Lessons Learned from ACTA

THE ANTI-COUNTERFEITING Trade Agreement (ACTA) is a proposed “plurilateral” (i.e., more than a “bilateral” but less than a “multilateral”) international agreement designed to establish higher intellectual property (IP) enforcement standards than those currently required under existing multilateral IP agreements. From the outset, the ACTA negotiations and ACTA itself have been mired in controversy for at least four reasons.

First, the negotiations took place behind closed doors and were dominated by leading industrialized countries (e.g., the United States, Japan, and members of the European Union). From the outset, various industry groups (e.g., the entertainment, software, and pharmaceutical industries) were apparently privy to information not initially available (but eventually leaked) to the public, thus creating a perception of bias and unfairness.

Second, ACTA was negotiated entirely outside the auspices of the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO)—the two international agencies responsible for administering and enforcing existing multilateral IP agreements. The WTO in particular is charged with ensuring “the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

THESE CONCERNS over the structure of the negotiations helped fuel additional suspicions about ACTA itself. To some, ACTA merely represented a covert effort by IP owner groups in the developed world to “socialize” the enforcement costs of their private IP rights, by persuading governments to create stronger civil, criminal, and border enforcement measures in the name of combating trade in counterfeit goods, such as fake pharmaceuticals. To others, contrary to the implication that ACTA was primarily concerned with combating illicit trade in counterfeit goods, some of the provisions under consideration seemed more designed to target online digital file-sharing and involve Internet service providers in policing the infringing activities of their subscribers. To these critics, the ACTA negotiations seemed to be an exercise in “policy laundering”—i.e., working to achieve a controversial policy objective while ostensibly addressing a more laudable one.

After four years of negotiations, the United States and its negotiating partners—Australia, Canada, the European Union, and its member states, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, and Switzerland—ultimately agreed on a final ACTA text in 2010. However, controversy continued to engulf the ACTA adoption and ratification process. The U.S. Trade Representative took the unusual position that the U.S. Senate need not be asked to ratify ACTA because ACTA was simply an “executive agreement.” Nevertheless, two pieces of domestic implementing legislation widely supported by the U.S. entertainment industry were duly introduced in Congress and seemed well on their way to enactment by the time the U.S. and seven of its negotiating partners actually signed ACTA in October 2011. But both bills were unexpectedly stopped in their tracks as a result of an unconventional political protest organized on January 18, 2012. Google, Wikipedia, and a host of Internet service providers and social network sites rallied more than 7 million people to sign an online petition opposing the legislation. Within hours, elected officials dropped their support, and the proposed implementing legislation was eventually pronounced dead. Commentators declared that January 18, 2012, represented a moment when “the new economy rose up against the old.”

MEANWHILE, the Mexican Senate adopted a resolution advising the Federal Executive not to ratify the agreement. In Europe, the decision of the EU and 22 of its member states to sign ACTA on January 26, 2012, sparked a widespread series of online petitions and offline protests against ACTA, eventually spreading to more than 200 European cities. In response, the European Parliament’s Rapporteur (i.e., investigator) for ACTA, Kader Arif, resigned and dramatically denounced the entire ACTA negotiating process. On July 5, the European Parliament voted overwhelmingly to reject ACTA, thus putting the ACTA ratification process throughout Europe in jeopardy.

So, what does the ACTA controversy have to teach those concerned with developing stronger international IP enforcement standards? First, it illustrates the shortcomings of the various political strategies employed throughout the ACTA negotiations—i.e., forum-shifting, closed-door plurilateral negotiations, and policy laundering. Second, it suggests that negotiations to enhance international IP enforcement standards need to occur in a multilateral forum such as the WTO, where trade-offs between IP and other trade policies are possible, thus ensuring that the enhanced IP enforcement standards will indeed function “to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

Charles R. McManis, the Thomas and Karole Green Professor of Law, is a nationally and internationally known expert on intellectual property and the author or co-author of numerous books, articles, and book chapters. A former consultant to the World Intellectual Property Organization, he is on the Executive Committee of the International Association of Teachers and Researchers of Intellectual Property.