

ACTA – TPP Comparison: Highlights

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General Provisions

- TPP requires countries to join in to a long list of treaties, conventions, and protocols, while ACTA merely avoids interfering with other agreements.

Copyright in the Digital Environment

- ACTA requires countries to “promote cooperative efforts within the business community to effectively address... infringement.” TPP requires countries to provide “legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials.”
- Under ACTA, a country *may* give its authorities the power to force an ISP to identify an infringer to rightholders, subject to certain conditions. Under TPP, a country *shall* establish administrative or judicial procedures for forcing an ISP to identify an infringer to rightholders, without ACTA's conditions.
- TPP additionally includes detailed notification and counter-notification procedures for ISPs and subscribers. These procedures have no equivalent in ACTA, but closely track those in the DMCA.

Technological Protection Measures

- Both ACTA and TPP require parties to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”
- Both ACTA and TPP make circumvention a distinct cause of action, independent of infringement.
- TPP goes beyond ACTA by applying provisions on technological protection where circumvention is carried out unknowingly or without reasonable grounds to know.
- TPP goes beyond ACTA by requiring criminal penalties for circumvention of TPM, or provision of services or products for circumvention of TPM, for profit. However, it explicitly excludes nonprofit libraries, archives, educational institutions, and noncommercial broadcasters from the criminal penalties.
- TPP goes beyond ACTA by explicitly limiting the possible limitations and exclusions to the TPM circumvention rules, while ACTA gives a country free reign to create exceptions and limitations it finds reasonable.

Criminal Penalties

- Both ACTA and TPP require countries to grant their authorities *ex officio* authority to take action against commercial infringement without a complaint from a rightholder.
- Both ACTA and TPP call for criminal penalties for those “aiding and abetting” infringement on a commercial scale
- Both ACTA and TPP require seizure and forfeiture of any assets connected to the infringing activity.
- Both ACTA and TPP require “imprisonment and monetary fines sufficiently high to provide a deterrent” to future infringements.
- TPP goes beyond ACTA by omitting safeguard that such penalties shall be consistent with “the level of penalties applied for crimes of a corresponding gravity.”
- TPP goes beyond ACTA by requiring party members to establish policies or guidelines to “encourage judicial authorities to [actually] impose those penalties.”
- TPP goes beyond ACTA by requiring criminal penalties for copyright or related rights infringements “that have no direct or indirect motivation of financial gain.”
- TPP goes beyond ACTA by explicitly including willful trade of counterfeit or pirated goods as a criminal activity

Civil and Administrative Penalties

- Both ACTA and TPP require the infringer to “pay damages adequate to compensate for the injury” using any “legitimate measure of value” submitted by the right holder, including the profits made by the infringer.
- TPP goes beyond ACTA by applying penalties when infringement is carried out unknowingly or without reasonable grounds to know.
- TPP goes beyond ACTA by requiring pre-established damages to be “sufficiently high to constitute a deterrent to future infringement.” Additionally, unlike ACTA, TPP provides that in patent infringement cases, the damages may be increased up to three times the injury.
- TPP goes beyond ACTA by adding patent infringement to the list of case types for which a losing party may be required to pay court costs and attorney's fees (in addition to copyright and trademark infringement cases).
- TPP goes beyond ACTA by allowing the destruction of materials and implements that merely have been used in manufacture or creation of infringing goods, while ACTA requires that such goods have been *predominantly* so used.

- TPP goes beyond ACTA by removing the safeguards providing that access to information be “without prejudice to [each country’s] law governing privilege, the protection of confidentiality of information sources, or the processing of personal data”

Border Enforcement

- Both ACTA and TPP require countries to grant border authorities *ex officio* powers. TPP broadly allows initiation of “Border Measures,” while ACTA lists specific powers to be granted to authorities.
- TPP goes beyond ACTA by requiring that seized goods found to be infringing be destroyed, except for in exceptional circumstances. ACTA allows for infringing goods seized at the border to be either destroyed, or otherwise “disposed of outside the channels of commerce in such a manner as to avoid any harm to the rightholder.”

Rights Management Provisions

- ACTA only requires adequate legal protection and remedies, while TPP requires criminal penalties when infringement is for profit.
- TPP goes beyond ACTA by limiting exceptions to those carried out by people working for the government for law-enforcement-related government purposes, while ACTA allows any “appropriate limitations or exceptions.”