THE ANTI-COUNTERFEITING TRADE AGREEMENT: COPYRIGHTS, INTERMEDIARIES, AND DIGITAL PIRATES

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I. INTRODUCTION

In April 2009, a Swedish court sentenced four men – Fredrik Neij, Peter Sunde Kolmisoppi, Carl Lundstrom, and Gottfried Swartholm Warg – to one year imprisonment and ordered them to pay $4.57 million for operating Pirate Bay, a website that enables users to upload and download movies and music for free.1 Pirate Bay is considered one of the largest online databases for copyright infringing material.2 Even after the criminal liability and hefty monetary sanctions imposed by the Swedish court, the website itself appears beyond the reach of courts and law enforcement, as it remains up and running today despite numerous attempts to shut it down.3

Pirate Bay, however, is only a small part of the overall problem of online copyright infringement. Estimates put the costs of online copyright infringement at $75 billion annually for G204 economies, in addition to the 2.5

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3 Gustav Sandstrom, Court Revises Pirate Bay Ruling, WALL ST. J. (Nov. 27, 2010), http://commcns.org/uhDvdW.

4 The G20 countries include: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Republic of Korea, Turkey, United Kingdom, United States of America. About G-20, G20.ORG, http://commcns.org/uX0wV8 (last visited Dec. 15, 2011).
million jobs that are lost due to counterfeiting and piracy.\textsuperscript{5} With approximately 2 billion Internet users worldwide,\textsuperscript{6} the rapid commercialization of the Internet has exacerbated the historical tension between copyright monopoly for right holders and the freedom of movement of information.\textsuperscript{7} For example, the European Union’s Directive 2004/48/EC on the Enforcement of Intellectual Property Rights ("IPR Enforcement Directive") expressed that adequate protection of intellectual property allows a creator to benefit financially from the creation of the intellectual property and encourages further creativity and dissemination of works.\textsuperscript{8} At the same time, however, the IPR Enforcement Directive stressed that such protection must be balanced against freedom of expression and free movement of information.\textsuperscript{9}

With a goal of setting "a new, higher benchmark for intellectual property rights enforcement that countries [could] join on a voluntary basis,"\textsuperscript{10} the Anti-Counterfeiting Trade Agreement ("ACTA" or "Agreement") seemed to be a promising step towards curtailing online copyright infringement.\textsuperscript{11} Unfortunately, entertainment industry lobbyists have lost the battle for more protection and enforcement in the digital arena to Internet Service Providers ("ISPs").\textsuperscript{12} Since consumers often employ ISP services to infringe on copyrights, earlier drafts of ACTA included language that created copyright infringement liability for ISPs.\textsuperscript{13} While this language was imperative in furthering copyright holders’ interests, it was subsequently left out of the final

\begin{itemize}
  \item \textsuperscript{5} Frontier Econ., Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy 5 (2011).
  \item \textsuperscript{7} Org. for Econ. Dev. & Cooperation, Piracy of Digital Content 26 (2009); William C. Harrelson, Filtering the Internet to Prevent Copyright Infringement: ISP Safe Harbors and Secondary Liability in the U.S. and France, 35 New Matter, no. 1, 2010, at 12, 13 (highlighting the “tension between competing public policy goals for [intellectual property] protection of copyright . . . by allowing enforcement through a single entity that arguably controls the source [ISPs] through which offending content is made available” and the desire to protect the free flow of information).
  \item \textsuperscript{9} Id.
  \item \textsuperscript{10} New Zealand Ministry of Economic Development, Anti-Counterfeiting Trade Agreement, http://commcns.org/s0DMg8.
  \item \textsuperscript{11} Office of the United States Trade Representative, The Anti-Counterfeiting Trade Agreement: Final Draft (December 2010), http://commcns.org/sijtkr [hereinafter Final Draft].
  \item \textsuperscript{12} See Anti-Counterfeiting Trade Agreement, Elec. Frontier Found., http://commcns.org/uBQcWC (last visited Dec. 15, 2011).
\end{itemize}
The Anti-Counterfeiting Trade Agreement draft of ACTA released in November 2010. ACTA’s digital environment section fails to hold ISPs directly responsible for infringing content, instead containing only vague language about business cooperation. As a result, ACTA’s purpose of supplementing current agreements designed to standardize intellectual property law across the world seems to have been lost.

This Comment discusses the importance and impact of ACTA, given that countries representing more than 50 percent of the world’s trade, as well as the lion’s share of intellectual property interests, have been instrumental in negotiating the agreement. Part II focuses on the current state of ISP secondary liability for copyright infringement, including a brief discussion of the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”). Part III examines the lead up to the release of the final draft text of ACTA in November 2010, specifically concentrating on provisions dealing with the Internet, as well as the proposed U.S. legislation aimed at implementing ACTA. Part IV considers whether ACTA’s final draft will provide adequate protection to copyright owners from the threat of online piracy. Ultimately, this Comment concludes that, as currently written, the digital environment section of ACTA does not confer additional remedies and

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14 Compare Predecisional/Deliberative Draft, supra note 13 at 19-21, with Final Draft, supra note 11.
15 Final Draft, supra note 11, at 16.
16 EUROPEAN COMM’N, ALL YOU WANT TO KNOW ABOUT THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) 1 (2010) [hereinafter EC MEMO].
17 EXEC. OFFICE OF THE PRESIDENT, 2010 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR: ANNUAL REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT 22 (2011) [hereinafter REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT]; Axel Metzger, A Primer on ACTA: What Europeans Should Fear About the Anti-Counterfeiting Trade Agreement, 1 JIPITEC 109, 109, 115 (2010). Prior attempts by countries with the most intellectual property interests to increase intellectual property protection through the World Trade Organization and World Intellectual Property Organization negotiations have failed because of lack of consensus with countries that do not share the same interests in increased protection. Unlike the U.S., the E.U., Japan, for example, developing countries are more interested in “better access to protected contents, technologies, and other subject matters through fair use exceptions, compulsory license schemes . . . .,” than in limiting access through more protection. As a result, instead of attempting to reach consensus, countries began entering into bilateral agreements for higher protection, such as the free-trade agreement of 2007 between the U.S. and South Korea (“KORUS”). Axel Metzger, A Primer on ACTA: What Europeans Should Fear About the Anti-Counterfeiting Trade Agreement, 1 JIPITEC 109, 110 (2010).
18 ACTA contains several specific provisions addressing intellectual property protection in the digital environment, border measures dealing with counterfeited goods. This Comment will not discuss the border measures provisions as well as the anti-circumvention provision contained within the digital environment section. It will only discuss the “Intellectual Property in the Digital Environment” section of ACTA. See Office of the United States Trade Representative, The Anti-Counterfeiting Trade Agreement: Final Round Draft 15-17 (Oct. 2010), http://commcns.org/sjtkr.
protections to right holders than those currently available when attempting to hold ISPs responsible for hosting infringing material.

II. SECONDARY COPYRIGHT LIABILITY AND ONLINE INFRINGEMENT

A. Copyright Law and the Internet as a Tool for Infringement

Copyright is defined as "a property right in an original work of authorship [including a literary, musical, dramatic, or other works] fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work" for a limited period of time. The purpose of such a monopoly is to encourage creativity and invention. Copyright owners may profit from their creations through distribution of their works; however, most copyright users profit through some form of a licensing scheme.

The rise of the Internet poses new threats to the interests of copyright holders and the legislatures that attempt to protect them. According to Senator Hatch (R-Utah), although the Internet is the "glue of international commerce," it has become a "tool for online thieves." With just a few clicks of a mouse, anyone may "replicate and distribute multiple copies of copyrighted material to any number of persons around the world," leaving no sign of copying and no deterioration in quality. The Internet's ease of access and use allows users to

\[17 \text{ U.S.C. § 102(a) (2006).}\]
\[\text{Id.}\]
\[\text{COPYRIGHT CLEARANCE CTR., RISKY BUSINESS OF INFORMATION SHARING: WHY YOU NEED TO CARE ABOUT COPYRIGHT 2 (2010).}\]
\[\text{Copyright owners typically transfer their rights through exclusive or nonexclusive licenses and assignments. An exclusive license means that the right to the copyrighted material is transferred to a third-party who exclusively controls the distribution and reproduction of the copyrighted work. A nonexclusive license grants the licensee the right to reproduce, distribute and create derivitive works, but the licensor may also grant a similar license to other third parties. An assignment is when the copyright owner transfers all copyright interests to the third party and may no longer control how the copyrighted work is used. Copyright Licenses and Assignments, BITLAw, http://commcns.org/v4hHtb (last visited Dec. 15, 2011).}\]
\[\text{RICHARD POYNDER, CAUGHT IN A WEB: INTELLECTUAL PROPERTY IN CYBERSPACE 13 (2001); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd, 545 U.S. 913, 928-29 (2005); EC MEMO, supra note 16, at 2; ORG. FOR ECON. DEV. & COOPERATION, supra note 7, at 11.}\]
\[\text{Press Release, Senator Patrick Leahy (D-Vermont), Senators Introduce Bipartisan Bill to Combat Online Infringement (Sept. 20, 2010) [hereinafter Leahy Press Release], available at http://commcns.org/uiYBgW.}\]
\[\text{Metro-Goldwyn-Mayer Studios, Inc., 545 U.S. at 928-29; POYNDER, supra note 23, at 13; ORG. FOR ECON. DEV. & COOPERATION, supra note 7, at 21.}\]
\[\text{ORG. FOR ECON. DEV. & COOPERATION, supra note 7, at 21.}\]
share these copies with one another at no charge, endangering the entertainment industry that depends on profits derived from the sale of these copyrighted materials.\textsuperscript{27}

B. The Agreement on Trade Related Aspects of Intellectual Property Rights

Currently, international copyright protection is achieved through TRIPS, as well as other bilateral agreements.\textsuperscript{28} TRIPS was negotiated and adopted by the World Trade Organization ("WTO") and its Member States during the Uruguay Round of trade talks in 1994.\textsuperscript{29} The agreement was aimed at standardizing intellectual property laws of Member States and applying "common international rules for regulating intellectual property throughout the world."\textsuperscript{30} It also attempted to harmonize the protection of rights and address problems raised by the increased availability of digital media.\textsuperscript{31} For the first time, intellectual property rights were given international enforcement power through the use of trade sanctions.\textsuperscript{32}

TRIPS also established "minimum levels of protection that each WTO member nation must provide to the intellectual property of fellow WTO members."\textsuperscript{33} For instance, it calls for detailed enforcement and evidentiary procedures\textsuperscript{34} and requires that each Member State provide adequate protection and enforcement of intellectual property rights, such as "provisional measures, injunctions, damages and other penalties."\textsuperscript{35} For the most part, TRIPS relies on

\textsuperscript{27} Id. at 9.
\textsuperscript{32} REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT, supra note 17, at 22.
\textsuperscript{33} TRIPS and Its Place in International Intellectual Property Law Making, supra note 30; Emily Ayoob, Recent Development: The Anti-Counterfeiting Trade Agreement, 28 CARDOZO ARTS & ENT. L.J. 175, 182-83 (2010).
\textsuperscript{34} Part III of the TRIPS Agreement requires Member States to "ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement." It further provides civil, administrative and criminal procedures, evidentiary procedures, as well as available remedies. Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 41-50, 33 I.L.M. 1213-16 (1994); TRIPS and Its Place in International Intellectual Property Law Making, supra note 30.
\textsuperscript{35} Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 41, 33 I.L.M. 1213-14 (1994); TRIPS and Its Place in International Intellectual Property Law Making,
the effectiveness of Member States’ domestic legislations to “implement the minimum standards governing enforcement of international intellectual property rights.”

TRIPS surpassed all “prior international conventions on intellectual property rights not only in the breadth of intellectual property rights covered . . . but also in the scope of protection, as well as the requirement of adequate and expeditious enforcement.” At the same time, the agreement “effectively [forced] many countries to sign on to heightened levels of protection against their own [developing and least-developed nation] interests.” However, the required protections are only the basic levels of protection – Member States are permitted to implement stricter standards, known as “TRIPS-plus.” ACTA is considered a TRIPS-plus standard.

C. Creation of Secondary Liability

As noted, the Internet has created unforeseen problems for legislators and copyright owners. Lawmakers have made numerous efforts to address illegal file sharing over the Internet, but have found difficulty designing effective methods to track down infringers and suing for infringement. While imposing liability would be simple, because these individuals or entities are directly infringing on the exclusive reproduction and distribution rights of copyright owners, the Internet enables them to infringe on copyrights without being

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supra note 30.


37 Id. at 83-84.


39 Member States are permitted to implement laws providing more extensive protection than TRIPS requires. Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 1, 33 I.L.M. 1198 (1994); Ayoob, supra note 33, at 182. For example, the United States has entered into numerous regional and bilateral free trade agreements with nations such as Australia and Singapore. These agreements provide for “criminal penalties and procedures in cases of willful trademark counterfeiting and copyright piracy on a commercial scale; border measures in cases involving trademarks and copyrights; and civil remedies for all intellectual property rights” that are consistent with U.S. law. SHAYERAH ILLIAS, CONG. RESEARCH SERV., THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT: BACKGROUND AND KEY ISSUES 6 (2010).

40 ACTA would require signatories to establish criminal penalties for willful intellectual property violations, including for aiding and abetting criminal conduct. In addition, it requires signatories to strengthen civil enforcement laws by providing for “meaningful damages,” and establishes DMCA-like anti-circumvention procedures. REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT, supra note 17, at 22-23.

easily detected.\textsuperscript{42} Thus, bringing them to justice is extremely costly and nearly impossible.\textsuperscript{43} Moreover, the individual infringers may not have the financial ability to satisfy their judgments.\textsuperscript{44}

Due to these hurdles, the entertainment industry has sought to impose liability on ISPs that enable infringement through their services.\textsuperscript{45} Due to the fact that ISPs are easier to identify and locate, as well as more likely to have financial means than are individuals, they are more attractive targets for infringement suits.\textsuperscript{46} The entertainment industry and copyright owners, however, face an uphill battle in imposing liability because ISPs themselves generally are not directly infringing on the copyrights.\textsuperscript{47}

The doctrine of secondary copyright liability holds accountable a person or entity that knowingly helps an infringer benefit from infringement.\textsuperscript{48} While not found within the text of the U.S. Copyright Act,\textsuperscript{49} courts have created two types of secondary liability: contributory and vicarious infringements.\textsuperscript{50} Contributory
infringement is found where one intentionally induces or encourages direct infringement, while vicarious infringement occurs when a person or entity, with authority to control or limit the infringing use, profits from such direct infringement.

The seminal case addressing secondary liability for copyright infringement is *Sony Corp. of America v. Universal City Studios, Inc.* In the early 1980s, Sony began to manufacture and sell home video tape recorders, known as Betamax players. The chief purpose of these new devices was time-shifting—allowing users to record television shows for later viewing. Universal City Studios and Walt Disney Productions brought suit alleging that the manufacture and sale of Betamax players made Sony liable for individual consumers' unauthorized recording of copyrighted material, thus infringing on their copyrights. Recognizing that the "Copyright Act does not expressly render anyone liable for infringement committed by another," the Supreme Court instead created the doctrine of secondary liability. In doing so, it noted "adequate protection of a [copyright] monopoly may require the courts to look beyond actual duplication of...[television shows] to the products...that make such duplication possible." Nonetheless, the Court declined to extend its newly created concept to Betamax recorders, given that the devices were capable of a number of substantially non-infringing uses. According to the Court, making or distributing a product or service that may be used for copyright infringement, however substantial that potential infringing use may be, does not necessarily warrant a finding of secondary liability.

To address the problems created by technological advancements, Congress amended the U.S. Copyright Act in 1998 by passing the Digital Millennium

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problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.") See also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd, 545 U.S. 913, 930 (2005) (citation omitted) ("Although the Copyright Act does not expressly render anyone liable for infringement committed by another, these doctrines of secondary liability emerged from common law principles and are well established in the law.").

51 Metro-Goldwyn-Mayer Studios, Inc., 545 U.S. at 930.
52 Sony Corp., 464 U.S. at 437, n.18; Metro-Goldwyn-Mayer Studios, Inc., 545 U.S. at 930.
53 Sony Corp., 464 U.S. at 417; Timothy B. Lee, John Paul Stevens, Defender of High-Tech Freedom, CATO@LIBERTY (Apr. 9, 2010), http://commcns.org/vzyU7E.
54 Sony Corp., 464 U.S. at 419-20.
55 Id.
56 Id.
57 Id. at 434-35.
58 Id. at 442.
59 Id. at 456.
60 ACTA Debate Gets Specific, CTR. FOR DEMOCRACY & TECH. (May 18, 2010), http://commcns.org/tCCxIx.
Copyright Act ("DMCA"). DMCA was Congress's first attempt to align U.S. copyright law with major copyright protections of other developed countries. Its purpose was to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age." Title I calls for anti-circumvention provisions, which outlaw the sale and distribution of technologies that effectively circumvent the technical measures instituted by right holders to protect copyrighted material. Title II allows ISPs that meet certain thresholds to qualify for safe harbor provisions and limit their liability for indirect infringement. Critics, however, argue that DMCA is already outdated and that lawmakers have yet to find "the right mechanisms" when "confronted with new technologies like Napster."

The European Union similarly responded to widespread digital file sharing by signing the E.U. Electronic Commerce Directive 2000/31/EC ("E-Commerce Directive"), standardizing ISP liability throughout the Member States. The E-Commerce Directive exempts ISPs from prosecution for unknowingly storing infringing content, since they are not responsible for monitoring and regulating content that they store. Moreover, ISPs are "not liable for information transmitted [through their services] if they neither

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62 Olasa, supra note 49, at 349.

63 This provision mandates that manufacturers of VCRs, DVD players, CD players, and video gaming consoles include measures in their products that effectively prevent copying of copyrighted material and of playing illicit copies on the devices. See 17 U.S.C. § 1201 (2006); Olasa, supra note 49, at 349. Title I also implements two World Intellectual Property Organization ("WIPO") treaties to which the U.S. was a party. See U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 2 (1998).


65 POYNDER, supra note 23, at 24. ACTA's purpose was to supplement TRIPS and address the many problems created by the widespread use of the Internet and advancements in technology. According to the 2010 Special 301 Report released by the Office of the United States Trade Representative, many new technologies, such as "cellular telephones, palm devices, flash drives, and other mobile technologies," are now being used for intellectual property piracy. In addition, the pirated content has spread beyond music and films and now includes the "piracy of ring tones, games, and scanned books . . . ." See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2010 SPECIAL 301 REPORT 11 (2010).


67 Miquel Peguera, Internet Service Providers' Liability in Spain: Recent Case Law and Future Perspectives, 1 JIPITEC 151, 151 (2010).

initiate transmission, nor select receivers of transmission.\textsuperscript{69} Finally, ISPs are required to comply with the notice-and-takedown requirements of the safe harbor provisions and to remove the infringing content upon notice.\textsuperscript{70}

D. Safe Harbor Provisions

Generally, four types of intermediaries operate the Internet: content providers, access providers, service providers, and network providers, although some intermediaries provide multiple services.\textsuperscript{71} Content providers are responsible for the information/content available on the Internet, such as texts, images, music, and movie files.\textsuperscript{72} Network providers administer the network and facilitate transmission through routers and cables,\textsuperscript{73} while access providers allow people to connect to the Internet.\textsuperscript{74} Finally, service providers commonly host content and provide space for users to post their content.\textsuperscript{75} If content posted on the Internet is infringing, a content provider may be directly liable to right holders for infringement,\textsuperscript{76} whereas network and access providers' liability is virtually nonexistent given that they only facilitate users' access to the Internet.\textsuperscript{77} Service provider responsibility, however, is more complex.

Although those who place copyright infringing material on the Internet expose themselves to liability for violating the rights of copyright holders, oftentimes these individuals cannot be easily identified.\textsuperscript{78} Moreover, they might be foreign-based or "insolvent, making it less interesting to sue for damages."\textsuperscript{79} The result is that many argue that service providers are in the best position to control online infringement.\textsuperscript{80} To do this, ISPs may comply with notice-and-takedown requests, block sites that engage in trafficking of pirated content, or use filtering capabilities that recognize possible infringing content.\textsuperscript{81}

DMCA also contains safe harbor guidelines, setting forth the standards ISPs must meet in order to qualify for immunity from secondary copyright

\textsuperscript{69} E-Commerce Directive, supra note 66, at 12; POYNDER, supra note 23, at 46.
\textsuperscript{70} POYNDER, supra note 23, at 46.
\textsuperscript{71} Strowel, supra note 44, at 135; Kleinschmidt, supra note 61, at 333.
\textsuperscript{72} See Strowel, supra note 44, at 135. See also Kleinschmidt, supra note 61, at 333.
\textsuperscript{73} See Strowel, supra note 44, at 135. See also Kleinschmidt, supra note 61, at 333.
\textsuperscript{74} See Strowel, supra note 44, at 135. See also Kleinschmidt, supra note 61, at 333.
\textsuperscript{75} See Strowel, supra note 44, at 135. See also Kleinschmidt, supra note 61, at 333.
\textsuperscript{76} See Strowel, supra note 44, at 135. See also Kleinschmidt, supra note 61, at 333.
\textsuperscript{77} See Strowel, supra note 44, at 135-36. See also Kleinschmidt, supra note 61, at 333.
\textsuperscript{78} See Nordemann, supra note 41, at 37.
\textsuperscript{79} See Strowel, supra note 44, at 134.
\textsuperscript{80} Kim Hart, NBC Executive: Curbing Illegal Web Traffic Does Not Violate Privacy Rights, THE HILL (Feb. 20, 2010), http://commcns.org/spXQFU.
\textsuperscript{81} Id.
liability. First, the act excludes four categories of services from liability altogether: (1) transitory digital network communications; (2) system caching; (3) information storage; and (4) information location tools. To be exempt from secondary liability, ISPs must show (1) lack of knowledge of the illegal nature of the content or "lack of knowledge of facts or circumstances from which the illegality is apparent;" (2) that it did not financially benefit from the infringement, if it had a right and ability to control the activity; and (3) that it complied with the notice-and-takedown procedure.

DMCA inspired the E-Commerce Directive's safe harbor provisions. While the same categories of services are excluded from liability and the conditions ISPs must meet to avoid liability are largely the same, there is one

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83 Transitory digital network communications include "the provider's transmitting, routing, or providing connections for . . ." material. 17 U.S.C. § 512(a). See Morris, supra note 82, at 3.

84 System caching is the "temporary storage of material on a system or network controlled or operated by or for the service provider . . ." 17 U.S.C. § 512(b). See Morris, supra note 82, at 3.

85 Information storage is the "storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider . . ." 17 U.S.C. § 512(c) (2006); Morris, supra note 82, at 3.

86 Information location tools include "referring or linking users to an online location containing infringing material or infringing activity . . ." 17 U.S.C. § 512(d) (2006); Morris, supra note 82, at 3.

87 The copyright owner, in informing the ISP of the infringing content, must submit "a written communication . . . to the designated agent of a service provider that includes substantially the following:

A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

A statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.


88 Peguera, supra note 67, at 151.
Article 14 imposes much broader notice-and-takedown requirements than DMCA's provisions. It provides for "horizontal immunity" to ISPs not only in the case of copyright infringement, but also for any information that ISPs "make available on the Internet, such as defamation, misleading advertising, or trademark infringement."[89]

E. Application of Safe Harbor Provisions in the U.S. and the E.U.

The application of safe harbor provisions varies greatly worldwide and does not grant automatic protection to intermediaries. For instance, in the U.S., active encouragement and inducement of copyright infringement exposed certain service providers to secondary liability.[90] In Metro-Goldwyn-Mayer Studios v. Grokster, the defendants distributed free software that allowed computer users to share electronic files through peer-to-peer networks, meaning users could share information directly without the use of server storage space.[91] This software enabled users to share copyrighted music and video files without authorization.[92] Copyright owners brought suit alleging that Grokster and StreamCast, another company operating software similar to Grokster's, "knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works in violation of the Copyright Act."[93]

While the defendants argued that the Betamax decision applied to their situation,[94] the Court found them liable for distributing their software solely to enable users to download copyrighted works and actively encouraging such infringement.[95] In fact, StreamCast purposefully intended to attract former

[89] The Directive exempts ISPs that are mere conduits, cache providers, and host providers. Mere conduits are service providers that merely transmit information without initiating the transmission, selecting the recipient or modifying the information transmitted. Cache providers temporarily store transmissions without modifying the content. Host providers provide storage services for the content. E-Commerce Directive, supra note 66, at 12-13; Peguera, supra note 67, at 151.

[90] William Harrelson, PART II: Filtering the Internet to Prevent Copyright Infringement: ISP Safe Harbors and Secondary Liability in the U.S. and France, 35 NEW MATER., no. 2, 2010 at 1, 5; Peguera, supra note 67, at 151.

[91] Harrelson, supra note 90, at 5; Peguera, supra note 67, at 151.

[92] See generally Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (holding that anyone distributing a device with the object of promoting its use to infringe copyright is liable for the infringing acts of third parties using the device).

[93] Id. at 919-20.

[94] Id. at 920.

[95] Id. at 920-21.


Napster users who were looking for a new free file-sharing website, after copyright holders had sued Napster for facilitating copyright infringement and succeeded in shuttering it down. As a result, the Supreme Court noted that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."

More recently, Viacom International, Inc. alleged that YouTube (a subsidiary of Google, Inc.) violated its copyrights when users uploaded videos containing copyrighted material. Specifically, Viacom argued that YouTube "built itself into the Internet's most watched video site by milking unlicensed use of copyright-protected clips stolen from professionally produced show[s]." Prior to trial, Viacom uncovered over 100,000 videos uploaded by millions of YouTube users that violated its copyrights. After being notified of these copyright violations, YouTube followed its own notice-and-takedown policy and removed the infringing material almost immediately. Moreover, YouTube's user policy provided that an account would be terminated if the company repeatedly warned the user about uploading infringing material. Given that YouTube met DMCA's requirements, followed its own internal procedures, and removed the infringing material, the district court applied the safe-harbor provision of DMCA and found YouTube not liable.

Madrid's Commercial Court reached a similar decision, holding YouTube not liable in Telecino v. YouTube. Spanish television stations Gestevision Telecinco S.A. and Telecinco Cinema S.A.U. filed suit against YouTube in Madrid for user-uploaded infringing content. Plaintiffs argued that YouTube

98 Id. at 924 ("Internal company documents indicate that StreamCast hoped to attract large numbers of former Napster users if that company was shut down by court order or otherwise, and that StreamCast planned to be the next Napster.").
99 Id. at 936-37.
102 Viacom Int'l, Inc., 718 F. Supp. 2d at 518; Liedtke, supra note 101 (stating that "about 24 hours of new video is posted to YouTube every minute.").
103 Liedtke, supra note 101.
104 Viacom Int'l, Inc., 718 F. Supp. 2d at 527. In addition to the three strikes policy, YouTube employs other mechanisms to address possible dissemination of copyright infringing content, including limiting most users from uploading video content that is longer than fifteen minutes and the use of digital fingerprinting tools that identify copyrighted material and ban such content. ENVISIONAL LTD., TECHNICAL REPORT: AN ESTIMATE OF INFRINGING USE OF THE INTERNET 19 (2011).
107 Id.; Spanish Court Clears YouTube of Copyright Liability for Uploaded Videos, OUT-
was liable, as it allowed users to upload copyrighted material and circulate the videos among other users. Following the E-Commerce Directive, the court disagreed, finding YouTube not responsible because it did not upload the infringing content and had no obligation to monitor users’ content. According to the court, the site’s only obligation was to cooperate with the rights holders and respond quickly to notice-and-takedown requests.

In a decision by a Regional Court in Hamburg, Germany, YouTube was not so lucky. Recording artist Sarah Brightman sued YouTube after users uploaded her private concert recordings without her permission. According to the German court, simply “asking users whether they have the right to post videos doesn’t relieve [YouTube] of the responsibility to seek proof from the user of [their right to publish the material], especially since people can post to YouTube anonymously.” As a result, YouTube was found liable for hosting infringing content.

### III. ACTA AND ITS IMPLEMENTATION IN THE UNITED STATES

#### A. Early Stages of ACTA and its Criticisms

In an attempt to create a “global framework” for combating intellectual property piracy, the U.S., E.U., Japan, and Switzerland joined together to initiate negotiations for ACTA and push for its adoption. The E.U. hoped that the negotiations would lead to “a new plurilateral treaty improving global standards for the enforcement of IPR [intellectual property rights], to more effectively combat trade in counterfeit and pirated goods.”

A limited number of other nations also were invited to participate in the

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109 Id. at 188; Spanish Court Clears YouTube of Copyright Liability for Uploaded Videos, supra note 107. YouTube presented testimony that monitoring users’ content was not physically feasible because its site has over 500 million videos.
110 Spanish Court Clears YouTube of Copyright Liability for Uploaded Videos, supra note 107.
111 Id.
112 Christopher Lawton, German Court Rules Against Google in Copyright in Copyright Case, WALL ST. J. (Sept. 7, 2010), http://commcns.org/tqiXkE.
113 Id.
114 Spanish Court Clears YouTube of Copyright Liability for Uploaded Videos, supra note 107.
115 REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT, supra note 17, at 22; Kaminski, supra note 38, at 250.
negotiations. However, the exclusion of many developing and least-developed nations from negotiations fueled allegations that countries with the strongest interests in intellectual property protection were forcing developing nations to sign onto a TRIPS-plus standard without any input from these nations. Moreover, countries that sign onto the Agreement once negotiations were completed would have no influence over its terms. To make matters worse, throughout the negotiations, the drafting parties refused to release any draft terms of the Agreement.

After numerous attempts by public interest groups in both the U.S. and the E.U. to publicize ACTA negotiations, the negotiations were classified as a matter of national security.

Much of the outrage over the shrouding of the negotiations in secrecy stems from the fact that ACTA is not simply an agreement between several countries – it attempts to create a “global standard on copyright infringement.” According to some scholars, it “would usher in radically stronger enforcement, including increased criminal sanctions and stronger border measures.” On

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117 Countries invited to participate included Australia, Canada, Jordan, Korea, Mexico, Morocco, New Zealand, Singapore, and the United Arab Emirates. See Kaminski, supra note 38, at 250-51. Negotiations on ACTA began in 2008, but they were kept secret for some time. See Ayoob, supra note 33, at 192-93.


119 Kaminski, supra note 38, at 254-55.


121 Ayoob, supra note 33, at 188-89. The Electronic Frontier Foundation and the Public Knowledge filed suit against the United States Trade Representative (“USTR”) under the Freedom of Information Act (“FOIA”) demanding release of the ACTA negotiated texts. In June 2009, the Obama administration announced that the negotiations were classified as a matter of national security. Id. In addition, the Congressional Research Service did a study on the Agreement in 2010, but only a portion of the study has been disclosed to the general public. Senator Wyden Releases Redacted Version of October 29, 2010 CRS Report on ACTA, Knowledge Ecology Int’l (Apr. 26, 2011), http://commcns.org/uBUzNR. The USTR stated the document is not subject to disclosure under FOIA. Letter from Fred Ames, Chair of Freedom of Information Act Appeals Committee of the Office of the U.S. Trade Representative, to James Love, Knowledge Ecology Int’l (Apr. 20, 2011), available at http://commcns.org/tPCOlp. In the E.U., the Foundation for a Free Information Infrastructure (“FFII”) applied to the E.U. Council for the same documents and was told that negotiations were classified because “unauthorized disclosure ... could be disadvantageous to the interests of the European Union or of one or more of its Member States ... .” Ayoob, supra note 33, at 189 (quoting Letter from Ramon Jimenez Fraile, on behalf of the General Secretariat of the Council of the European Union, to Ante Wessels, Foundation for a Free Information Infrastructure (Nov. 5, 2008), available at http://commcns.org/uijmu).

122 Kaminski, supra note 38, at 250.

123 Id. at 248.
the other hand, critics argue that ACTA provides more coverage and rights than TRIPS and, as a result, "threatens the negotiated balance that was achieved in the TRIPS Agreement." The Agreement also has been criticized for "exporting" U.S. copyright law, specifically the anti-circumvention provisions of DMCA.

One of the biggest points of contention, however, was Article 2.18 of the original draft text of ACTA. Specifically, Article 2.18(3) recognized the use of ISP services for engaging in infringing conduct. In addition to providing various circumstances under which ISPs would be exempt from liability, the April 2010 draft contained several options for holding ISPs responsible for policing online content. For instance, the draft required ISPs to filter infringing content and block access to websites providing access to pirated materials, a provision many critics found objectionable. Furthermore, Article 2.18 allowed copyright owners to demand and obtain users' identifying information from ISPs upon notice of infringement, an obligation that created numerous concerns in the arena of personal privacy.

B. Final Draft Language

Participating countries completed the last round of negotiations on October 2, 2010 and released the final text of ACTA on November 15, 2010.

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124 Raja Kanaga, Concerns Raised Over ACTA at TRIPS Council, THIRD WORLD NETWORK (Nov. 1, 2010), http://commcns.org/rFFdzY. See also Ayob, supra note 33, at 182-83. ACTA applies to counterfeit trademark goods and provides for increased border enforcement to address import and export of counterfeit and pirated products. Counterfeit trademark goods include "any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished." Final Draft, supra note 11, at 3.


128 Id.

129 Declan McCullah, ACTA Treaty Aims to Deputize ISPs on Copyrights, CNET NEWS (Apr. 21, 2010), http://commcns.org/sHuSF.

130 Predecisional/Deliberative Draft, supra note 13, at 19-20.

131 Kaminski, supra note 38, at 255.

132 EC MEMO, supra note 16, at 21; Press Release, European Comm’n, Joint statement on the Anti-Counterfeiting Trade Agreement (ACTA) from all the Negotiating Partners of the
According to United States Trade Representative Ambassador Ron Kirk, the negotiations provided "an opportunity to toughen international standards for the enforcement of intellectual property rights, making it harder for counterfeit and pirated goods to enter our country, and making the world safer for the innovation and creativity that are so critical to the U.S. economy." Under the final text of the Agreement, pirated goods are defined as:

[A]ny goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country in which the procedures set forth in Chapter II.

An individual "who, knowingly or with reasonable grounds to know, engaged in infringing activity" is subject to civil liability to the intellectual property owner.

Moreover, criminal liability is provided in cases where the infringer acted willfully and on a commercial scale. While TRIPS imposed criminal liability for infringing intellectual property "willfully and on a commercial scale," ACTA takes this liability even further. Article 23 of the final draft text provides that each participating nation:

[S]hall provide for criminal procedures and penalties to be applied at least in cases of willful ... copyright or related rights piracy on a commercial scale ... A party may provide criminal procedures and penalties in appropriate cases for the unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public.

Agreement (Nov. 15, 2010), available at http://commcns.org/t2RaNT.

See IIAS, supra note 39, at 2.

Final Draft, supra note 11, at 4 art. 5(k).

id. at 6 art. 9.

id. at 13 art. 23 ("Acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage").

Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 61, Apr. 15, 1994, 33 I.L.M. 1125, 1220. Article 61 of the TRIPS Agreement further provides:

Members shall provide for criminal procedures and penalties to be applied at least in cases of willful ... copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale.

Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 61, Apr. 15, 1994, 33 I.L.M. 1125, 1220; Kaminski, supra note 38, at 252.

Kaminski, supra note 38, at 252-53.

Final Draft, supra note 11, at 13 art. 23.
Additionally, the ACTA Discussion Paper "links criminal enforcement to border measures," and "criminalizes willful infringement without any motivation for financial gain," provided that such infringement is "significant" and "prejudicially affect[s] the copyright holder . . . ." However, important provisions regarding the digital environment were removed from ACTA's final draft. Due to concern on the part of ISPs and privacy interest groups over language in the April 2010 draft, the provisions of the final text impose fewer obligations on ISPs. For example, civil and criminal liabilities are only available against direct infringers of copyrighted material. The only language that could be construed to impose liability for ISPs is found in Article 27(3), which provides:

> Each Party shall endeavor to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and, consistent with that Party's law, preserving fundamental principles such as freedom of expression, fair process, and privacy.

Article 27 also allows member nations to authorize ISPs to disclose the identities of subscribers who potentially used their accounts for infringing purposes, but only once a claim has been filed.

As the European Commission notes, ACTA establishes a comprehensive international framework of practices to assist member nations in effectively

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140 Kaminski, supra note 38, at 252-53.
141 Id.
142 Sec. 4, Art. 2.18(3) provided that the parties recognized that individuals use the services of third parties, including ISPs, to infringe copyrights. ISPs were defined as "provider of online services or network access . . . and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user . . . without modification to the content . . . ." Predecisional/Deliberative Draft, supra note 13, at 19. Furthermore, the parties acknowledged that there are legal uncertainties between the protection of copyrights and limitations and exceptions in the digital environment. To address these uncertainties, the parties proposed various options that would allow for some limited liability for ISPs. Id. at 18-24; Karl Bode, Latest ACTA Version Leaked ISP Liability Possibilities Lessened, Through Problems Remain, BROADBAND DSL REPORTS (Sept. 7, 2010), http://commcns.org/syB2n6; ISP Liability for Infringement Nuked, ACTA Leak Reveals, TORRENTFREAK.COM (Sept. 6, 2010), http://commcns.org/tZKQTC; Final Draft, supra note 11, at 15-18; Sarah Lai Stirland, ACTA: International Trade Negotiators Drop ISP Liability, Anti-Circumvention Provisions Still In, BROADBANDBREAKFAST.COM (Sept. 7, 2010), http://commcns.org/sOHTKh; REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT, supra note 17, at 22.
143 Final Draft, supra note 11, at 15 art. 27(1) (explaining that each country shall ensure enforcement procedures to the extent set forth in art. 9(1), for civil liability which requires the infringer to know or have reasonable grounds to know of the infringement, and art. 23(1) for criminal liability, which requires willful infringement).
144 Final Draft, supra note 11, at 16 art. 27(3) (emphasis added).
combating intellectual property infringement.\textsuperscript{146} Because TRIPS was negotiated and concluded “at a time when the [I]nternet was still in its infancy,”\textsuperscript{147} an international standard for online infringement was virtually nonexistent.\textsuperscript{148} ACTA addresses this deficiency by providing “effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights.”\textsuperscript{149}

Since the release of the final text, eight countries have signed onto ACTA, and three others continue to express their support and intent to sign in the near future.\textsuperscript{150} In a joint press statement released following the signing ceremony, the parties reiterated that the Agreement is “a significant achievement in the fight against the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy on a global scale.”\textsuperscript{151}

C. U.S. Implementation of ACTA

ACTA must overcome a number of potential obstacles in the U.S., including challenges to its constitutionality.\textsuperscript{152} Since ACTA was negotiated as a sole executive agreement,\textsuperscript{153} Congress has not had an opportunity to review and ratify it.\textsuperscript{154} United States Senator Ron Wyden (D-Ore.) wrote to President Obama that “the executive branch lacks constitutional authority” to enter into

\textsuperscript{146} EC Memo, supra note 16, at 1.
\textsuperscript{147} Id. It is believed that the TRIPS Agreement does “not adequately address [intellectual property rights] infringement issues associated with the new and emerging technologies or provide effective tools for combating the proliferation of piracy in the digital media.” See Ilias, supra note 39, at 5.
\textsuperscript{148} EC Memo, supra note 16, at 1.
\textsuperscript{149} Final Draft, supra note 11, at 1. The United States believes that the Agreement “could fill in gaps in the TRIPS Agreement . . . .” See Ilias, supra note 39, at 5.
\textsuperscript{150} The U.S., Australia, Canada, Japan, Morocco, New Zealand, Singapore, and South Korea signed the Agreement, while the E.U., Mexico, and Switzerland expressed their intentions to sign the Agreement. Eva Galperin, ACTA Signed by 8 Countries—Now What?, ELEC. FRONTIER FOUND. (Oct. 10, 2011), http://commcns.org/v3yW48.
\textsuperscript{151} Negotiating Parties Joint Press Release, supra note 118.
\textsuperscript{152} Jack Goldsmith & Lawrence Lessig, Anti-Counterfeiting Agreement Raises Constitutional Concerns, WASH. POST (Mar. 26, 2010), http://commcns.org/sOT13N.
\textsuperscript{153} Id. Sole executive agreements may be entered into and implemented without any involvement from the legislative branch; however, constitutionality of the agreements may still be challenged. William New, US Senator Questions Constitutionality of ACTA, INTELL. PROP. WATCH (Oct. 12, 2011), http://commcns.org/t8kLTN.
\textsuperscript{154} According to Sean Flynn, Associate Director of American University’s program on Information Justice and Intellectual Property, the Agreement “will be binding on the U.S. once Ambassador [Ron] Kirk, as the U.S. negotiating representative, agrees to it.” Juliana Gruenwald, Criticism Continues to Dog ACTA as It Nears Completion, NAT’L J. (Nov. 16, 2010), http://commcns.org/t1ADB. The concern is that “if the USTR ratifies ACTA without Congressional consent, it may be circumventing Congress’ Constitutional authority to regulate international commerce.” Galperin, supra note 150.
an agreement, which is binding on the U.S., on an issue that falls within Congressional authority. Senator Wyden further demanded “that the administration either declare that ACTA does not create any international obligations for the US and therefore is “non-binding,” or provide a legal rationale to the Congress and the public” for bypassing the legislative branch. However, the Obama administration continues to support ACTA because it will “aid right holders and the U.S. government to combat infringement,” and has yet to respond to Senator Wyden’s demands.

On May 12, 2011, Senators Patrick Leahy (D-VT), Chuck Grassley (R-IA), and Orrin Hatch (R-UT) introduced the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (“PIPA” or “PROTECT IP Act”). PIPA was designed to combat rogue websites that promote the sale and distribution of intellectual property infringing goods and pirated content. These websites typically offer illegal products such as new movies and music releases, pharmaceuticals, and other products. PIPA “authorizes the U.S. Department of Justice to file a civil action against foreign rogue sites to obtain an order from the court” requiring ISPs to prevent user access to rogue websites and prohibit third party processing of the website’s purchases. In an effort to rally support for PIPA, “media giants such as NBCUniversal, CBS, Viacom, Sony Pictures and Warner Bros. are encouraging their employees to join a newly formed group called Creative

156 New, supra note 153.
159 See Protect IP ACT Preventing Real Online Threats, supra note 158.
160 See Leahy Press Release, supra note 158.
161 Protect IP ACT Preventing Real Online Threats, supra note 158.
America," an organization formed to support tougher anti-piracy legislation.\textsuperscript{162}

Critics of PIPA expressed concern over several of its provisions.\textsuperscript{163} For example, the legislation allows the United States government and intellectual property owners to seek injunctions and court orders against rogue websites and third party service providers.\textsuperscript{164} According to the Electronic Frontier Foundation, giving copyright owners a right to seek injunctions could eliminate the need to utilize the judicial systems for infringement suits.\textsuperscript{165} Moreover, critics stress that this provision may also "impose an immense burden on companies and commerce."\textsuperscript{166} PIPA was considered and approved unanimously by the Committee on the Judiciary on May 26, 2011.\textsuperscript{167}

IV. ASSESSMENT

ACTA has been widely supported by the U.S. Chamber of Commerce, the entertainment industry, and other interest groups.\textsuperscript{168} The final text of the Agreement safeguards a broad variety of intellectual property rights – not only does it include border enforcement measures to combat the importation of trademarks and patent infringing goods, but it also combats the sale of online trademark infringing products.\textsuperscript{169} This Comment does not examine the need for ACTA provisions dealing with patents, trademarks, or border enforcement. Rather, it focuses specifically on the likelihood of success of ACTA provisions titled "Intellectual Property in the Digital Environment."\textsuperscript{170}

Given that the total annual cost of digital piracy to G20 economies is estimated at $75 billion,\textsuperscript{171} the entertainment industry believes that ACTA is

\begin{itemize}
  \item \textsuperscript{163} Phillips, supra note 158; Declan McCullagh, \textit{Protect IP Copyright Bill Faces Growing Criticism}, \textit{CNET NEWS} (June 7, 2011), http://commcns.org/tV4iFy.
  \item \textsuperscript{164} Phillips, supra note 158; McCullagh, supra note 163.
  \item \textsuperscript{165} Phillips, supra note 158.
  \item \textsuperscript{166} Letter from Ed Black, President of Computer & Commc'ns Indus. Ass'n, Gary Shapiro, President of Consumer Elecs. Ass'n, and Markham Erickson, Exec. Dir. of NetCoalition, to Senators Patrick Leahy and Chuck Grassley (May 25, 2011), available at http://commcns.org/sVStR5.
  \item \textsuperscript{168} Stirland, supra note 142.
  \item \textsuperscript{169} \textit{Final Draft, supra note 11}, at 1; \textit{ACTA Section Analysis, PIJIP IP ENFORCEMENT RES. DATABASE}, http://commcns.org/vB0eCQ (last visited Dec. 15, 2011).
  \item \textsuperscript{170} Final Draft, supra note 11.
  \item \textsuperscript{171} \textit{Facts About IP}, \textit{GLOBAL INTELL. PROP. CTR.}, http://commcns.org/tNp4Zw (last visited
\end{itemize}
"an important step forward in strengthening international cooperation and enforcement." The Motion Picture Association of America, Inc. ("MPAA") expressed the need for stronger intellectual property cooperation and enforcement, stating that "more than 2.4 million" industry workers depend on such protections, without which the entertainment industry will not be able to sustain itself.

The removal of ISP liability from the final text of ACTA raises questions as to whether the agreement will achieve the entertainment industry's desired results. ACTA imposes civil liability on those who knowingly, or with reasonable grounds to know, engage in infringement. However, because most direct copyright infringers are usually insolvent, holding them financially liable is unlikely to deter future infringement, making this a largely ineffective method of enforcement. Ineffective enforcement coupled with the elimination of secondary liability renders most of the Article 27 provisions, are unlikely to have any impact on online copyright infringement.

The only possible method from which ISPs may find themselves in danger is Article 27(3), which requires cooperation within "the business community to effectively address trademark and copyright or related rights infringement." However, the final draft leaves the term "business cooperation" undefined. ACTA does not specify whether ISPs that refuse to terminate access to copyright-infringing websites would be held liable or whether this responsibility simply ends when an ISP discloses a user's information, as provided in Article 27(4). Furthermore, there is no indication of what sanctions may be imposed upon ISPs that refuse cooperation.

With no clear language to address ISP liability in copyright infringement, ACTA will likely fail to have the desired impact on copyright law in the digital arena. While the parties to ACTA recognize that copyright infringers often use


173 Id.

174 Final Draft, supra note 11, at 7; Bode, supra note 142.

175 Strowel, supra note 44, at 134, 145-46.

176 Nordemann, supra note 41, at 37.

177 Michael Geist, ACTA Text Leaks: U.S. Concedes on Secondary Liability, Wants to Go Beyond DMCA on Digital Locks (Sept. 6, 2010) http://commcns.org/tJjb1P.

178 Final Draft, supra note 11, at 16.

179 Id.

180 Enforcement provisions were included in earlier versions of the Anti-Counterfeiting Trade Agreement; however in the final draft of the agreement these provisions were omitted. See Final Draft, supra note 11, at 16; Public Predecisional/Deliberative Draft, supra note 13, at 19; Bode, supra note 142.
ISP services to infringe on protected material, they admit that current legislation lacks clear guidance on how to approach ISP liability. As a result, ISPs will continue to have discretion as to website termination in cases involving peer-to-peer file sharing websites. For instance, a number of ISPs have been issued injunctions and ordered to eliminate access to Pirate Bay, but have protested due to concerns about monitoring content. Tele2, one of Denmark’s largest ISPs, refused to shut down access by claiming they were “blind to what their customers transmit on their networks and should not be responsible for policing content.”

CB3Rob Ltd & Co. KG, a German ISP, was also issued an injunction ordering that they eliminate access to Pirate Bay. However, the court went one step further and ordered that failure to comply would subject the ISP’s operators to a monetary fine of up to $353,875 or up to two years of imprisonment for each instance of infringement.

ACTA attempted to give teeth to TRIPS online digital piracy. Instead, its intended reach has been chipped away to the point where all that remains is vague language about business cooperation and DMCA-like anti-circumvention provisions. ISPs may freely continue to reap profits while claiming they are not responsible for monitoring users’ conduct. ACTA negotiators have succumbed to massive lobbying by ISPs and private interest groups, while copyright owners are left with the responsibility and cost of policing every website to protect their rights.

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183 Danish ISP, supra note 182.
184 Cyberbunker Press Release, supra note 182.
185 Id.
186 Review of the Pirate Bay website by the Information Technology & Innovation Foundation revealed advertisements for “brands such as Amazon.com, Blockbuster, British Airways, and Sprint.” DANIEL CASTRO, THE INFO. TECH. & INNOVATION FOUND., BETTER ENFORCEMENT OF ONLINE COPYRIGHT WOULD HELP, NOT HARM CONSUMERS 1 (2010).
187 Review of the Pirate Bay website by the Information Technology & Innovation Foundation revealed advertisements for “brands such as Amazon.com, Blockbuster, British Airways, and Sprint.” Id.
188 The task of policing the Internet and investigating the identity and location of copyright infringers is “a costly, time-consuming process and is often impossible.” Moreover, prosecuting individual copyright infringers “is also laborious and expensive considering the sheer numbers of infringement concerned.” Nordemann, supra note 41, at 37.
V. CONCLUSION

There is no dispute that the sale, purchase, upload, and download of copyright infringing materials impacts world economies. The rise of the Internet has brought about easy access to millions of documents, videos, and music files, regardless of one’s location. That said, intellectual property protection and enforcement laws across the world significantly lag behind today’s technology. Liability of ISPs, which provide access to websites with infringing content and profit from them, has been limited.

There are provisions in the final draft of ACTA that might offer additional avenues whereby right holders may prevent and enforce their intellectual property rights in the areas of trademark and patent infringement. However, its provisions aimed at strengthening TRIPS and providing stronger uniform enforcement of copyrights in the digital world beg for more. Without imposing secondary liability on ISPs, ACTA will be ineffective in addressing the widespread copyright infringement. Unfortunately, the state of copyright protection in a digital world remains the same.