Cloak of Secrecy Lifted as ACTA Text Goes Public

by David Sohn [1]
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The parties negotiating ACTA have now made public the current version of the text [2]. It's not an easy read -- there are many provisions featuring multiple proposed options and brackets marking text that somebody (the released version doesn't say who) has proposed but that don't reflect any consensus. And it's not much of a surprise, since leaked prior versions had already been posted online. Still, it feels like a significant milestone in the ACTA debate. Everyone can now stop arguing about transparency and about provisions that are rumored or unofficial. Those who, like myself, signed a USTR nondisclosure agreement in order to be allowed to review an earlier draft of ACTA's Internet Chapter can stop worrying about what we can or cannot say publicly. In short, a robust public debate about the substantive merits of ACTA can now begin.

CDT's overall concern with ACTA is the one expressed by my colleague Andrew McDiarmid in a blog post [3] last month: ACTA seeks to selectively export U.S. copyright law, pushing other countries to adopt strong measures on copyright enforcement (like secondary liability), while leaving out the substantial safeguards in U.S. law against overbroad enforcement (like "fair use" and the judicial decisions saying secondary liability doesn't apply to products with substantial noninfringing uses). So ACTA could have the practical effect of encouraging other countries to adopt skewed copyright regimes that lack an appropriate balance. The recent case in Italy [4] holding Google executives liable for a nasty video posted by a user shows how far wrong things can go when countries take an unbalanced and overly aggressive approach to secondary liability.

Seeing actual text today has not alleviated those concerns. It does, however, give us official language we can point to. So, if you want to look for yourself, here is what we mean.

Article 2.18, paragraph 3 on page 19 would require countries to have remedies for third party liability. Footnote 47 tries to capture, in a brief single sentence, what "third party liability" means. To be clear, CDT is not opposed to the concept of third party liability (also known as "secondary liability"): In appropriate cases, it offers a powerful tool against copyright infringement. But third party liability is a judge-made doctrine. Its contours are not laid out neatly in a statute, but rather have emerged from a number of important judicial decisions, including the 1984 Sony Betamax case and the 2005 Grokster case. ACTA appears to try to paraphrase the portions of those holdings regarding when liability is appropriate, while making no effort at all to include the portions describing the crucial limits to the scope of third party liability.

Specifically, the Supreme Court in those cases made very clear that simply designing and distributing a product cannot subject a company to secondary liability, so long as the product has "substantial noninfringing uses." The Supreme Court explained that this limitation is essential to preventing the doctrine of secondary copyright liability from seriously impairing lawful commerce. Yet nothing in the ACTA text requires or encourages other countries to observe such a limitation. Telling countries they should impose third party liability for conduct that promotes infringement, without also telling them that the acts of designing and distributing multi-purpose products don't count, is an invitation to seriously unbalanced and harmful secondary liability regimes abroad.

Moreover, while this paragraph of ACTA would make third party liability provisions mandatory, the fair use and similar exceptions referred to in the associated footnote 47 appear to be merely optional -- and of course, many countries don't have anything analogous to our fair use doctrine anyway. Third party liability could operate in a much more restrictive way in a country without fair use. Keep in mind that fair use was central to finding VCRs lawful in the United States, because home recording for "time shifting" purposes was deemed fair use.

Meanwhile, much of the text spanning pages 19, 20, and 21 is devoted to a variety of options and proposals for creating a "safe harbor" regime loosely based on section 512 of the DMCA. The

proposals offer various versions of requirements for qualifying for the safe harbor -- apparently trying to ensure that ISPs and other intermediaries don't get overbroad protection. But the text reflects zero effort to require countries to offer a true "safe harbor" in the first place: It merely requires them to provide unspecified "limitations on the scope of liability." Any limitation would apparently be sufficient -- even a minimal reduction in damages. A true safe harbor, by contrast, makes clear that eligible entities will be held harmless. Thus, the DMCA says that eligible parties are "not liable for monetary relief."

ACTA's failure to be specific on this point is not a minor detail. The core intended purpose of this part of the text, one would think, is to provide safe harbor protection. CDT believes that is an absolutely essential element of a forward-looking copyright regime; the DMCA's safe harbor has successfully spurred a tremendous amount of innovation. By failing to state any actual requirement for signatories to adopt a true safe harbor, ACTA fails to provide balance and breathing space for innovation the way section 512 does today in the United States.

There are many other textual details, proposals and options that bear on the question of what role ISPs and other intermediaries should be encouraged to play regarding infringing conduct occurring on their systems. So this central issue is clearly up for grabs. As CDT has suggested elsewhere [5], pressing ISPs to step into the role of copyright police carries major costs and runs directly contrary to deliberate policy choices that Congress has made.

The bottom line is, the text of ACTA confirms that there are some serious and problematic issues at play in this agreement. It's high time that the details received serious scutiny from the full range of interests that may be affected. That process begins now.

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- secondary liability
- international copyright

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