

Michael Geist on The Anti-Counterfeiting Trade Agreement (ACTA)

There will soon be a big new beast in the IP jungle. And while the creature comes with the seemingly innocuous acronym of ACTA, cyber activists and copyright mavens fear that it will pave the way for a [Global DMCA \(Digital Millennium Copyright Act\)](#) that will significantly impact on ordinary people's privacy, and erode civil liberties. Moreover, they warn, the secrecy surrounding the ACTA negotiations raises important questions about representative democracy, and demonstrates the extent to which the developed world remains determined to dominate and control the developing world. For the research community, says University of Ottawa's [Michael Geist](#), ACTA will make Open Access (OA) even more urgent. However, he cautions, if ACTA succeeds in propagating the bruising [statutory damages](#) rules used in US copyright infringement cases it could threaten the [institutional repository](#) movement.

Richard Poynder, March 7th 2010

An initiative of the US, the European Commission, Switzerland and Japan, the Anti-Counterfeiting Trade Agreement ([ACTA](#)) was launched in October 2007, although negotiations didn't begin until the following spring. Subsequently Australia, Canada, Jordan, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore and the United Arab Emirates have also joined the negotiations.

Given the [health and safety implications](#) of, say, counterfeit drugs, most people might assume that anything that can help prevent mass counterfeiting would be a good thing, and wish ACTA negotiators Godspeed.

But as time has passed a number of important questions have arisen about ACTA. Why, for instance, are the negotiations being conducted in secret? And why does ACTA include an [Internet Chapter](#) (and civil enforcement and criminal provisions) evidently focused not on preventing counterfeiting, but pushing [TRIPS](#) (the 1994 [WTO](#)-negotiated Trade-Related Aspects of Intellectual Property Rights agreement) further down the road of [IP maximalism](#) — to create a kind of [TRIPS-Plus](#)?

There is, it seems, more to ACTA than meets the eye. Indeed if one consults the EC [fact sheet](#) published in 2007 (and updated in 2009) the objective of ACTA is more widely described as being that of facilitating "international cooperation" to create a "legal framework for enforcement of ([IPRs](#))" and "enforcement practices" to match. This is necessary, the document explains, in order to stem a worldwide "proliferation of IPR infringements".

Unsurprisingly many have concluded that ACTA is somewhat of a misnomer — a conclusion confirmed in 2008, when a [leaked ACTA document](#) turned up on the Internet. This revealed that the objectives of those negotiating ACTA were considerably more ambitious than the public had been led to believe.

Amongst other things, the document suggested that there were plans to force ISPs to provide customer information, to allow border guards to inspect laptops, cameras, iPods and other devices; and, moreover, to do so even where no complaint had been made by a rights-holder. Additionally, [reported](#) Canada's [Globe and Mail](#), "The agreement would permit guards and others to conduct '[ex parte](#)' searches of property or individuals, meaning a lawyer would not have to be present."

The leaked ACTA document triggered a firestorm of criticism in the blogosphere, forcing the EC to respond by publishing a [Q&A document](#) denying that iPods would be seized, and stressing that ACTA "is not about limiting civil liberties or harassing consumers".

In any case, the EC rebuttal pointed out, it is too early to say what ACTA will or will not consist of since, "There is no ACTA text", and "negotiations are still ongoing." In short, "The process is at an early stage, and most alarmist ideas that circulate on the web or in the press are speculations which do not reflect the true nature of the ACTA negotiations."

By now a number of core issues had emerged — including fears that ACTA would unjustifiably invade the [privacy](#) of ordinary citizens, that it would erode [civil liberties](#) generally, and that it would put the [developing world at further disadvantage](#) in the global economy.

[Third party liability](#) has also become a controversial issue, with further leaked documents suggesting there are plans to limit the [safe harbour rules](#) for ISPs. This would have significant implications for internet service providers and web-based content providers, since they could become liable for any infringing content they distributed.

The negotiators have apparently also proposed new limitations on [fair use/fair dealing](#), and the outlawing of [anti-circumvention](#) technologies, [even when the intended use is a legal one](#).

The bizarre behaviour of the Office of the US Trade Representative ([USTR](#)) has served only to increase suspicion: When civil society activists requested access to ACTA documents under Freedom of Information legislation, for instance, they were told that access was not possible [for reasons of "national security"](#).

With growing media interest the USTR eventually [agreed](#) to provide copies of the controversial "[Internet Chapter](#)" to several public interest groups, including [Public Knowledge](#) and the Center for Democracy and Technology ([CDT](#)) — but only if they first signed a non-disclosure agreement ([NDA](#)) and did not take any of the documents they were shown away with them.

More recently, the research community has begun to think through what ACTA might mean for it too — particularly the chilling effect it could have on the current trend for making research papers freely available in institutional repositories on an open-access basis. There are fears, for instance, that ACTA will propagate US-style [statutory damages](#) legislation. This could make universities increasingly reluctant to permit researchers to [self-archive](#) the papers that they have published in scholarly journals.

Meanwhile further leaked documents have continued to appear on the Web. Last October, for instance, an [EU commentary on a US proposal](#) revealed that US negotiators are pressing for an account-termination system to be put in place for copyright infringement, with "civil remedies, as well as criminal penalties".

The cult blog [Boing Boing interpreted this](#) as meaning that ACTA negotiators want to see widespread use of the controversial [three strikes](#) approach to copyright infringement. This, said Boing Boing, would threaten ordinary citizens with the withdrawal of their Internet service if a member of their household was even suspected of copyright infringement. Boing Boing added that the third party liability issue could also lead to the demise of web-based services like [Flickr](#), [YouTube](#) and [Blogger](#).

The problem for the public, however, is that there is insufficient information available to judge how great a threat ACTA represents. As Internet activist and blogger Cory Doctorow has [pointed out](#), a number of different ACTA drafts have been leaked, and the text is clearly changing over time.

But with unrest growing, politicians have also begun to take an interest in ACTA. In Europe, [MEPs began to jib](#) at the lack of transparency at the beginning of last year. By November [US Senators](#) were

asking questions too; and at the beginning of this year UK MPs began [pushing for](#) a cross-party motion to call for an end to the excessive secrecy surrounding ACTA.

Further raising the temperature of the debate, in February the EU Data Protection supervisor [Peter Hustinx](#) published a [20-page opinion](#) expressing concern about the privacy implications of ACTA. The office of the trade commissioner [Karel De Gucht](#) was compelled to respond by pledging that ACTA would not force countries to disconnect people for unlawfully downloading copyrighted material.

"We are not supporting and will not accept that an eventual ACTA agreement creates an obligation to disconnect people from the internet because of illegal downloads," De Gucht's spokesman John Clancy [assured](#) *ZDNet UK* in February.

ACTA negotiators are clearly now under considerable pressure to rethink their approach. Evidence of that was apparent in the most recent [leaked document](#), which reveals growing disagreement between the ACTA negotiating parties over some of the more controversial issues — including the proposals for anti-circumvention legislation and access controls. While the US wants a DCMA approach, many other countries, including the EU, Japan, and New Zealand do not — on the grounds that the [WIPO Internet treaties](#) (from which both the DMCA and the EC [Copyright Directive](#) emerged) do not require it.

But it is the issue of transparency that continues to attract the greatest criticism. To that end, four MEPS — [Zuzana Roithova](#) (Czech, EPP), [Stavros Lambrinidis](#) (Greek, Socialist), [Alexander Alvaro](#) (Germany, Liberal) and [Françoise Castex](#) (France, Socialist) — recently submitted a written declaration opposing ACTA. If the declaration gets sufficient signatures (starting tomorrow), it will challenge the European Union's rights to negotiate on the treaty. European citizens are being [encouraged](#) to write to the MEPs and ask for their support.

And last Friday [Sweden announced](#) that it had obtained an agreement among all members of the European Union to press for public disclosure of the ACTA text. "This now leaves the Obama White house as the only real obstacle to transparency", [Knowledge Economy International's](#) James Love [commented](#) on *The Huffington Post* site.

All in all, it seems, the whole ACTA process has become mired in confusion and controversy. The key question would seem to be whether ACTA will eventually prove to be the TRIPS-Plus agreement that some of the negotiating countries hope for (and critics fear), or whether it might prove a Waterloo for IP maximalists, the battleground on which the IP beast is finally tamed.

ACTA negotiators had hoped to complete the agreement by the end of 2010. As criticism continues to escalate that timetable seems increasingly unrealistic.

But what is ACTA really about? Why the secrecy? What are its implications?

Who better to answer these questions than [Michael Geist](#), the indefatigable [University of Ottawa](#) law professor who, as *The New York Times* [pointed out](#) last month, "has been mustering critics of the negotiations via his [blog](#)?"



Michael Geist

The interview begins...

RP: What, in a nutshell, is the Anti-Counterfeiting Trade Agreement ([ACTA](#)), and how does it differ from previous international agreements on intellectual property like the Agreement on Trade-Related Aspects of Intellectual Property Rights ([TRIPS](#)) in 1994?

MG: Actually in some ways ACTA is a bit of a misnomer, both with respect to calling it a trade agreement, and in suggesting that it deals with counterfeiting, or primarily with counterfeiting. There are undoubtedly counterfeiting provisions in it. But what has proved to be most controversial about ACTA, and arguably is the most important aspect of it, are the copyright-related provisions.

RP: You mean the [Internet chapter](#)?

MG: Right, but the copyright provisions are not only in the Internet chapter. The Internet chapter is the one that is getting the most attention, but once you start looking at the civil enforcement provisions, or even the [criminal provisions](#), you find all sorts of copyright-related issues — e.g. [statutory damage](#) provisions, anti-camcording provisions etc. These are copyright-related provisions, and clearly extend ACTA beyond the realm of what the general public would think of when they think of counterfeiting.

I also think that doing this diminishes what might otherwise be a valuable treaty. I don't think there is anyone that would oppose a treaty dealing with the core [health and safety concerns](#) that arise with some counterfeiting-related issues; but with ACTA these things feel like simply the *entrée* into something far more controversial — they are more like a Trojan Horse designed to allow these other issues to be introduced. So ACTA is clearly more than just about counterfeiting.

RP: It's more about copyright?

MG: It's about copyright yes; and it's about trademarks of course. And indeed the EU would like to see it extended even further, and to also include [patents](#) for instance.

So we are talking about much more than just counterfeiting, which means that it is really misnamed as a trade agreement.

Sea change

RP: IP does tend to be included in trade agreements these days.

MG: Yes, and ACTA reflects more than a decade of linking intellectual property with bilateral trade deals. So in one sense it is just an extension of that. But as you say, at its heart it is a copyright deal.

The other point to make is that ACTA is being negotiated in a fundamentally different way from prior agreements that have dealt with intellectual property.

RP: You mean because it is not being negotiated in an international forum like that provided by the WTO or the World Intellectual Property Office ([WIPO](#)), which is a United Nations ([UN](#)) agency?

MG: Correct. So it is not as open as UN discussions and negotiations are. It is strange to think that we might want to hold WIPO up as an example of transparency, but by comparison with ACTA it is!

In that sense ACTA could represent a real sea change — with a move away from more open multilateral negotiations towards what are now being described as [plurilateral](#) negotiations that are more closed. So it sets a dangerous precedent, not just for how IP negotiations are conducted, but trade negotiations more generally.

RP: This has attracted a lot of criticism. But with regard to the proposals themselves (as far as we are able to understand them): People are worried about [civil liberties](#) and about [privacy issues](#) etc. What are your main concerns about ACTA?

MG: Well those are concerns. But you know one challenge that has arisen from an ACTA advocacy perspective is that its implications differ for pretty much every country. So yes, there are broadly uniform concerns that resonate everywhere around, say, the lack of transparency associated with the deal, some of the privacy implications — which is a point that has been made by [Peter Hustinx](#) for instance — and whether [the three strikes issue](#) should be mandatory or not. But then there are all sorts of other provisions in ACTA whose relevance depends on where you sit and what your domestic law currently looks like.

RP: Can you give me an example?

MG: For instance, if you are in the United States there are fewer implications for you than if you were in any of the other countries taking part in the negotiations — because much of what is currently proposed in ACTA is based on a US model. Of course that is unsurprising when you consider that the US has for the last ten years used trade deals to export US approaches to intellectual property enforcement, but it suggests that the US itself wouldn't be required to make a huge number of changes to its laws as a result of ACTA. That said ACTA will likely apply new pressure down the road for a three strikes model in the US. In other countries, including my own, by contrast, the changes would be very dramatic.

RP: What you are talking about is called upward harmonisation isn't it?

MG: That or Americanisation.

RP: As you say, critics argue that the ACTA negotiations are taking place in secret; the negotiating countries do not [seem to disagree](#). Could it just be a misunderstanding? Might it simply be that since the treaty is not being negotiated through traditional channels like the World Trade Organisation ([WTO](#)), WIPO or [G8](#), the process is simply different?

MG: No, there is no misunderstanding here. You perhaps saw the [important leak](#) that came out of the Netherlands following the [Mexico meeting](#). That document names which countries are the barrier to greater transparency.

So we now know who is who, and I think it shows that there is really no misunderstanding here. Let's face it, there are lots of countries who are starting to stand up and say "We ought to be more transparent. We ought to make the text more readily available". And that includes countries like the UK, Canada, Australia and New Zealand, along with many other European countries. Even Japan in fact.

RP: *You are saying that there is discrete group of negotiating countries that are opposed to transparency over ACTA.*

MG: There is handful of countries — e.g. Korea, Singapore and the US — who by not speaking out in favour of transparency are sending out pretty clear signals that they are not in favour of it. So we can conclude that even within the small group of countries involved in the ACTA negotiations there is disagreement over the right approach with regard to transparency.

The point is that if ACTA is more properly characterised as an international intellectual property agreement, and we look at past precedents in virtually almost any international fora, we see that there has always been far more transparency about what was being discussed in those fora than we are seeing with respect to ACTA.

With regard to simply updating the public on how the negotiations are going I find it astonishing that we could write down in advance what the negotiators will say after each meeting. So we can predict, for instance, what they will say after the [New Zealand meeting in April](#) — based on what's been said before. Essentially it is the same three scripted paragraphs. And yet within a week or two we start seeing leaks of the actual reports coming back from the delegates who were actually at the meeting.

Reasons of national security

RP: *It is certainly striking that those being consulted during the negotiations are being asked to sign Non-disclosure agreements (NDAs); and I think they are being asked to do so "for reasons of national security". What do we make of that?*

MG: Oh well that is positively bizarre. But actually you are conflating two different things here. First there is the issue of the NDAs that various people have been asked to sign, and which some in the US did sign. Those who did so were then granted access only to the Internet-related chapter, and they were given the information under very, very strict conditions: They had to go into a room and sit and read it; they couldn't take the text away with them.

Basically they had to read it and provide immediate feedback based on their own memory of what copyright law currently looks like. So it was a pretty limiting kind of feedback loop that was created, and one associated with a huge amount of secrecy. However, most countries haven't adopted that approach.

The issue of national security is a separate matter. This came up when people asked to see the ACTA documents under the [Freedom of Information](#) or access to information statutes. These requests were denied in the US on the basis of national security. I mean, the notion that a copyright deal is somehow akin to nuclear secrets is just insane.

RP: With regard to what you said about ACTA being a sea change in the way that intellectual property treaties are negotiated. The change is both in terms of greater secrecy and the use of so-called pluralist agreements?

MG: Right and it is different in terms of what it will mean on a substantive level with regard to specific issues. This is something that resonates very strongly in Canada, and has to do with the way in which ACTA is clearly meant lead to a tightening — almost a re-negotiation — of the [WIPO Internet treaties](#) from the mid 90s.

RP: Can you expand on that?

MG: When those treaties were negotiated a considerable amount of flexibility was very specifically and intentionally built in on a number of key issues over how they would be implemented — e.g. over the [anti-circumvention legislation](#), or legal protection for digital locks issue.

RP: Digital rights management, or [DRM](#)?

MG: Right. So if you if you look back to the WIPO discussions among the various delegations from around the world in the 90s you will see that there was no agreement on a specific US model. The way they achieved consensus was through using more flexible language.

In a sense ACTA seeks to renegotiate that by now taking the language that the US wanted then but was unable to get agreed at the diplomatic conference in the 1990s, and instead building it into ACTA — thereby making a requirement what was previously optional. This means that substantively we are seeing dramatic and significant changes taking place.

And, as I say, this is not just about ACTA; it is what ACTA bodes for future treaty negotiations. I don't think it is lost on anyone, by the way, that the rise of ACTA coincides directly with the emergence of a [development agenda](#) at WIPO.

RP: In other words, WIPO has said it plans to focus more on the needs of developing countries, and to view IP as one of many tools for development — not as an end in itself.

MG: And that is because many developing countries — and many other countries too — have begun to take a more active interest in some of these issues, and to be more assertive in pushing their views about the matter. As a consequence it has become much more difficult to achieve consensus.

RP: Consensus about the way in which IP should be protected internationally?

MG: Or if you are from the US, or one of the other major industrial nations, how you ensure that your agenda is followed.

It is hard not to conclude, therefore, that ACTA is a direct response to the development agenda, with those countries who want to set their own agenda effectively saying: "You know what, if this venue isn't going to work we will just take our ball and go play elsewhere."

Attempt to mute criticism

RP: And so presumably the secrecy we are seeing is a consequence of the fact that those countries trying to push their own agenda on the world have come to realise that if they follow the more

transparent model of TRIPS they will face considerable restlessness and opposition. Essentially, they don't want a public debate. Does that sound right?

MG: I think it is hard to conclude anything but that. The secrecy associated with the deal appears to be an attempt to mute criticism. Ironically enough, however, it has had the opposite effect: we are seeing a steady stream of leaks, and this is stirring up far more resistance and public concern, and gaining far more attention, than might have been the case had they taken a more open and transparent approach.

RP: You said earlier that the USTR has used NDAs when providing access to ACTA documents. We should acknowledge that the US did invite civil society groups like [Public Knowledge](#) and the Center for Democracy & Technology (CDT) to view some of the documents, and it listened to their views, although as you say in a limited way. What more in your view should be done by the ACTA negotiators to provide greater transparency?

MG: The right approach is to open it all up. I am not talking about providing volumes of information: it would be possible to provide an additional level of detail in just a couple of pages in far more useful language, and so give a better sense of what was actually being discussed, the different positions being taken, and where things really stand.

So even if you take the view that you can't release the full text it seems to me that there are a myriad of ways that countries could be more transparent, and so enable the public to provide more meaningful input, and to be more aware of what their governments are negotiating on their behalf.

The truth of the matter is that at this stage there have been leaks of virtually all of the core chapters anyway.

RP: The most [recent](#) being on March 1st I think.

MG: Yes. However, the leaked documents may not all be up to date, and we don't know enough about the positions different countries are taking; so a lot more information is needed. The point is that the idea that they will succeed in keeping this secret is now laughable — because people have the ability to access at least some of what has been put on the table at different points of time. So that train has left the station.

As I say, they now need to put the text forward as openly as possible, and even some of the proposals that are on the table too. It is important for the public to know where there is agreement and where there are still a lot of square brackets and multiple proposals about what the final language ought to look like.

By doing so the negotiators could ensure that a better agreement emerged: one that would be more likely to gain support domestically among the ACTA partners, but also one that catered for those not sitting at the negotiating table. Doing so would at least provide those countries that are absent with a chance to see what, in a sense, is being negotiated on their behalf — because down the road it will impact on them.

As I say, even if you take the approach that the release of the full text is too much there are so many different things that could be done, from providing more robust reports on the meetings themselves, to countries putting forward their own analysis of what the text would mean to them, where their concerns are, and the positions they are taking on the treaty.

That would give people a much better sense of what they're own governments are saying, and some idea of what the implications might be for them; and all that seems completely possible, even without revealing the actual text. Instead we see a subset of insiders acting on their own, and the notion being promoted that if you give some outsiders a few minutes with some draft text it will have a big impact on how the treaty ultimately looks.

RP: *I guess the way it is being negotiated raises a number of questions about representative democracy. As you said, right now we have [national lawmakers beginning to say](#), "Wait a minute; what's going on here; we need more transparency." If, as you say, ACTA is likely to be a model for future such treaties, we should presumably be worried about the long-term political implications?*

MG: Well, that is one of the most astonishing things. Really, it is hard to understand the basis on which elected officials, elected by the public to represent them as part of a representative democratic system, can be told: "Well you can't have access to the ACTA documents either".

At the same time, however, it is very positive that we are seeing elected officials in countries all around the world — many European officials have been at the forefront of this, but also officials in Australia, New Zealand, Canada, and even US senators — demanding more transparency.

Winners and losers

RP: *The [latest](#) politician to speak out I think was the German justice minister. But who do you expect to be the overall winners and losers if and when ACTA is finalised?*

MG: It is still early days. And that perhaps is the other positive thing here: notwithstanding the desire by the negotiators to get this done by the end of this year there is still a lot of negotiating work to be done. They have set a very aggressive negotiating timetable, with three meetings through the beginning of June, and these meetings are getting far longer than they were. [The New Zealand meeting](#) is apparently going to last five days, which is much longer than previous ones, which tended to be just a day and a half. So the meetings have become much longer, and they are meeting more aggressively.

RP: *Which gives critics more time to be heard.*

MG: Sure, but with regard to your question: if they are able to conclude a treaty I think it is pretty obvious that it will be the US and the European Union — who are the major protagonists behind this — who will benefit. Obviously they are likely to have to give up some of what they are hoping to achieve, but they will be the big winners.

RP: *Presumably the developing world, which as you say is not represented at the ACTA table, would be the major loser?*

MG: And ironically, at the end of the day this is a treaty more about them than it is about anybody actually sitting at the table — with a couple of exceptions like Canada and New Zealand, where there is a desire on the part of the US to see some domestic reforms.

RP: *What do you mean when you say it is more about developing countries than those actually sitting at the table?*

MG: Because within a year or so many of those countries will be told, as part of trade deals, that this is the new standard and this, therefore, is what they have got to incorporate into their domestic law.

And then it won't be long before we will see these countries being named in [Special 301](#) reports as having inadequate IP laws because they don't conform to ACTA.

RP: *I guess this is particularly bad news for them because most of what is being given value here, and afforded special treatment, is intellectual property — which is generally something that the developed world possesses a lot of, but developing countries very little?*

MG: Of course and in that sense calling ACTA a trade agreement is absolutely right: It is all about trade, but trade in which the shipments pretty much go in one direction only. I mean quite frankly even many of the ACTA negotiating partners will have trade deficits when it comes to intellectual property. So these countries are simply playing defence. In my view they are participating as a form of damage control.

RP: *How do you mean?*

MG: If you are New Zealand, Canada or Australia, or even Morocco and Singapore, you recognise from a national interest perspective none of this is terribly positive for you, but in the broader trade relationship with some of the giants you need to try and find a way to manage that relationship.

Implications for the research community

RP: *Does ACTA have implications for the research community?*

MG: Given the kinds of copyright-related provisions, anti-circumvention rules, and take-down rules envisaged with ACTA I certainly think that it could have implications from a research perspective, just as much in fact as it has for ordinary consumers and the public at large.

Statutory damages also have potentially huge implications for education, because unless you have a statutory damages rule that exempts education or nonprofits, or acting in [good faith](#), the effect of that kind of provision is very, very significant.

We already see this in Canada, where many universities and other research institutions routinely take an incredibly conservative approach when issues of copyright arise, for fear of potentially massive liability.

RP: *Does that mean that researchers could end up with increasingly restricted access to the information they need in order to do their research?*

MG: Well more and more of the content researchers need already comes with various locks and conditions. However, this kind of agreement — or the legal provisions being discussed by the ACTA negotiators — seeks to buttress that lock-down model and to create new restrictions, even where fair use might be expected to provide certain rights for researchers and educationalists. Fortunately, at the same time we are seeing the terrific movement towards Open Access ([OA](#)), with more and more material being made freely accessible.

RP: *Is ACTA a threat to OA at all?*

MG: Of course OA will continue to exist. In fact it becomes even more important, because it ensures that as much material is made openly accessible as possible. So as people find their ability to access materials increasingly frustrated by agreements like ACTA, OA becomes one of the most important, if not the most important, alternative way of ensuring that people retain access. On the other hand, I

wouldn't underestimate what a statutory damages provision means for anyone working within an educational environment.

RP: How do you mean?

MG: Take the case of an institutional repository for instance: If a claim is made that a particular article, or a particular work, posted in an institutional repository infringes copyright, and the institution knows that it could face a statutory damages claim of \$150,000 per infringement, and it knows that there is no exception for a [good faith action](#), the potential liability will be so great that it will take the material down. That's simply an issue of risk management.

RP: And ACTA is intended to create an environment in which statutory damages are the norm?

MG: Yes. [Some countries](#) already have statutory damages, but others don't.

RP: As I understand it, statutory damages allow courts to impose set fines where infringement is deemed to have incurred. The basic level of damages in the US is between \$750 and \$30,000 per work, but this can rise to [\\$150,000](#) where wilful infringement is said to have taken place.

MG: Correct. The whole idea of statutory damages is that you don't have to demonstrate your actual damages since the statute prescribes a specific level of damages that the plaintiff can rely upon, even if the real damages are in themselves much lower.

That is why in the [file sharing lawsuits](#) you see in the United States you get these crazy sums of money — millions of dollars of potential liability, even for 99c cent songs. That is because the statute prescribes \$150,000 per infringement.

A minority of rabble rousers?

RP: A recent New York Times [article](#) aired the view that criticism of ACTA is being orchestrated by a minority of people with a vested interest in weakening copyright protection. In reality, it was suggested, greater international coordination is essential in order to protect businesses that rely on creativity, brand names and other easily copied assets, particularly in export markets. The article quoted [Mark T. Esper](#), executive vice president of the [Global Intellectual Property Center](#), an affiliate of the US Chamber of Commerce, as saying: "Given the importance of this agreement to our economy and to consumers, we must not allow ACTA to be derailed by a minority opposed to protecting the rights of artists, inventors and entrepreneurs." Does he not have a point?

MG: No. There are many artists, entrepreneurs and others who are opposed to ACTA, so the notion that this is just a minority of rabble rousers is wrong. I also don't consider some of the [senators in the United States that have called for greater transparency](#), and have expressed concerns about ACTA, to be anti-copyright, or pro counterfeiting; neither are the 67 — or whatever the number is now — of MPs in the UK that have [signed a cross party motion](#) calling for greater transparency; nor are the many other elected officials around the world who are doing the same.

And it's not just elected officials expressing concern: We also see many major companies — the googles and the telecom companies for instance — doing so. And we see many other companies expressing huge concern about what ACTA might mean too. Many of these companies are as big a part of the US economy as the companies that Esper was talking about. This tells us that, from an economic perspective, ACTA could just as well have a chilling effect on the economy as a positive one.

RP: Do you think it would be fair to characterise ACTA as an attempt by a few large businesses — primarily American businesses perhaps — to foist rules and regulations on the rest of the world that suit their own personal business interests and very little else?

MG: I think that is the prime driver behind this, but I don't think it is exclusively American companies — some of the large companies we see pushing for ACTA are based in Europe. But as I said, it's not new: This linkage between the corporate perspective and US trade policy has been in place now since the mid 1990s, and if you take a look at the various trade agreements that the US has entered in since then you can track the whole process. In fact, the very last trade agreement that didn't have a substantive IP chapter was the North American Trade Agreement ([NAFTA](#)).

RP: NAFTA came into force in 1994.

MG: And since then every single trade agreement has had an IP element. And if people looked at the level of specificity that these agreements go into I think they would be shocked. They tend to go right down to what requirements an ISP in Marrakesh has to meet if someone claims that it is hosting an infringing file.

No toothless tiger

RP: Standing where we are standing now, what do you expect to be the outcome of ACTA, and when do you expect it to be finally implemented?

MG: Well my crystal ball is broken. So to be totally candid I don't know what the outcome is going to be. But as I said, I do think that even with the aggressive negotiating timetable that has been established it is going to be a challenge to complete it by the end of the year. The Australians have already made reference to the possibility of moving it to 2011.

That said, I do think that eventually we will see it opened up in a more effective fashion than we have seen to date. There is strong momentum for transparency.

As for what the deal will look like: at the end of the day, of course, that is by far the most important question. And I don't really know the answer to it. Will the US accept a watered down ACTA; one that meets the various concerns of the partners such that in America's view it really doesn't achieve very much? I am not so sure it would.

Certainly I expect we will see many developing countries becoming increasingly aware of the treaty and what its long-term implications for them will be. And they will begin to demand a seat at the table. That could have a major impact.

So predicting at this stage what the ultimate outcome will be is very difficult. In fact, I doubt any of the negotiating parties would be in a position to tell you with any kind of certainty where it is going to end up — not least because there are so many pieces in play at the same time: there are a lot of countries involved, and while as a group they have more commonality than if the discussion were expanded to include the entire body of WIPO, there are still enough differences between those taking part to make achieving an agreement in which all their laws were ratcheted up in conformity with those of the US very difficult. There will still be some sizeable opposition around the ACTA negotiating table.

RP: It is your belief that ACTA will inevitably mean changes in national IP laws for those countries taking part?

MG: If it is passed, unquestionably it will. Look, there is no point to ACTA if it doesn't do that. As I said, the US already has many of these rules in place, as do other of the ACTA partners. But as country after country goes around trying to assure its citizens that this won't result in any domestic change the notion that this is somehow going to save the US economy, or is critically important, will be increasingly difficult to reconcile with the notion that ACTA isn't going to change anything in all of the other various countries taking part.

Again, the degree of change will differ between countries, but nobody should be under any illusion that ACTA is going to be some kind of toothless tiger that means nothing for them. It will have a dramatic impact on many countries.

Knowledge society vs. knowledge economy

RP: I wanted to get your view on what one might call the bigger picture. That is, the larger struggle I think we can see taking place in defining what a knowledge society ought to be, and look like. On one side we have those who argue that information needs to be treated as a tradable raw material. Since it can be so easily copied, they say, it needs to be given the qualities of a physical object — which is what IP does — and then vigorously protected, by both technical and legal means. Others argue that that is to miss the point, and that information needs to circulate freely on the Web if we are to create a true knowledge society — which means that it should not be locked down. As novelist and Internet activist [Cory Doctorow put it](#), "An 'information economy' can't be based on selling information. Information technology makes copying information easier and easier. The more IT you have, the less control you have over the bits you send out into the world. It will never, ever, EVER get any harder to copy information. The information economy is about selling everything except information." At the heart of this debate, perhaps, is a disagreement about whether we ought to be creating a knowledge society or a knowledge economy. Do you agree with Doctorow, or do you think there is a midway position between these two views?

MG: Well that is certainly a part of what is taking place yes. I don't think there is any doubt that — from a trade policy perspective — some countries take the view that an IP enforcement agenda leads directly to local jobs and economic success. At the same time you have many other countries, and many companies within the first set of countries, who have come to the realisation that there is tremendous economic potential from using a model that does not rely on IP.

And then overhanging all of that is a question about the overall effectiveness of the kind of enforcement that ACTA envisages anyway. So you see a kind of *realpolitik* emerging that says: "You know what, it doesn't really matter: You can introduce all the rules you want; you can threaten to kick people off the Internet but — as Cory likes to say, copying is never going to get any harder." That, I think, is why — as we see businesses begin to evolve and change, and respond to the inevitable changes — we will see a gradual acceptance of that reality: that laws alone, or even laws as a component of a trade strategy, just don't really work very well.

RP: So there will be a change over time?

MG: Yes, and at the same time, as people spend more time in the new environment, I think we will also see more recognition of the business potential of non-IP centric approaches. Of course there are

going to be winners and losers. And the hard thing for many businesses is recognising that fact, that the success they have had under some of the prior models is no guarantor of success today.

And it is the companies who are most threatened that are pushing hardest for things like ACTA. They are motivated not so much by fears of "piracy", but by the emergence of new competitors and new possibilities. The reality they face, however, is that the kind of value-add that they once provided, and which is a core part of their business, ceases to exist in the new world.

RP: As I think we've agreed, the debate is somewhat polarised right now. But from what you say I guess you see a more complex picture emerging, where perhaps in some parts of the economy IP will continue to be very important, and rights holder will expect it to be protected very sternly, but in other parts of the economy IP will be viewed as increasingly irrelevant?

MG: Certainly I am not one of those who argue that the days of IP are over. I expect it to continue. But the notion that you can draw a direct line between IP and economic success, and even more between IP enforcement and economic success, just isn't right. At some point people are just going to have to realise that.

As it happens, there are some very good — and perhaps surprising — reasons for protecting IP, although these are not focused so much on protecting proprietary rights, but enabling greater openness. This is the case for those working with open source software for instance.

RP: Because software licences like the General Public Licence ([GPL](#)) counter-intuitively exploit some of the proprietary rights provided by the copyright system to ensure that software remains freely available, and is not locked up? Some Creative Commons licences aim to do something similar?

MG: Yes, and so if someone is distributing software or information without the express permission or control of the IP rights holder we need rules to stop that from happening.

RP: I saw one commentary that argued that some aspects of ACTA will be made moot by the increasing tendency for rights holders to bind users to a contract, rather than to rely on copyright rules. That is a [growing development](#) isn't it?

MG: It is absolutely a big development, and the question of whether [contract law trumps copyright is a huge issue](#), not just in the context of ACTA, and especially in an education and research context — where hard-won user rights upheld by courts around the world are effectively jettisoned by virtue of contract.

No satisfaction

RP: Perhaps if ACTA turns out not to be the tiger that the US government wants we will see greater use of contract law?

MG: We are going to see more of that with or without ACTA. What we can also be confident about is that even if ACTA is agreed something else will quickly emerge. The fact is that those pushing for ACTA are playing the long game — in the sense that as soon as they have achieved one new treaty or statute another one pops up literally the very next day.

And that should be a warning sign for those many politicians and policy makers who have decided, as I put it earlier, to play defence on this issue. It is all very well to say, "We recognise our broader trade relationship with the EU, and with the US, and so we have got to play along". But they also

need to realise that there is never satisfaction on this issue, and it can never be solved by agreeing to this point or that point.

If you give in today you have less that you can give in on tomorrow, because you can be sure there is going to be another agreement, and there is going to be more pressure coming the very next day.

RP: *My final question then: I note Intellectual Property Watch [cites Knowledge Economy International's James Love](#) saying that the recent US Supreme Court case over corporate funding poses a greater threat than ACTA. As IP Watch put it: "Love, when asked his greatest concern for 2010, did not point as many others did to the much-debated Anti-Counterfeiting Trade Agreement, but said he was most afraid about the effects of the [Supreme Court's decision](#) that corporate funding of independent political broadcasts in US government elections should be unlimited. 'It is a big threat for democracy,' he said."*

I guess there are worse things out there than ACTA, particularly if the growing opposition we are seeing begins to tame the tiger, and even perhaps begins to remove some of its teeth?

MG: Of course there are worse things than ACTA. Canada might not win a gold medal in [the Olympics](#)! Yes, there are lots of things that might be bigger than ACTA — I take Jamie's point. But I would again note that ACTA's impact and effects will be different in every country. So if you are in Canada, for example, the implications for Canadian domestic copyright policy are far more significant than they are in the US. Where ACTA ranks as a threat level really does depend on where you sit.

RP: *Thanks for your time.*

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