. The feedback received so far is equally as encouraging, and we are determined to continue our efforts to generate knowledge and enhance understanding of the extraordinarily complex interface between IP policy, innovation, trade and sustainable development in general. This book is unique in that it brings together diverse voices on enforcement issues that today occupy a central space in international economic debates as we have witnessed with the recent experience of ACTA.

I sincerely hope that you find this volume a useful contribution to efforts aimed at improving our understanding of the changing IP debate in order to move it in a constructive way which results in concrete actions and solutions.

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This book has been produced as part of the efforts of the International Centre for Trade and Sustainable Development (ICTSD) to promote the use and management of knowledge and technology to strive for a more sustainable and development-oriented intellectual property (IP) regime. Under the guidance of Ricardo Meléndez-Ortiz, ICTSD's chief executive, the Programme on Innovation, Technology and Intellectual Property is responsible for the preparation and successful culmination of the varied chapters which make up this book. Gratitude is expressed to the ICTSD staff members instrumental in bringing the book to completion, including Christophe Bellmann, Deborah Vorhies, Ahmed Abdel-Latif, Pedro Roffe, Anja Halle, Daniella Allam, Marco Valenza and Chris Ruck. Pedro Roffe and Xavier Seuba are the principal editors of the book.

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Acronyms

A2K	Access to Knowledge
ACP	African Caribbean and Pacific Countries
ACTA	Anti-Counterfeiting Trade Agreement
APEC	Asia-Pacific Economic Co-operation
AUSFTA	Australia-US Free Trade Agreement
BASCAP	Business Action to Stop Counterfeiting and Piracy
BRICS	Brazil, Russia, India, China, South Africa
BTIAS	Broad-based Trade and Investment Agreements
CARICOM	Caribbean Community
CAS	Copyright Alert System
CCIA	Computer & Communications Industry Association
CETA	EU-Canada Comprehensive Economic and Trade Agreement
DFAT	Department of Foreign Affairs and Trade (Australia)
DMCA	Digital Millennium Copyright Act
EAC	East African Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EDRi	European Digital Rights
EFF	Electronic Frontier Foundation
EGA	Environmental Goods Agreement
EPP	European People's Party
EU	European Union
FDI	Foreign Direct Investment
FFII	Foundation for a Free Information Infrastructure
FOIA	Freedom of Information Act
FTA	Free trade agreement
FTAA	Free Trade Area of the Americas

GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GI	Geographical indication
GIZ	German International Cooperation Agency
GPA	Government Procurement Agreement
ICANN	Internet Corporation for Assigned Names and Numbers
ICESCR	International Covenant on Economic, Social, and Cultural Rights (UN)
ICTSD	International Centre for Trade and Sustainable Development
IFPI	International Federation of the Phonographic Industry
IIPA	International Intellectual Property Alliance
INN	International non-proprietary name
INTA	Committee on International Trade of the European Parliament
INTA	International Trademark Association
INTERPOL	International Criminal Police Organization
IP	Intellectual property
IPFI	International Federation of the Phonographic Industries
IPR	Intellectual property right
ISP	Internet service provider
ITA	Information Technology Agreement
JSCOT	Joint Standing Committee on Treaties (Australia)
KAM	Kenya Association of Manufacturers
KEI	Knowledge Ecology International
LCA	Library Copyright Alliance
LDC	Least Developed Country
MAI	Multilateral Agreement on Investment
MEP	Member of the European Parliament
MERCOSUR	Southern Common Market
MFN	Most favoured nation
NASA	National Aeronautics and Space Administration (United States)
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OSP	Online service provider
P2P	Peer-to-peer
PRG	Procuraduría General de la República (Attorney General's Office, Mexico)
PhRMA	Pharmaceutical Research and Manufacturers of America
PIPA	Protect Intellectual Property Act
PTA	Preferential Trade Agreement
RMI	Rights management information

RTA	Regional Trade Agreement
SFFC	Spurious/falsely labelled/falsified/counterfeit (medicines)
SMEs	Small and medium enterprises
SOPA	Stop Online Piracy Act
TAFTA	Transatlantic Free Trade Area
TFEU	Treaty on the Functioning of the European Union
TiSA	Trade in Services Agreement
TPM	Technical protection measure
TPP	Transpacific Partnership Agreement
TPSEP/P4	Trans-Pacific Strategic Economic Partnership Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UAE	United Arab Emirates
UGC	User-generated content
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPU	Universal Postal Union
US	United States
USC	United States Code
USTR	United States Trade Representative
WCIT	World Conference on International Telecommunications
WCO	World Customs Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTC	WIPO Copyright Treaty
WTO	World Trade Organization

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