



Rejecting Rapporteur Gallo's Stubborn Defense of ACTA

1. Rapporteur Gallo argues that ACTA does not modify nor is incompatible with EU law. To back such claims, she invokes the EU Parliament's legal services opinion in date of December 8th, 2011.

1.1 The lack of transparency on EP legal services' opinions on ACTA. Some key elements of the legal services' opinions on ACTA have not been made public. The EU Parliament refused to publish them in full, unredacted form, saying that it would “*seriously interfere with the complex ratification process*”¹.

1.2 EP legal services overlook the fact that ACTA would block any reform. The legal services' analysis completely overlooks the fact that ACTA will bind EU lawmakers to a poorly drafted and dangerous text, while constrain their legislative power by blocking any reform of key aspects of EU copyright and patent law.

1.3 EP legal services are contradicted by many other analysis. The opinion has been widely criticized for overlooking issues related to damages, injunctions, border, criminal and extra-judicial measures. It is contradicted by scholars, experts and public institutions on crucial aspects. Here are just a few examples:

- An independent study commissioned by the INTA committee stresses that “*in some cases, ACTA is arguably more ambitious than EU law, providing a degree of protection that appears to go beyond the limits established in EU law.*”²
- Leading European academics have also shown how ACTA clashes both with EU law and with the enforcement provisions of the TRIPS Agreement, particularly on border measures, damages, and lack of safeguards.³
- In an opinion criticizing the EU Commission's IPR Strategy, the European Economic and Social Committee stressed that “*fundamental human rights, such as the right to information, health, sufficient food, the right of farmers to select seeds and the right to culture, are not taken sufficiently into consideration*”.⁴ This is confirmed by the OSCE Representative on Freedom of the Media, Dunja Mijatović, in a letter sent to the President of the EU Parliament.⁵

1.4 ACTA could have disastrous consequences for third countries. By focusing solely on EU law, Mrs. Gallo disregards the fact that in countries where the rule of law is not as strong as in the EU, ACTA could have even more severe consequences for fundamental rights.

1 <http://acta.ffii.org/?p=904>

2 http://www.laquadrature.net/wiki/Against_ACTA#EU_Parliament_INTA_study_-_July_2011_-_Calls_on_MEP_to_refuse_consent_to_ACTA

3 http://www.laquadrature.net/wiki/Against_ACTA#EU_IPR_Academics_-_February_2011_-_ACTA_goes_beyond_EU_law

4 http://www.laquadrature.net/wiki/Against_ACTA#EU_Economic_26_Social_Committee_-_January_2012_-_Fundamental_rights_not_taken_into_consideration_in_ACTA

5 http://www.laquadrature.net/wiki/Against_ACTA#OSCE_media_representative_-_February_2012_-_EU_Parliament_must_reassess_ACTA_to_safeguard_freedom_of_expression

2. The report then goes on to dwelve into some of ACTA's most contentious aspects. Here, rapporteur Gallo commits serious analytical errors.

2.1 The proportionality criterion is not a satisfactory safeguard. Marielle Gallo argues that ACTA's article 6 on proportionality ensures balance between the different rights and interests at stake. However, the proportionality criterion is vaguely defined and remains open to interpretation. It is by no means an appropriate safeguard against a disproportional implementation of the agreement, as she claims.

2.2 Rapporteur Gallo's misinterprets the “commercial scale” threshold. Rapporteur Gallo falsely portrays the “commercial scale” threshold for criminal sanctions by claiming that it would not apply to the activities of individuals sharing files on the Internet. This interpretation misses the point that “commercial scale” is defined to also include acts carried on for an “indirect” commercial or economic advantage. Such definition is over-broad and already widely contested in the context of the IPRED directive. Also, by criminalizing the fact of “aiding and abetting” (art. 23.4 – not part of the EU acquis) infringements on a “commercial scale”, ACTA would criminalize innovative tools and services widely used to distribute online content. Through these provisions, the final text of ACTA unfortunately delivers on the Commission's negotiation mandate to criminalize “*infringements without motivation for financial gain*”⁶.

2.3 Rapporteur Gallo overlooks the risk of privatised copyright enforcement. Mrs. Gallo wrongfully interprets the digital chapter provisions. The article 15 of the eCommerce directive – which rules out any general obligation of monitoring Internet communications – is irrelevant to the analysis, since it only creates obligations for States. ACTA circumvents this crucial safeguard of EU law by calling for “cooperative efforts” between Internet service providers and rights holders (art. 27.3). Internet actors, under the threat of litigation for “aiding and abetting” infringements on a “commercial scale”, could be compelled to implement preemptive measures such as monitoring and filtering, without even being so ordered by public authorities.

2.4 Draft report proposes a pointless compromise. Marielle Gallo concludes her report by conceding that ACTA could be interpreted in ways that are harmful to fundamental rights. Mrs. Gallo therefore proposes that the Commission issues a yearly report on ACTA's implementation by the EU and Member States. However, the Commission's reports would be non-binding, politically biased, and therefore close to meaningless. Rapporteur Gallo further argues that the EU Court of Justice would “immediately sanction” any transposition measure contrary to fundamental rights. However, it is hard to see what ECJ competence Mrs. Gallo is referring to. Preliminary rulings are unfortunately not fit for this purpose.

- **JURI members must recognize that ACTA is a vaguely worded agreement, circumventing democratic procedures to push a repressive trend in the field of copyright, patent and trademark.**
- **ACTA would set in stone today's contentious policies (an impact study is still expected on EUCD and IPRED). It would block any possibility for the EU and national lawmakers to propose positive reforms in this field.**

Rejection is the only option.

⁶ Excerpt of a July 2007 discussion paper submitted in interservice consultation:
http://www.laquadrature.net/wiki/Counter-Arguments_Against_ACTA#Criminalization_of_sharing_was_part_of_the_EU_Commission_ACTA_mandate