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# The Anti-Counterfeiting Trade Agreement of 2010: Two Problems and One Unanswered Question

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# THE ANTI-COUNTERFEITING TRADE AGREEMENT OF 2010: TWO PROBLEMS AND ONE UNANSWERED QUESTION

ROXANE DELAURELL<sup>†</sup>

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## I. INTRODUCTION

The relative benefit of an increasingly globalized economy, as well as the increasingly fluid international trade which accompanies that trend, is, undeniably, a highly contentious matter.<sup>1</sup> However, regardless of whichever view one adopts of that process—as a gift or as a curse—it is also an undeniable reality of the 21<sup>st</sup> Century.

It has, hopefully, further emerged as a demonstrable corollary in that context that certainty of contract is the major goal and desired outcome of international legal regimes and treaty agreements governing trade.<sup>2</sup>

As with the development of domestic commercial law in the U.S., a crucial step in assuring cross-border certainty of contract, and thereby fostering international commerce, will be the recognition that as there are different types of goods, so must there also be different types of contracts. Different types of contracts imply different types of legal rights and relations associated with those separate categories.<sup>3</sup>

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<sup>1</sup> For a review of the issues and viewpoints in controversy see SARAH ANDERSON, VIEWS FROM THE SOUTH: THE EFFECTS OF GLOBALIZATION AND THE WTO ON THIRD WORLD COUNTRIES (2000); see also JAGDISH N. BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004).

<sup>2</sup> Roxane DeLaurell, *Assessing the Effects of Chapter 15: Cross Border Insolvency Cases in U.S. Bankruptcy Courts 1995-2006*, 4 S.C. J. INT'L L. & BUS. 1, 13 (2008); Roxane DeLaurell, *The Role of Legal Regimes in New Industrial Economic Theory*, 5 ASPER REV. INT'L BUS. & TRADE L. 195, 205 (2005).

<sup>3</sup> This was addressed early on in the development of the Uniform Commercial Code in the U.S. by one of its primary authors and proponents, Karl Llewellyn. In a noted law review essay, he outlined the history of commercial law and transactions in the U.S. as moving from “small community” commercial transactions—the ideal type being piece work of an artisan, sold directly to the consumer—to those characterized by “factorage”—i.e., mass production—and mercantile buying and selling “at a distance,” where the points of manufacture and consumption may be in separate states, or even nations. See generally Karl Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 883 (1939).

For example, the history of domestic, commercial jurisprudence in the U.S. demonstrates that in the absence of enforceable intellectual property rights (“IPR”) there would be no national brands or franchise businesses—that is, commercial enterprises which reach across multiple state jurisdictions—or the attendant economies of scale those bring.<sup>4</sup> Logically, stepping up in scale—from interstate to international commerce—will likely only serve to magnify the inherent difficulties and not to neutralize them.

From a scholarly perspective, adding to the complexity of applying domestic understanding of IPR to international commerce, is the generally opposing nature of the latter’s development versus that within the U.S. over the last century and a half. That is, over that period of time, U.S. domestic law has had to adapt to an economy shifting from one in which the major commercial transaction involved the transfer of “property”—assets such as land and livestock—to one in which most contracts now concern the sale of consumable goods and services (a major impetus towards the adoption of a “uniform commercial code,” as noted above).

Over the same period of time, however, international commerce has begun to experience much greater growth in transactions implicating property rights, specifically the subset of those which fall under the category of IPR, and proportionally less of simple trade in goods (that is, transactions only involving a sale and transfer from one place to another).<sup>5</sup> This is a trend which is likely only to continue for the foreseeable future, as nearly all goods have come to implicate some aspect or another of IPR. Any such broad-based change in commercial practice is very likely to cause confusion and engender uncertainty with regard to the legal environment for business; in this regard, growth in international trade involving IPR is no exception.

Further, as might be expected, uncertainty in the international context is likely to be the greatest at that point where enforcement is called for; that is, that point where the tangible expression of the force of law and of the courts’ authority must be executed. It is for this reason that the Anti-Counterfeiting Trade Agreement (“ACTA”) was drafted.<sup>6</sup> Finalized in December of 2010, ACTA seeks to address

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<sup>4</sup> In U.S. case law this principle has generally manifested as a question of preemption, but the holdings of the Supreme Court in this vein devolve to the same conclusion, as with Justice O’Connor’s majority opinion in *Bonito Boats v. Thunder Craft Boats*: “One of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution was to promote national uniformity in the realm of intellectual property.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989).

<sup>5</sup> For example, the World Intellectual Property Organization’s Patent Cooperation Treaty (“PCT”) registry of international patent applications showed a steady increase in filings for every listed nation of at least 5% each year from 2000-2006, and some developing nations, particularly in Asia, showed even more marked increases in such applications seeking recognition of international patent rights. Press Release, World Intellectual Property Organization, Record Year for International Patent Filings with Significant Growth from Northeast Asia, PR/2007/476 (Feb. 8, 2007), available at [http://www.wipo.int/pressroom/en/articles/2007/article\\_0008.html](http://www.wipo.int/pressroom/en/articles/2007/article_0008.html).

<sup>6</sup> Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, *opened for signature* May 1, 2011, 50 I.L.M. 243 (2011), available at [http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc\\_147079.pdf](http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf) [hereinafter ACTA].

problematic issues with regard to enforcement of IPR across borders and “in the digital environment.”<sup>7</sup>

International trafficking in unlicensed copyrighted material, and counterfeit trademarked goods and consumables—the two areas addressed by ACTA’s terms<sup>8</sup>—in turn, presents two major issues with regard to successful regulation and enforcement: First, the same conditions which create increased opportunities for legitimate commerce often create still greater opportunities for illegitimate transactions. Second, “intellectual property,” as a category comprised of intangible artifacts and human activities, by itself implicates some fairly fundamental characteristics of separate national identities which seem unalterable across borders. The interdependence of these two issues further leaves open the question of whether there is any commercially useful middle ground with regard to enforcing international IPR.

## II. NEW OPPORTUNITIES AND NEW CRISES

The latter part of the last century and the beginning of the present one have witnessed tremendous growth in communication opportunities on a global scale.<sup>9</sup> Simultaneously, the possibilities for businesses to expand into new markets have, predictably, followed suit.<sup>10</sup>

Coincident with this growth in global communication and international commerce, there has come a heightened emphasis on the need to enforce IPR in the larger frame of the international legal environment for business. Practically, this is because the constituents of “intellectual property”—as a category of goods or the qualities thereof, and as distinct from other forms of property—are generally the most easily transported across borders while simultaneously being the most highly perishable. More specifically, copyrighted compositions, patented designs and processes, trademarks, software, recordings of performances and their like, are easily carried or—much more commonly in the present day—transmitted from place to place, while at the same time being subject to the most rapid and complete depreciation of their commercial value.

In particular, it is often the case that what value there is in copyrighted materials, for example, may be directly related to the extent to which those have *not* been

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<sup>7</sup> *Id.* at Preamble.

<sup>8</sup> *Id.* art. 2.

<sup>9</sup> For example, World Bank data indicates that over the course of the first decade of the 21<sup>st</sup> Century, the number of worldwide internet users increased three-fold, from less than 500 million in 2000 to nearly 2 billion by 2008. *Internet Users*, WORLD BANK, <http://data.worldbank.org/indicator/IT.NET.USER/countries/1W?display=graph> (last visited Feb. 19, 2012).

<sup>10</sup> Perhaps the most compelling evidence of this expansion is the changeover in computer network addressing from the IPv4 system—that which has been in use since the advent of “the Internet” in 1977—to the IPv6, currently being promoted by the International Corporation for Assigned Names and Numbers, underway since 2008. The capacity of the former—more than 4 billion unique network addresses—was “exhausted” in February of 2011. In its place, the new system offers an unimaginably greater number—described as “340 trillion trillion trillion”—for future expansion. *Factsheet: IPv6 – the Internet’s Vital Expansion*, ICANN (Oct. 2007), available at <http://www.icann.org/en/announcements/factsheet-ipv6-26oct07.pdf>; Press Release, Number Resource Organization, Free Pool of IPv4 Address Space Depleted (Feb. 3, 2011), available at <http://www.nro.net/news/ipv4-free-pool-depleted>.

transmitted, published, or exhibited in any way. Appropriate empirical evidence for this (albeit “negative” in nature) is the concept of the “public domain” which allows for unfettered access to otherwise copyright protectable works as a matter of wide and long-term dissemination.<sup>11</sup>

With the advent of the 21<sup>st</sup> Century the naturally brief “half-life” of the value of intellectual property in commerce has shrunk even further. Advancing and increasingly affordable means of communication technology have made available entertainment, advertising and commercial transactions involving copyrighted material and trademarked goods to billions of persons across the globe at a moment’s notice and on a twenty-four-hours-a-day basis.

The most obvious evidence of the evolution of global communication and business is, of course, the Internet. Less obvious, at least to many users and consumers, is that the content of the Internet, fairly in its entirety, may be categorized as “intellectual property” of one kind or another.

At the same time, the worldwide access the Internet now grants to the images of, and marketing for, trademarked goods, branded events (for example sports championships), motion pictures and highly valued (at least in terms of money) media content and products, has provided the means for trafficking in counterfeits and unlicensed copies to become a high growth industry in the early 21<sup>st</sup> Century.<sup>12</sup> It seems that, as technological possibility met economic opportunity in billions of daily worldwide transactions, the brewing of a “perfect storm” over international intellectual property rights has likely been simply a matter of time in coming.

Of course, even before there ever was an Internet, as the last century progressed, the interested parties visited, and re-visited, the pertinent issues involved in maintaining the legal environment for international business and fostering

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<sup>11</sup> Coincident with developments in worldwide telecommunication, as well as ongoing revision of the Berne Convention covering copyright, it has been exactly this notion of “public domain” which has come under perhaps the heaviest legislative scrutiny on a similarly global scale. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.S.T. 221, *available at* [http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf) [hereinafter Berne Convention]. So, copyright terms have been altered in both the U.S. and Europe, with the EU further moving to “recover” many works from the public domain. In the U.S., despite the Copyright Term Extension Act of 1998 (“CTEA”)—supported by the Supreme Court’s decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003)—the passage of time remains in place as the definitive factor separating protected works from those which have been freed of copyright restrictions. As a result, while reaffirming the *existence* of the public domain as an eventual end-state towards which all copyrighted works begin progressing towards—or “decomposing into,” as the case may be—from the moment of their publication, the CTEA may be just the first legislative step taken towards making the journey a very much longer one.

<sup>12</sup> The Economic Impact of Counterfeiting and Piracy, a comprehensive report on the subject, published in 2008 by the Organisation for Economic Co-operation and Development (OECD), specifically acknowledged that “the overall degree to which products are being counterfeited and pirated is unknown and there do not appear to be any methodologies that could be employed to develop an acceptable overall estimate.” ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY 71 (2008), *available at* <http://internationalauthenticationassociation.org/upload/file/OECD%20Report.pdf> [hereinafter OECD REPORT]. However, the report is able to cite customs seizure statistics as well as various consumer survey statistics which support at least the notion that such trafficking is on the increase worldwide. *Id.* at 71-78.

intellectual property rights within that environment. Over the years, these efforts produced one United Nations sponsored enterprise—the World Intellectual Property Organization (“WIPO”)<sup>13</sup>—as well as pertinent voluntary agreements—the Paris and Berne Conventions on patented, trademarked, and copyrighted works<sup>14</sup>—and the World Trade Organization’s “Agreement on Trade-Related Aspects of Intellectual Property Rights” of the General Agreement on Tariffs and Trade (“GATT-TRIPS”);<sup>15</sup> all have the apparent shared goal of heading off the storm and promoting the recognition of intellectual property rights across international borders.

The terms of the Berne Convention seek protection for published works and performances as they move from their time and place of original publication outward into the international marketplace and forward in time.<sup>16</sup> Similarly, the text of the GATT-TRIPS agreement sets out its central “objective” as “[that] [t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology . . . in a manner conducive to social and economic welfare . . . .”<sup>17</sup>

“Revisiting” the terms of these agreements—e.g., the Berne Convention has had many revisions including the latest in 1989—is often prompted by the wide-spread adoption of new technologies, which alters the underlying, cognate logic.<sup>18</sup> That logic has largely been the logic of a contract where the sale and transportation of goods is either the central issue or at the very least is implied. Material goods have traditionally been the products of, and necessary vessels for, claims to protectable IPR (e.g., published materials, vinyl and then-magnetic recordings of musical performances and film, branded products with distinctive marks and definite places of original manufacture). Prior to the last half of the 20<sup>th</sup> Century, IPR, and infringement thereupon, while assuredly involving co-optation of the same “intangibles” as it does today—trademarks, copyright, and patent—yet retained the distinct characteristic of nearly always also involving some “other thing” that was, more or less, very tangible. Where this condition remains true—i.e., that the tangible goods and the attached IPR interests are completely integrated—the

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<sup>13</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/portal/index.html.en> (last visited Feb. 18, 2012).

<sup>14</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm on July 14, 1967, 21 U.S.T. 1583, 828 U.N.S.T. 305, *available at* [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html) (last visited Feb. 18, 2012); Berne Convention, *supra* note 11.

<sup>15</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.S.T. 299, 33 I.L.M. 1197 (1994) [hereinafter GATT-TRIPS Agreement]; Berne Convention Implementation Act of 1988, 17 U.S.C. § 401, *et seq.* (2012).

<sup>16</sup> Article 2 of the Berne Convention, as amended in 1979, defines the works covered to include “literary and artistic works” which does not, by itself, exclude performance works, though it is acknowledged that members of the union of signatory nations “[may] prescribe that works . . . shall not be protected unless they have been fixed in some material form.” Berne Convention, *supra* note 11, art. 2.

<sup>17</sup> GATT-TRIPS, *supra* note 15, at Part I, art. 7.

<sup>18</sup> *See generally* Berne Convention, *supra* note 11.

situation with regard to providing international protection of IPR is, for good or for ill, relatively unchanged.

However, that set of circumstances is rapidly becoming the rare exception rather than the rule for at least two reasons.

First, it has become clear that more and more present day commerce and consumption is, strictly speaking, no longer concerned with tangible goods.<sup>19</sup> An increasingly large part of human activity and commerce has become almost solely one or another a form of communication,<sup>20</sup> and more and more often in today's world, that communication takes place either explicitly or implicitly in an international context. Second, the major sources of goods both counterfeit and genuine—at least in terms of global region—have merged.<sup>21</sup>

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<sup>19</sup> This shift away from a material component underlying IPR, as well as the impact on the enforcement of those rights, may be seen in the recent history of the motion picture distribution system in the U.S. Through the 1990s, it was common for motion pictures, in the form of reels of film, to be transferred from one exhibiting theater to another, overnight, by specialty delivery services. By year 2000, overnight delivery had blossomed into a free-standing industry in its own right, while much of the actual distribution of popular motion pictures was simultaneously evolving into an on-demand, digitally transmitted one in which no “reels of film” were at all necessary (at least from the practical perspective of the consumer). As the new style of distribution became popularized, the threat of infringement by large-scale copying became more of a real possibility and rights-holders began increasing efforts to criminalize and prosecute such activities. This point may be best highlighted by a comparison of the 21st century fortunes of Blockbuster, Inc. (est. 1985) and Netflix, Corp. (est. 1999). By 2010, Blockbuster—whose primary business was renting physical copies of recently released feature films from a chain of over 3000 stores—was forced to declare bankruptcy and undergo restructuring, while at the same time Netflix—which distributes the same sort of content, primarily via digital streaming over the internet—had increased its subscriber base to 20 million. Maria Halkias & Eric Torbenson, *Blockbuster Files for Chapter 11 Bankruptcy Protection*, DALLASNEWS.COM (Sept. 24, 2010, 7:52 AM), available at <http://www.dallasnews.com/business/headlines/20100923-Blockbuster-files-for-Chapter-11-bankruptcy-5523.ece>; Todd Haselton, *Netflix Streaming Subscribers Watched More Than 2 Billion Hours of Video During Q4*, BGR.COM (Jan. 4, 2012, 3:10 PM), available at <http://www.bgr.com/2012/01/04/netflix-streaming-subscribers-watched-more-than-2-billion-hours-of-video-during-q4/>.

<sup>20</sup> Significantly, the rise of an economy based on intangible goods and attendant changes in legal theory, served as the basis for Warren and Brandeis' seminal statement—authored in the last decade of the 19<sup>th</sup> Century—on the subject of “law of privacy” under the U.S. Constitution:

The development of the law [of privacy] was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things . . . . Recent inventions and business methods call attention to the next step which must be taken for the protection of . . . the individual.

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). In that sense, the relationship between the issue of privacy and the concerns of intellectual property has apparently always existed in U.S. legal thinking, something which has come clearly to the fore in the drafting and negotiation of ACTA.

<sup>21</sup> As a continent, Asia is currently home to two of the top five largest economies in the world, and, at the same time, is home to those five nations which account for 80% of the

As a result, the current understanding of both the substance and desired outcomes of international IPR agreements is likely inadequate, mainly as a matter of having been, up to this point, attempts to merely “scale up” the legislative approach to the same issues on a domestic level.

For example, in U.S. domestic law, the single most important factor in finding commercial IPR protectable was traditionally defined as the need to prevent consumer confusion as to source. That is, to make certain that a buyer of a certain good could be equally certain of the commercial source of that good; that “Shredded Wheat Squares” come from Nabisco and not from Kellogg’s.<sup>22</sup>

In the international marketplace as it exists in the present, however, “source” has become a very tenuous characteristic of goods and services. More value often now resides in identifiers—brand names, trademarks, and “trade dress,” even given the loosest definitions<sup>23</sup>—rather than in the goods themselves or in any measurable quality assurance intrinsic to a given commercial source.

Thus, the material “carrier” in trade for the intangible “intellectual” content in the present day often seems to have become somewhat fungible in the case of what may be termed, “hard goods,”<sup>24</sup> while developing the room decorating qualities of a light dessert<sup>25</sup> with regard to products that are fundamentally purely intellectual property in their nature (i.e., motion pictures, software, musical recordings, and their like).<sup>26</sup> Make no mistake that the relevant IPR are legitimately registered and held—legitimate by all pertinent legal measure—but often very remotely from any recognizable “source” and with seeming disregard for any notion of cohesively representing a single product or its inherent qualities.

Given these conditions, in some ways both counterfeiters and consumers can hardly be blamed for their infringements in many cases. Indeed, the standard

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worldwide trade in counterfeit and unlicensed products. OECD REPORT, *supra* note 12, at 78-79.

<sup>22</sup> See generally *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938).

<sup>23</sup> For example, McDonald’s Corporation’s unsuccessful attempt—concluded in 2009—to block a local Malaysian franchise from using the name “McCurry” based on the former’s claim to “Mc” as a significant part of its trademark. *McCurry Rest. v. McDonald’s Corp.*, Rayuan Sivil No. W-02-1037-2006 (Apr. 27, 2009) (Malaysia), available at [http://www.kehakiman.gov.my/directory/judgment/file/Capp%20388%20Mc%20Curry%20Restaurant%20Sdn%20Bhd%20v%20Mc%20Donalds%20Corporation%20\\_W-02-1037-2006\\_.pdf](http://www.kehakiman.gov.my/directory/judgment/file/Capp%20388%20Mc%20Curry%20Restaurant%20Sdn%20Bhd%20v%20Mc%20Donalds%20Corporation%20_W-02-1037-2006_.pdf).

<sup>24</sup> Much research in this area acknowledges that this is often the case with regard to consumer perception (i.e., many counterfeit products are naively purchased by consumers who cannot tell the difference between those and the genuine article). Scholars working in this field also agree that such “deceptive” or “blur” counterfeiting is both the most profitable for the sellers and the most dangerous for the unknowing consumer. See, e.g., Lyne S. Amine & Peter Magnusson, *Cost-Benefit Models of Stakeholders in the Global Counterfeiting Industry and Marketing Response Strategies*, 15 MULTINAT’L BUS. REV. 2, 63-86 (2007).

<sup>25</sup> “Like nailing Jell-O® to a wall.”

<sup>26</sup> While copyright protection, at least domestically, has always existed for these types, the fluidity of the underlying “material” has never been greater. Consider the difference between storing large numbers of infringing printed books or magazines, as compared to what is required for a single, compressed digital file and the ease with which digital media may be readily reformatted.



framework for survey or even secondary statistical research into the market for unlicensed copying and counterfeit goods generally includes some recognition of naïve members in both groups,<sup>27</sup> though their numbers are, in both cases, dwarfed by those with knowledge of the illicit nature of the goods in question.

Similarly, the currents of modern communication and commerce seem also to have made it impossible to continue to consider intellectual property issues in any other context than an international one because those same conditions make it impossible for any commercial interest to conduct business on a strictly domestic basis any longer.<sup>28</sup> So, while the actions of counterfeiters and consumers may be understandable—even economically rational in some cases—it is simultaneously true that the present environment is of great concern for all types of businesses and only more so for those whose major assets consist of IPR.<sup>29</sup>

With this in mind and in light of past agreements, it seems inevitable that the nature of international law on such matters must proceed from clarifying jurisdiction with regard to protections and rights, to calling for cooperative enforcement and remedy for trespass of those rights. When negotiation and drafting of ACTA began in 2007, then, it may be said to have been a natural progression in terms of international trade regulation.

### III. TWO PROBLEMS: PROPORTIONALITY AND PRIVACY

As with the effort to codify domestic commercial transactions in the U.S., the greatest bar to international regulation is that the several “states” involved are not necessarily in agreement with regard to all of the pertinent legal issues. In the international, rather than interstate context, the difficulties of harmonizing not only the laws of multiple jurisdictions, but the enforcement and prosecution of those laws as well, has already proved to be much more problematic.

Yet, “to address the problem of infringement of intellectual property rights, including that which takes place in the digital environment, and . . . to provide effective and appropriate means . . . for [their] enforcement . . . taking into account differences in [signatory nations’] respective legal systems and practices”<sup>30</sup> is exactly what the new agreement purports to do.

The problem for the drafters of ACTA is how to separate infringements from legitimate commerce and other protected activities. The problem for courts and for

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<sup>27</sup> See, e.g., OECD REPORT, *supra* note 12, §§ 2.2.3-2.2.4; see also Amine & Magnusson, *supra* note 24, at 66-67.

<sup>28</sup> For example, in the case *Grupo Gigante v. Dallo*, the U.S. 9th Circuit Court of Appeals found that a relatively small domestic grocery business was not insulated from the trademark infringement claim of a much larger foreign corporation because of brand knowledge imputed to the pertinent public, as defined by ethnic heritage rather than citizenship or place of residence and despite the foreign corporation being unregistered, and having no interest, in the U.S. market. See generally *Grupo Gigante v. Dallo*, 391 F.3d 1088 (9th Cir. 2004).

<sup>29</sup> The best example of the latter being the Coca-Cola Corporation. Most estimates of the company’s value are U.S. \$150 billion or more. In 2009, Interbrand.com, estimated the value of the Coca-Cola brand itself to be about one half of that amount (U.S. \$67B); a figure which has remained steady, and top of the ranking, since at least the year 2000. *100 Best Business Brands*, BUSINESSWEEK.COM, [http://www.businessweek.com/interactive\\_reports/best\\_global\\_brands\\_2009.html](http://www.businessweek.com/interactive_reports/best_global_brands_2009.html) (last visited July 23, 2011).

<sup>30</sup> ACTA, *supra* note 6, at Preamble.

any legislative bodies attempting to forge enacting legislation to support such a treaty as domestic law is how to comply with extra-territorial powers while not ceding any of their own.<sup>31</sup> Essentially, agreements such as ACTA call for national courts and legal authorities to police the commercial rights of foreigners within the formers' own borders and over their own citizens.

Completely adopting the language of GATT-TRIPS in this regard,<sup>32</sup> ACTA hinges the issue of infringement on the nature of the copying or counterfeiting as “wilful” [sic], while using “commercial scale” as the measure of criminality.<sup>33</sup> In brief, ACTA’s terms—like those of GATT-TRIPS—call for “right holders and other relevant stakeholders”<sup>34</sup> working with “competent authorities”<sup>35</sup> to provide “relevant information”<sup>36</sup> with regard to detecting “wilful” infringement of a “commercial scale” for the purposes of undertaking criminal prosecution.<sup>37</sup>

Note that the included qualification implied by “commercial scale” works to exempt any individual whose infringement is “wilful,” but is only for personal use

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<sup>31</sup> In practice, however, even before the terms of ACTA were finalized, the obstacles to its ends which are presented by “the second problem” facing local lawmakers became relatively obvious and somewhat zealously controversial. Perhaps the clearest (and latest) case on point—highlighting especially the pragmatic difficulties inherent in enforcing and prosecuting infringement cases across borders—was raised in June of 2011 when a young Englishman was arrested upon the accusation of copyright infringement by the U.S. customs office. The man, a computer science student, had been operating a website which presented links to other web services carrying on-demand, current-release films and television programming, including that of U.S. producers. The major point of contention with regard to the extradition of the man to face trial in the U.S. is the legality of his activities in the UK versus the infringing nature of those under U.S. law. The as yet unresolved case raises an important question which, given the current of development in telecommunication services is only going to become more onerous in the near future: may “databases and computing clouds” be said to exist in any single jurisdiction, and if not, on what basis may the place of any infringement be said to have occurred for the purposes of any subsequent prosecution. See “Piracy” Student Richard O’Dwyer Loses Extradition Case, BBC NEWS (Jan. 13, 2012), available at <http://www.bbc.co.uk/news/uk-england-south-yorkshire-16544335>.

<sup>32</sup> Over the course of negotiations, ACTA was often criticized for merely being an attempt to extend GATT-TRIPS in terms of digital copyright infringement and greater policing authority. See, e.g., William New, *China, India to Raise Concerns at WTO about “TRIPS-Plus” Measures, ACTA*, INTELLECTUAL PROPERTY WATCH (June 3, 2010, 10:18 PM), <http://www.ip-watch.org/2010/06/03/china-india-to-raise-concerns-at-wto-about-%E2%80%9Ctrips-plus%E2%80%9D-measures-acta/>.

<sup>33</sup> ACTA, *supra* note 6, art. 23.

<sup>34</sup> ACTA, *supra* note 6, art. 28, ¶ 4; see also GATT-TRIPS, *supra* note 15, art. 42 (“[m]embers shall make available to right holders civil judicial procedures concerning enforcement of any intellectual property right covered by this Agreement.”).

<sup>35</sup> ACTA, *supra* note 6, art. 5(c).

<sup>36</sup> *Id.* art. 11.

<sup>37</sup> *Id.* art. 23. In fact, “commercial scale” and “willfulness” make up the entirety of Part III, Sec. 5, art. 61 of GATT-TRIPS, while the Berne Convention remains silent on quantity of reproduction since its terms suggest a greater concern with wide exploitation across borders with no respect for registration in the originating national jurisdiction. GATT-TRIPS, *supra* note 15, art. 61; see generally Berne Convention, *supra* note 11.

and not fundamentally for profit; this is comparable to “fair use” as defined in U.S. domestic copyright law.<sup>38</sup>

Specifically, ACTA defines “commercial scale” as “activities for direct or indirect commercial advantage.”<sup>39</sup> This functionally exempts from criminal prosecution the Internet user, for example, who downloads copyrighted material for their own limited consumption and without intent to copy and distribute that material for gain (i.e., single-instance infringement vs. bootlegging). Of course, any domestic civil remedies against those same individuals remain intact.

Right holders and their representatives—typified by the Record Industry Artists Association (“RIAA”)<sup>40</sup>—have been actively and notoriously engaged in this latter category of civil litigation for the several years prior to the final draft of ACTA being released, the major goal for those legal actions being to establish a “no tolerance” legal precedent with regard to even the most isolated instances of copyright infringement.<sup>41</sup> In effect, presently in the U.S. at least, the combination of civil and criminal liability for illegal copying may now be seen as presenting an “event horizon” which allows no “wilful” infringement, regardless of scale, to escape its gravitational pull.

Outside the influence of domestic law, however, lies the unknown international dimension, one in which each nation has traditionally made and enforced its own rules.<sup>42</sup>

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<sup>38</sup> ACTA, *supra* note 6, art. 23; 17 U.S.C. § 107 (2011).

<sup>39</sup> ACTA, *supra* note 6, art. 23, ¶ 1.

<sup>40</sup> RECORD INDUSTRY ARTISTS ASSOCIATION, <http://www.riaa.com> (last visited Feb. 19, 2012).

<sup>41</sup> Nearly coincident with the announcement of the final version of ACTA, the U.S. Supreme Court refused to certify an appeal from a case involving a 16-year-old who defended her unlawful downloading of music against a \$27,000 claim of the RIAA as having been made without due notice. The infringer claimed that since she never handled any actual recorded media, but only dealt with digital files, she was not aware of the copyrighted nature of the material. *Harper v. Maverick Recording Co.*, 131 S. Ct. 590 (2010); *Maverick Recording Co. v. Harper*, 598 F.3d 193 (5th Cir. 2010).

<sup>42</sup> In 2007, the Dispute Settlement Body of the World Trade Organization faced this grey area with regard to the United States’ Trade Representative’s complaint that China’s government was in violation of GATT-TRIPS, art. 61 because the latter’s relevant laws used the rather vague “illegal business volume” standard to determine criminal levels of infringement, and that the uncertainty of the standard was further complicated by the rule regarding its interpretation and application: “Additionally, where the thresholds are defined in terms of ‘illegal business volume,’ Article 12 of the December 2004 Judicial Interpretation provides that value ordinarily is calculated according to ‘the prices at which such products are actually sold’ or ‘the labeled prices or the actual prices found to be sold at after investigation.’ In other words, it is the price of the infringing goods as opposed to the price of the corresponding legitimate goods that determines ‘illegal business volume.’ The lower the actual or labeled prices of infringing goods, the more of them an infringer can sell or offer for sale without reaching the thresholds in the Criminal Law that are defined by reference to ‘illegal business volume.’” Request for Consultations by the United States, *China- Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e/362r\\_d\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/dispu_e/362r_d_e.pdf); see also GATT-TRIPS, *supra* note 15, art. 61.

Among the “rules” made by each separate national entity, of course, are those which establish the limits of—or, in some cases, altogether deny—civil liberty for the citizenry of each. As more of modern life has become bound up with international communication and commerce, the conflict between nations and national entities with regard to the fundamental definition of civil liberty has also come to the forefront with increased frequency.<sup>43</sup>

So, in keeping with the preamble to ACTA’s promise to consider differences in the “legal systems and practices”<sup>44</sup> of all participants, “proportionality” is cited early in the text of ACTA as one of several “General Obligations with Respect to Enforcement” undertaken on the part of all signatories.<sup>45</sup>

At a fundamental level, the concept of “proportionality” stands as a proscription against unreasonable criminal prosecutions and an assertion that, in civil matters, intellectual property rights may not exceed the bounds of equity under any circumstances. A similar requirement was explicitly defined in GATT-TRIPS.<sup>46</sup> Given its history, the term “proportionality” used in this context embodies the problem of reconciling any prosecution for infringement with, what in practice turn out to be, the conflicting definitions of civil liberty.

“Proportionality” has been most thoroughly developed as a concept in the jurisprudence of the European Court of Human Rights (“ECHR”).<sup>47</sup> In the first instance, proportionality may be characterized as simply defining the requirement that state laws and actions be subject to the limits of civil liberty; not unlike the same limitation which is, of course, imposed by all constitutional systems of government.<sup>48</sup>

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<sup>43</sup> The significance of commercial communications services to broad-based political movements in Egypt and several other Middle Eastern nations in early 2011, as well as the denial to their access which was threatened and imposed by unpopular regimes, gives emphatic testimony to those services’ evolution into something approaching “basic human right” status. James Glanz & John Markoff, *Egypt Leaders Found the “Off” Switch for Internet*, NY TIMES (Feb. 15, 2011), available at <http://www.nytimes.com/2011/02/16/technology/16internet.html?pagewanted=all>; see also *The U.N. Declares Internet Access a Human Right*, THE ATLANTIC WIRE (June 6, 2011), available at <http://www.theatlanticwire.com/technology/2011/06/united-natipons-wikileaks-internet-human-rights/38526/>.

<sup>44</sup> ACTA, *supra* note 6, at Preamble.

<sup>45</sup> *Id.* art. 6, ¶ 3.

<sup>46</sup> Article 46 of GATT-TRIPS states, in part, “the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.” GATT-TRIPS, *supra* note 15, art. 46. The text of the Berne Convention contains no mention of “proportionality.” Berne Convention, *supra* note 11.

<sup>47</sup> Though not explicitly mentioned in the European Convention on Human Rights—first enacted in 1950 and last amended in 2010—it has become perhaps the most important factor in ECHR’s decision making process. See, e.g., Jeremy McBride, *Proportionality and the European Convention on Human Rights*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 23-26 (1999); see also Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT’L J. CONST. L. 468, 468-493 (July 2009) (containing more recent discussion).

<sup>48</sup> Arguably the defining condition of being “a nation of laws, not of men,” one of the founding principles on which the U.S. Constitution was based.

As a guidepost for judicial review, however, proportionality may also be favorably compared to the type of balancing test which the U.S. Supreme Court routinely engages in, for example, with regard to determining the constitutionality of laws in terms of free speech and protected expression guarantees.<sup>49</sup> Such a balancing test places the legitimacy of government interests, and the expediency and efficiency of the measures taken or called for by enacted law on one balance, and the requirements of civil liberty on the other. In this context, constitutional scholars are likely most familiar with the Supreme Court's "narrowly-tailored" analyses.<sup>50</sup>

Indeed, the line between serving the commercial interest in the surveillance and punishment of international infringement versus the interest of defending nationalistic definitions of civil liberty has already been clearly drawn. In Europe in particular the civil rights imperatives of the concept of proportionality have thus far served to impede—though not completely halt—the adoption of new laws on infringement and the enforcement of those within some national jurisdictions.<sup>51</sup> Over the course of the ACTA negotiations, proportionality was raised as an issue with regard to including any sort of “three strikes” or graduated response style of

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<sup>49</sup> See generally Simon Evans & Adrienne Stone, *Balancing and Proportionality: A Distinctive Ethic?*, ENELSYN.GR (June 11-15, 2007), available at [http://www.enelsyn.gr/en/workshops/workshop15\(en\).htm](http://www.enelsyn.gr/en/workshops/workshop15(en).htm).

<sup>50</sup> For example, in 2000 the U.S. Supreme Court found that the Federal Communications Commission's regulation on the time of day when cable operators could distribute adult channel programming was found to be violative of the First Amendment protection of speech because it was not the “least restrictive” means—and therefore not “narrowly tailored”—to achieve the state's purpose of protecting children from the influence of that programming. *United States v. Playboy Entm't Group*, 529 U.S. 803, 827 (2000).

<sup>51</sup> Invoking their 1789 Revolutionary Declaration on the Rights of Man and Citizens, France's senate, in 2009, restricted the ability of its newly-created Internet policing agency, HADOPI, to itself restrict an infringer's access to the Internet, making judicial review an integral requirement. Conseil constitutionnel [Constitutional Court], decision No. 2009-580DC, June 22, 2009, relative a lo loi favorisant la diffusion et al protection de la creation sur internet, June 13, 2009, Journal Officiel de la Republique Française [Official Gazette of France], available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2009580dc.pdf> (English). See also Nicola Lucchi, *Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression*, 19 CARDOZO J. INT'L & COMP. L. 645, 650-55 (2011). In England, the result was similar with regard to the “Digital Economy Act” of 2010; it too was eventually passed into law despite warnings from the government's own 2009 report on “Digital Britain,” citing “graduated response” as an untenable legal principle. See generally Digital Economy Act, 2010, c. 24 (Eng.), available at <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=3699621#attrib>; Digital Britain: Final Report, Dep't for Culture, Media & Sport & Dep't for Bus. Innovation & Skills (June 2009), available at <http://www.official-documents.gov.uk/document/cm76/7650/7650.pdf>. For commentary on the “graduated response,” see Nate Anderson, “Digital Britain” to Legislate Graduated Response for ISPs, ARSTECHNICA.COM, available at <http://arstechnica.com/tech-policy/news/2009/01/digital-britain-will-legislate-graduated-response-for-isps.ars> (last visited Feb. 20, 2012). Perhaps most notoriously, the accepted evidentiary standard in U.S. courts for allowing infringement claims to go forward, was found wanting by the courts of the Netherlands in 2005 when balanced against the civil liberties of that nation's citizens, and such a case was dismissed. *BREIN Foundation v. UPC Nederland B.V.*, 194741/KGZA-05-462/BL/EV (District Court of Utrecht July 12, 2005).

punishment for repeat infringers.<sup>52</sup> While being completely rejected by the national entities which were party to the negotiation of ACTA, this same form of punishment for infringing Internet usage is still under serious consideration among commercial and regulatory interests in the U.S.<sup>53</sup>

Though “proportionality” most obviously reveals disparate views as to the acceptable limits of redress for infringement, tangentially, it also raises the issue of individual privacy and the tension between any such “right to privacy.”

A full treatment of privacy, particularly in the context of U.S. Constitutional law, is, of course, beyond the scope of the present discussion. Here, it may suffice to offer the simple observation that any efforts to untangle acts of infringement from legitimate activities will require surveillance, and that any exercise of surveillance must have limits, particularly in constitutional societies where intellectual property and privacy have always been linked.<sup>54</sup> Further, given the current trends in technology and commerce it may indeed be the case that “the boundaries between legal spheres, such as IP and privacy law, are starting to dissolve.”<sup>55</sup>

GATT-TRIPS requires that prosecution of claims of infringement must respect “confidential information” and only utilize “reasonably available evidence”.<sup>56</sup> In the fully digital age of the 21<sup>st</sup> Century, however, there may be no point at which the objects of infringement or the identities of the infringers may be “reasonably available,” or considered to be naked of the confidence of one or more concepts of what is deemed confidential or private.

Though the “laws protecting privacy” seem to have been a priority to the parties negotiating ACTA,<sup>57</sup> it is clear that those same parties are generally of two rather opposed viewpoints as regards the question of what is private and what may be kept confidential. Those may be characterized as a primarily objective concept of the person’s right to privacy, typified by current U.S. legal interpretation,<sup>58</sup> and the

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<sup>52</sup> See David Meyer, *Europe ‘Will Not Accept’ Three Strikes in ACTA Treaty*, ZDNET UK, (Feb. 26, 2010, 12:05PM) <http://www.zdnet.co.uk/news/networking/2010/02/26/europe-will-not-accept-three-strikes-in-acta-treaty-40057434/>.

<sup>53</sup> In July of 2011, a consortium of large-scale rights-holders and internet service providers joined in agreeing to a system of “six strikes” to punish infringing users. The agreement is, as yet, untested in court, and not legally binding on any of the parties to its terms. Ian Paul, *ISPs Fight Piracy: Meet the Six Strikes*, INFO WORLD (July 8, 2011), <http://www.infoworld.com/t/internet/isps-fight-piracy-meet-the-six-strikes-529>.

<sup>54</sup> “The statutory right [to intellectual properties] is of no value, unless there is a publication; the common-law right [to privacy of information] is lost as soon as there is a publication.” Warren & Brandeis, *supra* note 20, at 200 (emphasis omitted).

<sup>55</sup> Independent Report by Ian Hargreaves, Intellectual Property Office, Digital Opportunity: A Review of Intellectual Property and Growth 20 (May 2011) (U.K.), *available at* <http://www.ipo.gov.uk/ipreview-finalreport.pdf> [hereinafter Hargreaves Report].

<sup>56</sup> GATT-TRIPS, *supra* note 15, art. 42-43.

<sup>57</sup> ACTA, *supra* note 6, art. 4.

<sup>58</sup> For example, in *California v. Greenwood*, 486 U.S. 35, 39 (1988), the Supreme Court made “objectively reasonable” a co-requirement with any asserted “expectation,” in order to bar warrant-less search by police of a citizen’s garbage bags. In terms of electronic communication, this rule was followed by the 9th Circuit, in *United States v. Gano*, 538 F.3d 1117, 1127 (2008), where no objectively reasonable expectation of privacy was found in the

opposing view—primarily subjective—where what is personal is nearly wholly self-determined. Conflict resides in the fact that the latter may extend beyond “the pursuit of happiness” to encompass any activity, or area of activity, which holds the potential for “development of the individual’s personality.”<sup>59</sup>

Such a broad definition to the extent of individual liberty—or restriction of acceptable surveillance powers, depending on one’s perspective—has become much more problematic with regard to trade and commerce in the copyrighted forms of intellectual property. This is likely because “development of the personality,” like the aforementioned content of the Internet, may be said to be constituted in its entirety of the ineffable stuff of intellectual stimulation and communication.

Though many years ahead of the development of the Internet per se, as early as 1981, the Council of Europe acknowledged an impending threat to the civil liberties of the citizens of its member states in the form of data gathering and trade in digitized information.<sup>60</sup>

Europeans, and Germans in particular, are not that far removed in their history from the onerous abuses engendered by unrestrained information-gathering, notoriously on the part of oppressive governments. Perhaps as a result, German courts have led the way in establishing a presumptive preference for the privacy interest of individual citizens; this judicial preference coalesced in the early 1980’s as the concept of “informational self-determination,”<sup>61</sup> often compared to the still controversial “right to privacy,” much debated in U.S. constitutional analyses.

Growing out of a 1983 German high court decision finding some aspects of a government census act unconstitutional,<sup>62</sup> “informational self-determination” is defined as the right to control information that has been or will be gathered by institutions, regardless of any implied or express consent, as well as the right of those institutions to retain that information.<sup>63</sup> Ultimately, the individual citizen,

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computer files of a man who had participated in a wholly electronic, peer-to-peer exchange of those files, referred to as “torrent” filesharing. *Id.*

<sup>59</sup> Note that the importance of “proportionality” may be said to be directly linked to a basic view that at least one of the major functions of the law is to protect “the right to free development of [the individual’s] personality” which has been typified since 1949 by the Basic Law for the Federal Republic of Germany. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (GRUNDGESETZ) [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.) art. 2.

<sup>60</sup> Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, art. 1, Jan. 28, 1981, 1496 U.N.T.S. 66. Note that, several years prior, the U.S. Congress—acting in the shadow of the Watergate scandal—had expanded existing freedom of information legislation and formalized a right for citizens to review any records kept by government agencies about that person. The Privacy Act of 1974, 5 U.S.C. § 552a (2006). Any questions concerning commercial data, or forms of implied consent were left unaddressed at that time. *Id.*

<sup>61</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 4, 2006, 115 BVERFGE 320 (344-45, at para. 81) (Ger.).

<sup>62</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 2006, 65 BVERFGE 1 (Ger.).

<sup>63</sup> Antoinette Rouvroy & Yves Poullet, *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy*, in RIGHT TO PRIVACY? 45, 45-46 (Prof. Serge Gutwirth et al eds., 2009).

under such a definition, is presumed by the court to have the broadest reach permissible in terms of deciding what information about oneself may be considered private or public. This reach extends to the right to have such information about oneself deleted from existing records, within a reasonable time frame. By this view, information about an individual, is neither untethered from that individual by mere exposure, nor by the durability of the information itself.

While these conflicting understandings of the individual's right to informational self-determination may be viewed as not the law of the EU in its entirety, recent, relevant findings of the European Court of Human Rights have made efforts to source the concept in the now 60-year-old European Convention on Human Rights.

Specifically, the Convention defines a citizen's right to "respect for his private life . . . and his correspondence."<sup>64</sup> The ECHR has interpreted this protection to be a fundamental right against government(s) needs for surveillance and security. Most notably, in *Liberty v. UK*,<sup>65</sup> following *Weber and Saravia v. Germany*,<sup>66</sup> the ECHR has upheld a broad definition of the terms, "private life" and "correspondence" suggesting that a large part of the communication activities utilizing international networks may fall within the Convention's protections for those areas of a citizen's life.<sup>67</sup> While the right is tempered by such needs of government as those which are "lawfully" undertaken, it is clear that the ECHR will hold any intrusion on this right to a strict standard derived from the language of the Convention calling for "foreseeability" pursuant to any police authority.<sup>68</sup>

Informational self-determination, in that respect, is nearly a complete negation of the U.S. view of privacy which most often seems to rest on the concept of publication or third party exposure. That is, in the U.S., publication of any kind seems inevitably accompanied by a presumption against a reasonable expectation of privacy. Further, with regard to any perceived right to privacy on the part of the individual, such is mitigated (some would say "truncated") by any communication of personal information to a "third party."<sup>69</sup>

The obvious implication is that any consensual release of personal information to any institution, regardless of its status as governmental or private enterprise, may be opportunistically construed as a waiver by that individual to any expectation of privacy with regard to such information from that point in time and infinitely forward thereafter.

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<sup>64</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 13 U.N.T.S. 221.

<sup>65</sup> *Liberty v. United Kingdom*, App. No. 58243/00, 48 Eur. H.R. Rep. 1 (2008).

<sup>66</sup> *Weber v. Germany*, App. No. 54934/00, 46 Eur. H.R. Rep. SE5 (2006).

<sup>67</sup> *Liberty*, 48 Eur. H.R. Rep., ¶ 56 (citing *Weber*, 46 Eur. H.R. Rep. SE5).

<sup>68</sup> *Liberty*, 48 Eur. H.R. Rep., ¶ 15.

<sup>69</sup> Thus, while the Court in *Ganoe* acknowledged that a person may have a reasonably objective expectation of privacy in their personal computer, the same does not exist for the directory or folder which they might utilize for file-sharing activities. *United States v. Ganoe*, 538 F.3d 1117, 1119 (2008). The Court held that despite his lack of knowledge or volition, by using the file-sharing software the defendant had "opened up his download folder to the world." *Id.* at 1127.



The importance of the issue is highlighted when one considers, for example, the “exposure” of personal information to third parties which is inherent in the simple act of making a purchase with a credit card via the Internet, or as a matter of utilizing a social networking website with the goal of organizing a high school or family reunion.<sup>70</sup>

Even more distinct than the difference between “informational self-determination,” and “reasonably objective expectation,” would be a concept of the individual not only without a right to privacy of personal information, but having no personal information whatsoever at all. In such a circumstance, a larger form of “personality” would subsume all others and the functional construct of “government” becomes the lone institution or entity that may create, utilize or preserve data, and thus may do so as it sees fit.

In such a case, the sole right to “privacy”—as a euphemism for dominion or control over information—belongs to that government and may only be exercised by its officials and for its own purposes. It therefore falls to officials to decide as to propriety of any sharing or review of such data and, from a civil liberty perspective, no true question of “privacy” arises.<sup>71</sup>

Clearly, parties approaching any related issue from (at least) three such disparate perspectives on “privacy” will likely encounter difficulty in finding common ground on any dependent issues. What may be considered private to one may seem public to the other and vice versa. The difficulty arises when signatories to an agreement which calls for surveillance of citizens as a measure of discovering infringing activity seek that enforcement against one another’s citizens.

At the present moment, a large part of the *raison d’être* of ACTA is simply that the several conflicting concepts of privacy, may be said to have created “safe havens,” where particularly gross copyright infringement may be undertaken with little fear of prosecution. These are jurisdictions where otherwise criminal and commercially destructive activities are beyond the reach of redress from the holders’ whose rights are being infringed. As an independent report commissioned by the British government and undertaken by a former “digital Britain” MP put it, “free downloads are not necessarily illegal and paid for downloads are not necessarily legitimate[;] what is legal is [sic] one country may not be [illegal] in another [but] the internet allows businesses and consumers to trade across boundaries.”<sup>72</sup>

For example, it appears to be the case that a great deal of copyright infringement on IPR held by U.S. interests is presently carried on via the Internet from websites and servers located beyond the jurisdiction of U.S. courts. While civil suits on a “piecemeal” basis may be undertaken against individual “users” on the receiving end

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<sup>70</sup> This is exactly the sort of concern that has prompted some engaged in the business of profiting legitimately by the willingness of others to reveal as much personal information as possible to decry the notion of privacy in its entirety. See, e.g., Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, THE GUARDIAN (Jan. 10, 2010), <http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy>.

<sup>71</sup> Notably, in general terms this was the issue which brought Google, Corp. into conflict with the government of China early in 2010 as the latter was attempting to use the search engine and email service provided by Google as a means to collect data on the conduct of its citizens. *Google vs. China*, WASH. POST (Jan. 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/13/AR2010011302908.html>.

<sup>72</sup> Hargreaves Report, *supra* note 55, at 69.

of infringing materials within the U.S.<sup>73</sup> simultaneously, no means currently exist to seek civil or criminal enforcement in the localities where the infringing activities originate, so the illicit distributors remain at large.

Thus, the question remaining, in ACTA's terms, is this: is it possible to investigate and prosecute infringement which has been undertaken on an international, commercially-viable scale without coincident understanding on the part of all of legitimate authorities involved with regard to the individual's right to possess and manage personal information or with regard to the limits of permissible redress?

#### IV. CONCLUSION

To put the question more plainly: is ACTA an enforceable international agreement?

The answer to this unanswered question is "likely not." To understand why not, we must return to the matter of certainty of contract. Implicit within the notion of "certainty of contract" is the legal understanding of what a contract is exactly. In order to move forward with the goal of enforcement of international IPR, it appears that this concept must be reconsidered.

It must be understood in the first instance, that the nature of international trade implicating IPR makes it impossible to regulate in the same manner as contracts between merchants may be regulated, or even that between retailers and consumers. Limiting the interests served merely to the individuals and commercial enterprises whose consumption and profits are most directly involved is not realistic in that context. Contracts implicating international IPR, regardless of how they appear within the confines of their "four corners," also implicate intangible values, including nationalistic, political values, and involve more than commercial parties.

The intent of agreements such as GATT-TRIPS and ACTA is to formalize the place governments, and the publics they represent, have as unnamed parties to and intended beneficiaries of the contractual relationships involving international IPR. That does not seem a likely outcome given the approach called for by these agreements—cooperative surveillance and prosecution—and a simple understanding of human behavior gained through observation. As a result, there may not be a law or treaty that could provide an answer to the question cited above.

That would require the several nations of the world to agree to protect one another's ideas (not to mention, one another's "ideas about ideas"), and, further, to have those same national entities enforce such agreement. Each government would then be serving more than one public's interest at the same time. That seems, at this time in history, not to be a very probable outcome. A brief review of the

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<sup>73</sup> The prosecution of so-called "John Doe" lawsuits is an example of such a "piecemeal" approach. These are characterized as actions by rights-holders—of late, mainly producers of pornographic films—seeking statutory damages against unauthorized downloads made via discoverable internet protocol addresses ("IP addresses"). In general, plaintiffs hope that defendants, "John Does," will choose out-of-court settlements as a matter of preserving anonymity, and avoiding the expense of attorney's fees and the greater evil of the statutory damages. The success of these actions in particular, or as a deterrent strategy, is still in question. See generally Jaikumar Vijayan, *The RIAA Proposes a Deal for Illegal Downloaders*, PCWORLD.COM (Feb 14, 2007 6:00 PM), available at [http://www.pcworld.com/article/129036/the\\_riaa\\_proposes\\_a\\_deal\\_for\\_illegal\\_downloaders.html](http://www.pcworld.com/article/129036/the_riaa_proposes_a_deal_for_illegal_downloaders.html).

development of communication technology will suffice to demonstrate that, for whatever reason, people of different nationalities and political viewpoints are not inclined to entertain even the possibility of exposure to the value-laden ideas of others much less to protect the commercial interests inherent in those.<sup>74</sup> It may even be argued that people's almost instinctive impulse to value only their own "intellectual property" may be at the root of the development of differing language communities; an impulse which seems particularly pronounced given a small land-mass such as Western Europe.

In what seems an ironic twist, infringement may thus be viewed as hopeful in that respect. That is, on a very basic level, the act of infringing itself constitutes something of a tacit recognition of value. It is credulous to imagine that anyone who infringes, like anyone who converts property, does so without a sense of value for whatever is being illicitly appropriated. So, in a sense, one may view the impulse to infringe as an indication that some artifacts of human life are universally appreciable and hold out hope for eventual world harmony on that basis. Imitation is the sincerest form of flattery and if we all value the same products, fashions, art and entertainment, perhaps we can indeed all get along someday.

So, ultimately, one may choose to view it as a gift or as a curse.

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<sup>74</sup> This was the case as different "regions" of the globe developed different television technologies over the 20<sup>th</sup> Century—e.g., PAL (most of Asia, South America, some of Africa, most of Europe), SECAM (France, Russia, some of Eastern Europe, some of Africa) and NTSC (North America, Japan, Korea, Philippines)—a system of separation which has remained in place even as recorded video media—first magnetic tape, and now DVD's, designated as "region 1," or "region 2," etc.—have replaced much of broadcasting.