

The anti-counterfeiting trade agreement: the ethical analysis of a failure, and its lessons

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Abstract The anti-counterfeiting trade agreement (ACTA) was originally meant to harmonise and enforce intellectual property rights (IPR) provisions in existing trade agreements within a wider group of countries. This was commendable in itself, so ACTA's failure was all the more disappointing. In this article, I wish to contribute to the post-ACTA debate by proposing a specific analysis of the ethical reasons why ACTA failed, and what we can learn from them. I argue that five kinds of objections—namely, secret negotiations, lack of consultation, vagueness of formulation, negotiations outside any international body, and the creation of a new governing body outside already existing forums—had only indirect ethical implications. This takes nothing away from their seriousness but it does make them less compelling, because agreements should be evaluated, ethically, for what they are, rather than for the alleged reasons why they are being proposed. I then argue that ACTA would have caused three ethical problems: an excessive and misplaced kind of responsibility, a radical decrease in freedom of expression, and a severe reduction in information privacy. I conclude by indicating three lessons that can help us in shaping a potential ACTA 2.0. First, we should acknowledge the increasingly vital importance of the framework of implicit expectations, attitudes, and practices that can facilitate and promote morally good decisions and actions. ACTA failed to perceive that it would have undermined the very framework that it was supposed to foster, namely one promoting some of the best and most successful aspects of

our information society. Second, we should realise that, in advanced information societies, any regulation affecting how people deal with information is now bound to influence the whole 'onlife' habitat within which they live. So enforcing IPR becomes an environmental problem. Third, since legal documents, such as ACTA, emerge from within the infosphere that they affect, we should apply to the process itself, which one day may lead to a post-ACTA treaty, the very framework and ethical values that we would like to see promoted by it.

Keywords ACTA · Anti-counterfeiting trade agreement · Infraethics · Intellectual property rights · Information ethics

Introduction

The world needs a huge injection of ethics. From politics to business, from social affairs to religious conflicts, from international relations to multicultural disputes, our behaviour seems to have become worse than usual. Bankers, politicians, businesswomen and middlemen, journalists, extremists of all stripes, civil servants... Recently, the erosion of moral standards appears to be deepening. Why this is happening is not entirely clear. Perhaps, the speed of some economic success has outpaced the corresponding growth in civilised behaviour. After all, the rich have more opportunities to misbehave than the poor,¹ even if one may still reasonably object that immorality is not a winning strategy, at least not in the long run. Or could it be because some of us are no longer in the grip of religious beliefs, and

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¹ A recent study supports the hypothesis that 'upper-class individuals behave more unethically than lower-class individuals', Piff et al. (2012). Of course this may hold true today, and in our society.

hence more relaxed about their *post-mortem* reckoning? If so, this is still too generic and, in any case, we should probably concentrate more on the decline of “protestant ethics” in Western countries.² But maybe the explanation is simpler: we are merely better informed about what goes wrong daily in a globalised world. There is no Wikileaks for good deeds, although this cynical rationalisation is inconsistent with the fact that those misbehaving know very well that their deeds are more likely to be exposed, and so they are becoming increasingly tech-savvy in order to increase their chances of not being caught.³

Whatever the reasons for the apparent decline of our current moral standards—including some selective blindness towards how rotten things already were in the past—this much is clear: petty immorality, the purgatorish not the hellish kind, is often the not-too-deep source of major disasters. Corruption, unfairness, discrimination, greed, harassment, resentment, insincerity, vandalism, carelessness, waste, intemperance, selfishness, all the way down to mere idiocy: these are not just philosophical problems, but also economic and social drags, with high costs in missed or diminished improvements in humanity’s well-being.

This long premise should help one understanding why approaching some of our current difficulties from an ethical perspective is not an idle exercise in intellectualism, but a badly needed intervention of conceptual engineering. Metaphorically speaking, if some of the pipes of our social interactions are rusty or leaking, identifying and repairing the damage at source is the only way to improve the situation, and avoid having to patch the unwanted consequences on a daily basis.

Of course, all this applies even more forcefully when new mechanisms are being devised and put in place in order to regulate human interactions and to try to redress the moral erosion just outlined. There is, however, a major difficulty. Relying on the previous metaphor, our pipes are already badly damaged, it would be great to fix or even replace them, but the last thing we need is some unauthorised and incompetent plumber who, more or less secretly, tries to install some faulty valves of his own invention. In the most charitable scenario, he may mean

well but will make things much worse. The most recent plumber was called ACTA (the Anti-Counterfeiting Trade Agreement), and the hole it was trying to fix was the widespread infringement of intellectual property rights (IPR).

ACTA’s commendable goal

ACTA was the third in a series of attempts to improve the legal enforcement of IPR, after PIPA (the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, or Protect IP Act) and SOPA (the Stop Online Piracy Act). Its explicit goal, which critics saw as only partially related to some lobbyists’ alleged hidden agenda, was enforcing and harmonising IPR provisions in existing trade agreements (in WTO TRIPS⁴ and bilateral agreements) within a wider group of countries. This was and still is commendable in itself. IPR are constantly and widely breached all over the world and it is undeniable that this has many negative consequences. ACTA explicitly (and correctly) mentions undermining ‘economic growth, [...] legitimate trade and sustainable development of the world economy’, possibly causing some ‘financial losses for right holders and for legitimate businesses’, while perhaps providing ‘a source of revenue for organized crime’, and maybe even posing ‘risks to the public’.⁵ The reader may have noticed that I significantly moderated the original language. All these negative consequences are concrete, but may easily be exaggerated, because they are not only unwanted but also hard to document. They are regularly overstated, and were overemphasised by some of ACTA supporters. Still, it seems uncontroversial that a world in which IPR are respected would be a better world, legally, economically (Gollin (2008)), and ethically. No reasonable opponent of ACTA argues against the *value* of IPR *tout court*, and the importance of formulating them correctly, defending them properly, and enforcing them efficaciously. After all, they are called IP *rights* for a reason. True, IPR need to be refined and adapted through time, and the relevant legislation may be improved. For example, Neelie Kroes, Vice-President of the European Commission responsible for the Digital Agenda, stressed that “the 2001 [European] Copyright Directive needs to be adapted” (Kroes 2012) to our new technologies, needs, and expectations. But this applies to any good agreement. Generally

² The classic reference is Weber (2011). According to The Pew Forum (2008) ‘the United States is on the verge of becoming a minority Protestant country; the number of Americans who report that they are members of Protestant denominations now stands at barely 51 %’.

³ ‘In the last two decades, organized crime has grown more complex, posing evolving challenges for US federal law enforcement. These criminals have transformed their operations in ways that broaden their reach and make it harder for law enforcement to combat them. They have adopted more networked structural models, internationalized their operations, and grown more tech savvy’, Bjelopera and Finklea (2012), p. 2.

⁴ *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, 15 April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C. Available at: http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

⁵ ACTA (2011), the quotations are taken from the initial statement preceding the text of the agreement.

speaking, none of us would be amused if our own IPR were regularly trampled on indiscriminately and without consequences. It is precisely because the problem is serious and pressing, and the agreement behind the need to solve it is widespread, that ACTA's failure was all the more disappointing.

What went generally wrong with ACTA

The problems with ACTA turned out to be numerous and diverse.⁶ Unfortunately, history teaches us that there is one force more powerful than mighty rationality, and that is almighty hope, the only gift from the Gods in Pandora's box. Hope that *this* will be the last war that ends all wars; that *this* wall (the wall of Jericho, Hadrian's wall, the Maginot line, the Siegfried line, the Great Wall of China, the Berlin wall, ...) will keep the enemy at bay; that *this* is the right lottery ticket; ... that *this* ACTA will stop IPR infringements once and for all. Such a hope must have been supported by the illusion that a *blitzkrieg*, secretly planned and swiftly executed, would have delivered the deserved success. It was a miscalculation, even if one may assume plenty of good faith on the side of ACTA proponents, given that the initial intent was to operate within existing commitments in the WTO, and just agree on how best they should be enforced. This time, Poland was not caught unprepared (Lipowicz (2012)), and after thousands of people demonstrated against ACTA in front of the European Parliament office in Warsaw on 24 January 2012, criticisms began to prevail. What started as a potentially good idea ended in an unfortunate failure. On 4 July 2012, the European Parliament rejected ACTA, with 478 votes against the treaty, 165 abstentions, and 39 votes in favour. It was the first time that the European Parliament used its powers under the Lisbon Treaty to reject an international trade agreement.⁷

⁶ Among the many analyses available, Mercurio (2012) is particularly enlightening. It "aims to demonstrate that the ACTA's importance extends beyond the text and goes to the heart of international IP policymaking. In order to do so, the article analyses certain purported advances of the ACTA, and briefly compares these benefits against the existing legal framework of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) and elsewhere. Having revealed that the Agreement fails to substantively build on the existing legal framework, the article argues that the importance of the ACTA lies not in its textual obligations but more in the effect it will potentially have as a starting point in multilateral and bilateral trade negotiations, an alternative forum for international IP rulemaking and on the 'governance' of international IP more generally." p. 362.

⁷ On "revisits the arguments, debates and controversies that led up to the European Parliament's rejection of the Anti-Counterfeiting Trade Agreement (ACTA)", see Matthews (2012).

The mistakes made at different stages in the negotiations, formulation, publication, consultation, debate, and approval, leading to the final shelving of ACTA before any ratification, were many and serious. They deserve a book-length investigation.⁸ The outline, however, is well known and does not need to be summarised here, although I shall say a bit more about it in the next section.⁹ What is worth stressing is that vocal and sometimes inconsistent complaints about ACTA came from a multiplicity of sources, from Doctors Without Borders to the Electronic Frontier Foundation, from developing countries to the Entertainment Consumers Association; that this all-out counterattack was successful; but that it also had the strategic shortcoming of bundling together different objections, some strong, some weak, some answerable, some insurmountable. Perhaps this was fine during the frenetic months following the first leaks, when blocking ACTA was more urgent than thinking about any plausible and constructive alternative *after* ACTA. However, unless such objections are unravelled and teased out, it will be difficult to learn any lessons, and hence do better in the near future. Recall the conclusion of the previous section: the ultimate goal of defending and enforcing IPR for digital and physical goods is ethically commendable in principle; the question is how to achieve it fairly and satisfactorily in practice. For this reason, in the rest of this article I wish to contribute to the post-ACTA debate by proposing a specific analysis of the *ethical* reasons why ACTA failed, and what we can learn from this particular line of criticism. Such analysis will be based on a theoretical framework known as information ethics (Floridi 2010, 2013). Of course, ACTA had many other and often intertwined shortcomings: procedural, legal, political, formal, and technological. They all deserve a similarly close scrutiny, and for the same reason, but this will be a task for other experts.¹⁰

What was not immediately wrong, ethically, with ACTA

The first clarification concerns five objections that addressed flaws in ACTA that were *not* in themselves immediately ethical. Note that they concern ACTA in general, that is, insofar as it deals with IPR about both physical and virtual or digital goods.

⁸ For a book-length commentary, see Blakeney (2012) but also the critical, although balanced review of the book by Vousden (2013).

⁹ The usual Wikipedia entry 'ACTA' provides a reliable and informative overview with plenty of references.

¹⁰ See for example the Letter to President Barack Obama (28 October 2010) signed by over 75 Law Professors.

Secret negotiations

There is nothing unethical in secrecy *per se*, in the same way as there is nothing intrinsically ethical about openness or transparency either. Sometimes, important issues need to be discussed without initial transparency; examples include anti-terrorist measures, new tax legislation, or modifications in the interest rates. International treaties concerning law enforcement or cybercrime are usually negotiated within the context of the UN, the Council of Europe, or the like, with limited transparency but without raising any (let alone ethical) objections. Likewise, trade agreements such as ACTA tend to be prepared in secret, and rightly so. Conversely, awful injustices, such as slavery, are sometimes perpetrated in all transparency. Voting may be better kept secret or open depending on the circumstances. Secrecy becomes suspicious by proxy, only when the *reasons* to adopt it and then protract it are suspicious. In the examples above, it is commonly agreed that secrecy is adopted (and dropped as quickly as possible) when it serves the public good better. The correct complaint, in the case of ACTA, is not that it was secretly negotiated, but that the *justification* for keeping the negotiations secret was flimsy, whereas the main reason for the lack of transparency seemed unethical, because lobbyists' interests ended up breaching a principle of universal equality among stakeholders, privileging the protection of the interest of some, at the expense of the interest of all (Levine (2012), on a Habermasian reply to Levine see Bridy (2012)). As a result, what may be unethical is not that a trade agreement was secret but that, in order to adopt a secret procedure, law enforcement with implications for civil rights (see section four) would be negotiated in terms of a trade agreement.¹¹ Maybe a trade agreement is not the right strategy to deal with the enforcement of IPR, although it remains unclear what viable alternatives may be available. Finally, consider that one of the advantages of the very publicity of such a consultation process would have been that of sending a firm and loud signal to the wrongdoers that the days of unpunished IPR infringements were over. It could have worked like a speed camera in the UK: big, yellow, very visible, and hence so much more disincentivising. The fact that such a valuable, potential side effect was insufficient to make the negotiations more transparent

¹¹ This objection is developed in <http://www.publicknowledge.org/issues/acta>. For similar concerns about the Trans-Pacific Partnership US-Pacific see <https://www.commondreams.org/headline/2012/06/13-5> and about CETA (the Comprehensive Economic and Trade Agreement, between Canada and the EU see <http://www.michaelgeist.ca/content/view/6580/135/> For a valuable assessment of CETA see Michael Geist <http://www.michaelgeist.ca/content/view/6580/135/>.

is a bad sign about the potentially unethical motivations behind the secrecy of ACTA negotiations in the first place.

Lack of consultation with the general public, civil society groups, consumers' organisations, and developing countries

This is not to be confused with secrecy. The whole series of negotiations could have been kept secret and yet many more (kinds of) stakeholders could have been involved. In section "Three lessons for the future" and in the conclusion, I shall argue that the insufficient degree of consultation actually gives some hope for a future treaty designed through more inclusive negotiations. At this stage, having acknowledged the difference with the secrecy issue, the evaluation is similar: in itself, lack of consultation is primarily a procedural, legal, or political problem. In our case, it becomes an ethical issue only indirectly, if it is *motivated* by the undeclared intention of excluding other parties, which were going to be affected by ACTA, from knowing about the proposal and contributing to its formulation. The ethical requirements of consultation and openness (see above) ground the institutionalisation of democratic decision-making and procedural law (e.g. the fair trial, the legality principle in criminal law). Again, it is hard to dispel the suspicion that such motivation was a determinant cause. The result was that mutual, a priori mistrust between supporters and detractors of ACTA played a role in its failure.

Vagueness of formulation

This problem is not immediately ethical either. Indeed, sometimes, some technical vagueness is not only inevitable but also welcome in order to ensure that all parties may ratify an international agreement. It can help in a stepping-stone process. Vagueness acquires a negative moral dimension when, although avoidable, it is not dispelled, and not for reasons of mere negligence or incompetence,¹² but for more suspicious reasons privileging vague legislation that can easily support more extreme interpretations leading to unfair, intolerant, or repressive measures, which then are plainly unethical. For example, in the case of ACTA, considering together counterfeit and generic drugs without any sufficient distinction would have seriously endangered access to medicines in developing countries, and this could have had serious ethical implications (Baker (2011)). The criminal enforcement of intellectual property rights internationally, supported by ACTA, remains a problem (Geiger 2013), or consider the description of what constitutes a copyright infringement on a commercial

¹² Reading EU (29 OCTOBER 2009) is enlightening about the very poor formulation of the original document.

scale, which was too broad and would have forced States to impose criminal sanctions on such infringements.¹³

Negotiations outside any international body

Ethics is silent on this point as well, which is a matter of convention, international law, and proper procedures. Consider that developing and developed countries do free trade agreements, double taxation agreements, and extradition agreements outside multilateral bodies and on bilateral/plurilateral grounds, without necessarily raising ethical objections. What is ethical is the point, already stressed above, that *implicit motivations behind such format* might have been based on unethical goals.

Creation of a new governing body outside already existing forums (UN, WIPO, WTO, etc.).

This objection too has no ethical import, if not indirect, again about potentially unethical motivations.

To summarise, it is clear that, if we look at objections (a–e), they had potential ethical implications, but that these were indirect, more a matter of inferring possible intentions and motivations and hence hidden goals—all denied at different stages by ACTA supporters—than a matter of plain breach of some moral principles, rules, or codes. This takes nothing away from the seriousness of the previous objections. Indeed, such indirect ethical impact is an important aspect of ACTA, and I shall return to it below. But it does make some of the aforementioned criticisms less compelling and more easily answerable: agreements should be evaluated, ethically, for what they are, rather than for the alleged reasons why they are being proposed. Whatever the intentions, motivations or hidden agenda that allegedly may lie behind some agreement, if the text of the agreement is ethically satisfactory in itself, that is all that matters and counts when it will be applied. If Alice causes some evil to occur, her best intentions may exculpate her but take nothing away from the negative evaluation of their effect; likewise, if Bob causes some moral goodness to occur, his worst intentions may inculpate him but take nothing away from the positive evaluation of their effect. This is why it is important to realise that there are some direct and explicit ethical objections to ACTA itself, as opposed to the processes, reasons, intentions, alleged agendas and so forth that led to its formulation. Let us see how they could be interpreted.

¹³ The problem has not disappeared; see the EC “Roadmap” For Review of the IPR Enforcement Directive and its remarks on the definition of ‘commercial scale’, <http://www.edri.org/edriagram/number10.3/review-ipred-directive>.

What was ethically wrong with ACTA

Three main objections to ACTA had a clear ethical thrust. They concern ACTA insofar as it deals with IPR of virtual or digital goods. They are connected, but for the sake of simplicity let me analyse them separately.

Misplaced and excessive responsibility

Given ACTA’s vague formulation, wide scope of application, and unclear measures of enforcement, it soon became clear that it was *likely* (recall, it is a poorly formulated text) to make Online Service Providers (OSPs)¹⁴ liable for copyright infringement by users. This may seem only a legal issue, but it is also an ethical one, once moral responsibility is correctly interpreted as the counterpart of liability/accountability, these being two sides of the same coin. Saddling OSPs with the responsibility of ensuring that users would not err would have meant falling into a dilemma: either it would have been unethical (see the privacy problem below) and/or it would have been supererogatory. As previous legislation has rightly recognised, OSPs can help, but they are the wrong agents to charge with the ethical responsibility and the legal liability of ensuring that IPR are respected (misplaced responsibility), *and* the demand would have been beyond a reasonable normative course of duty (excessive responsibility). Indeed, it would have been so much so that the supererogatory problem would have caused a cascade of further ethical problems. In particular, it would have badly affected two main civil liberties: freedom of expression and privacy. This has been justifiably attacked in the literature against ACTA. Let us see why.

Decreased freedom of expression

When an agent is asked to behave in a way that is morally right but too demanding, if that responsibility is enforced so rigidly as to make it unlimited (something avoided, for example, by OCILLA, the Online Copyright Infringement Liability Limitation Act, which creates a conditional safe harbour for online service providers), then one alternative left to that agent is to make its task as feasible (and hence less demanding) as possible. In our case, this means that the ethical pressure on OSPs would have caused them to put pressure on their customers, the Internet users. This might actually have been seen—in the mind of ACTA supporters—as a positive outcome. They would not have been the first to

¹⁴ Online Service Providers include Internet Service Providers (ISPs), but also other providers such as email provider, news providers, entertainment providers (games, music, movies), e-shopping sites, e-finance or e-banking sites, e-health sites, e-government sites, educational sites, e.g. Wikipedia.

argue that the supererogatory task is made feasible by current technology. For the sake of argument, let us concede that this is the case. That is, let us assume that current technology could make it possible to monitor all Internet users' relevant activities. I shall return to this problem below. At the moment, it is clear that, among the various 'costs' that such supererogatory imposition outlined above would have forced OSPs to pass on to their customers, one would have been ethical: a reduction in their freedom of expression. The reasoning is simple and can be crudely summarised in the following way: if Alice is charged with guaranteeing Bob's morally good behaviour, and if Alice cannot avoid or attenuate such responsibility, then Alice will make sure that there is as little as possible of Bob's behaviour that she needs to guarantee in the first place, *independently* of whether Bob's behaviour is evil or morally good. Indeed, the ideal scenario for Alice would be if Bob's behaviour were completely constrained to the point of being null. Apply this to the exchange of information of all kinds, and it is obvious that the pressure on OSPs would have ended up limiting the expression of freedom of Internet users. Universalise this principle (all OSPs should ensure that all users behave morally well when it comes to respecting IPR) and you can see that, in the same way as the safest computer is one that is always switched off, the most IPR-respectful OSP is one that prevents its users from exchanging any information, that is, it is one that stops being in business itself. That would have been the end of the Internet as we know it. One may object that systematic monitoring of content would provide OSPs with fantastic data analytics for targeted advertising. So, by preventing copyright infringements—the objection continues—OSP s could also do excellent business. The reply is that this is definitely a 'driver' for OSPs that would be reinforced by such an interpretation of ACTA, but it would be incompatible with users' privacy. And this introduces the next problem.

Reduced privacy

I mentioned above (recall the 'concession' about the technological feasibility of monitoring the Internet) that the second *ethical* effect would have been a reduction in users' information privacy.¹⁵ This follows not only from the supererogatory problem, but also from the problem of

¹⁵ This is also a legal problem, since art. 15 of the eCommerce Directive simply prohibits EU Member States from imposing systematic monitoring obligations on ISPs: '(15) The confidentiality of communications is guaranteed by Article 5 Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.' ACTA would have required changes in the European law. (from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:En:HTML>).

vagueness seen above. OSPs would have been forced to monitor much more closely and intrusively all the informational activities of any Internet user. Relying on the previous reasoning, this second horn of the dilemma can be summarised thus: if Alice cannot avoid being ethically responsible for Bob's behaviour, and cannot stop him altogether, then she better know *exactly* what Bob is up to, anytime, anywhere. So Bob will have no information privacy, at least in principle. It follows that, since we saw that ACTA left to the discretion of each country the exact definition of what constitutes a 'commercial' level of IPR infringement (especially piracy), different agencies might have chosen to monitor, search, and charge individuals in a variety of ways, making 'zero information privacy' a more likely default position, at least in the minds of the users, if not *de facto*. This is a kind of 'informism', to coin a neologism, to which I shall return below.

Let us take stock. We have seen that the ratification of ACTA would have caused an excessive and misplaced kind of responsibility, a radical decrease in freedom of expression, and a severe reduction in information privacy. These are serious ethical objections. Ethical analysis is often seen as the investigation of what is morally good and evil, and the attempt to answer questions about the right behaviour, the good life, or the virtuous character. Sometimes, we forget that it is also the sophisticated art of finding a fine balance between different moral goods, which are all desirable but may be conflicting. In the case of ACTA, I argued that the ultimate goal of promoting and protecting IP *rights* is a morally good thing. However, our current understanding indicates that a defence of IPR should not be achieved at the expense of fundamental civil liberties, another equally good thing, for this would be an unaffordable ethical price to pay, contributing to the huge damage caused to the *infosphere* (Floridi 2013). The real challenge we are facing is to design a legal and ethical system within which a satisfactory balance becomes feasible. To this end, the failure of ACTA may teach us three lessons.

Three lessons for the future

I mentioned above that the indirectly ethical nature of some of the problems caused by ACTA deserved further discussion. This is connected with the first lesson we can learn from ACTA's failure. The main ethical shortcoming of ACTA is that it failed to acknowledge the increasingly vital importance of what I would like to call, with a second neologism, *infraethics*.¹⁶

¹⁶ This is related to, but not to be confused with, what Jonsen and Butler (1975) meant by 'infraethics', which they understood as a particular level of ethical enquiry concerning public ethics, see Daniels (1996), p. 341. On the concept of infraethics see (Floridi forthcoming).

The idea may be quickly introduced by comparing it to a phenomenon well known to economists and political scientists. When one speaks of a ‘failed state’, one refers not only to the failure of a *state-as-a-structure* to fulfil its basic roles, such as exercising control over its borders, collecting taxes, administering justice, providing schooling, and so forth. One also refers to the collapse of a *state-as-an-infrastructure* or environment, which makes possible and fosters the right sort of social interactions; that is, one may be referring to the collapse of a culture of trust, of the presence of, and certainties about, the rule of law, of default expectations about the protection of human rights, of a sense of political community, of civilised dialogue among differently-minded people, of ways to reach peaceful resolutions of cultural, ethnic or religious tensions, and so forth. All these expectations, attitudes, practices, in short such an implicit ‘socio-behavioural infrastructure’, which one may take for granted, provides a vital ingredient for the success of any complex society. It plays a crucial role in socio-political contexts, comparable to the one that we are now accustomed to attributing to physical infrastructures in economics. By analogy, it seems time to acknowledge that the morally good behaviour of a whole population of agents is *also* a matter of ‘ethical infrastructure’ or *infraethics*, to be understood not as a kind of second-order ethical discourse or metaethics,¹⁷ but as a first-order framework of implicit expectations, attitudes, and practices that *can* facilitate and promote morally good decisions and actions. Examples include trust, respect, reliability, privacy, transparency, freedom of expression, openness, fair competition, and so forth. I highlighted ‘also’ and ‘can’ above because it is important to understand that such an *infraethics* is *not* necessarily morally good in itself. Any successful complex society, be this the City of Man or the City of God (even a society in which the entire population consisted of angels, that is, perfect moral agents, needs norms for collaboration), has an implicit *infraethics*. Theoretically, that is, when one assumes that morally good values and the *infraethics* that promotes them may be kept separate (an abstraction that never occurs in reality but that facilitates our analysis), a society in which the entire population consisted of Nazi fanatics could rely on high levels of trust, respect, reliability, privacy, transparency, and even freedom of expression, openness, and fair competition. Clearly, what we want is not just the successful mechanism provided by the right *infraethics*, but also the coherent combination between it and morally good values, such as civil rights. To rely on a previous analogy: the best pipes may improve the flow but do not improve the

¹⁷ For the non-philosopher, metaethics is the branch of philosophy that studies the nature of ethical theories, properties, statements, attitudes, and evaluations.

quality of the water, and water of the highest quality is wasted if the pipes are rusty or leaky.

Turning back to the analysis of ACTA’s failure, the point is that the more complex a society becomes, the more important and hence salient the role of a well-designed *infraethics* is, yet this is exactly what ACTA missed. By focusing on the enforcement of IPR, it failed to perceive that it would have undermined the very *infraethics* that supporters of ACTA hoped to foster, namely one promoting some of the best and most successful aspects of our liberal, information societies. It would have promoted the structural inhibition of some of the most important individuals’ positive liberties and their ability to participate in their information society (Floridi 2009a, b), thus fulfilling their own potential as informational agents. For lack of a better word, ACTA would have promoted a form of *informism*, comparable to other forms of social agency’s inhibition such as classism, racism, and sexism.¹⁸ Sometimes a defence of liberalism may be inadvertently illiberal. If we want to do better, we need to grasp that IPR are part of the new *infraethics* for the information society, that their protection needs to find its carefully balanced place within a complex legal and ethical infrastructure that is already in place and constantly evolving, and that such a system must be put at the service of the right values and moral behaviours. This means finding a compromise, at the level of a liberal *infraethics*, between those who saw ACTA as a simple fulfilment of existing ethical and legal obligations from trade agreements, and those who saw ACTA as a fundamental erosion of existing ethical and legal civil liberties.

The second lesson is environmental, and therefore strictly related to the previous one. ACTA also failed to realise that the digital and the analog, the Internet and the physical environment, the online and the off-line, are now aspects of a single habitat, which I labelled the *infosphere*. In advanced information societies, any regulation affecting how people deal with information is now bound to influence the whole ‘onlife’ habitat within which they live. So enforcing IPR becomes an environmental problem. This does not mean that any legislation is necessarily negative. As is well known, rabbits, introduced in the eighteenth century in Australia, are a pest and invasive species, but the small Indian mongooses, introduced in the nineteenth century in St. Kitts for control of rats and snakes, were a great success. The lesson here is one about complexity: since IPR are part of our *infraethics* and affect our whole environment understood as the *infosphere*, the intended and unintended consequences of their enforcement are widespread, interrelated, and far-reaching. These consequences need to be carefully considered, because mistakes will generate huge problems that will have

¹⁸ On ACTA becoming an obstacle to participate in social and cultural activities see Ellis (2011).

cascading costs for future generations, both ethically and economically. Rabbits in Australia cause millions of dollars of damage to agriculture every year. Their introduction seemed such a brilliant idea at the time. Mongooses in St. Kitts have helped the tourism industry, although that was hardly the goal when they were first introduced. The best way to deal with 'known unknowns' or unintended consequences is to be careful, stay alert, monitor the development of the actions undertaken, and be ready to revise one's decision and strategy quickly, as soon as the wrong sort of effects start appearing. *Festina lente*, 'more haste, less speed' as the classic adage suggests. There is no perfect legislation but only legislation that can be perfected more or less easily. A good agreement may include clauses about its timely update.

The third and last lesson I wish to highlight is one of self-reflection. It is a mistake to think that we are like outsiders ruling over an environment different from the one we inhabit (Floridi 2014). Legal documents such as ACTA emerge from within the infosphere that they affect. We are building, restoring, and refurbishing the house from inside. Precisely because the whole problem of respect, infringement, and enforcement of IPR is an infraethical and environmental problem for advanced information societies, the best thing we could do, in order to devise the right solution, is to apply to the process itself, which one day may lead to a post-ACTA treaty, the very infraethical framework and ethical values that we would like to see promoted by it. This does not mean that ACTA 2 should proceed in the same inclusive way as ACTA 1. Indeed, ACTA 2 should probably drop the holistic approach to all kinds of goods indiscriminately. Instead, it should break up into at least three separate agreements, one about digital products and services, one about manufactured goods, and one on pharmaceuticals. But it does mean that, in each case, it is still the infosphere that should regulate itself from within, not from an impossible without. To put it more simply: we should ensure that we avoid the ethical problems by avoiding the procedural mistakes, and we do this in three, separate agreements, each deserving its specific analysis. All this gives some reason for optimism, to be clarified in the following, concluding remarks.

Conclusion

Regrettably, ACTA turned into a wasted opportunity to tackle a serious problem. Arguably, the infringement of IPR may undermine the development of information societies and seems plainly unethical.¹⁹ One of the most serious

¹⁹ Some caution must be exercised with respect to the exact definition of both IPR and of their infringement, but the point I am making here concerns a fair and shareable definition of both.

collateral damages caused by ACTA's failure is that it has made it more difficult to reach an international agreement on how best to protect IPR. ACTA's ghost may influence the discussion of other trade agreements, such as the *Combating Counterfeit Products Act* (Bill C-56),²⁰ recently introduced by the Canadian Conservative Government in the House of Commons, or the formulation of the *Transatlantic Trade and Investment Partnership* (TTIP, formerly known as TAFTA), currently being negotiated by the European Commission, on behalf of the EU, with the United States.²¹ In short, ACTA has undermined the very infraethics that it was trying to fix. Nevertheless, this should be no reason for despair. The challenge is indeed more complex than ACTA supporters realised, and their failure has actually increased the difficulty of the task ahead, not least because there is now much more mistrust about any similar initiative. But we can learn from our mistakes and, above all, we can ensure that, next time, we harness the skills, ingenuity, expertise, wisdom, and sagacity of all stakeholders, while respecting their interests. This is no small difference. Nobody should have ever thought that it was going to be an easy task. But where few failed many may succeed.

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²⁰ <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6013262&File=42>.

²¹ <http://ec.europa.eu/trade/policy/in-focus/ttip/>.

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