



Shedding the light on ACTA

What is ACTA?

Since Spring 2008, the European Union, the United States, Japan, Canada, South Korea, Australia as well as a few other countries have been secretly negotiating a **trade agreement aimed at enforcing copyright and tackling counterfeited goods** (Anti-Counterfeiting Trade Agreement)¹.

ACTA goes way beyond traditional trade agreements by imposing **civil and criminal penalties for both commercial and non-commercial infringements of "Intellectual Property Rights"** (IPR), such as online file-sharing and cross border shipping of generic drugs².

Whereas important debates are taking place on the need to adapt IPR to the digital age, this treaty would **bypass democratic processes** in order to enforce a fundamentally irrelevant regulatory regime. It could profoundly **alter the very openness of the Internet** as we know it by putting an end to Net neutrality.

Are the negotiations on ACTA transparent?

No. Because there is increasing criticism regarding current IPR international law in forums such as the WIPO³, the countries who initiated ACTA have chosen to negotiate **outside of any international organization**.

Talks regarding the agreement have remain secret in spite of the **demands for more transparency** coming from many civil society groups. Members of the European Parliament as well as Parliamentarians in Member States have been **refused access to negotiation documents**. In the United States, a few IPR industries representatives have been granted access to them⁴.

We therefore don't know much about the **exact content of ACTA**, except for the very succinct summaries released by the European Commission and the leaked documents.

1 See a global overview of ACTA written by the Commission: http://www.laquadrature.net/wiki/ACTA_Key_Elements

2 For a discussion of the impact of ACTA on public health, see: <http://www.oxfam.org/en/pressroom/pressrelease/2009-07-15/criminalize-generic-medicines-hurt-poor-countries>

3 See for instance: <http://keionline.org/node/681>

4 The list of the people in the U.S industry who have been granted access to the draft ACTA is available at: <http://keionline.org/node/660>

Would ACTA go beyond current EU law?

The 2000 **e-Commerce directive**⁵ created a regime of limited liability for Internet technical intermediaries (such as Internet access providers and hosting services⁶). This regime ensures that an ISP's role is limited to the transport of data. Under this legal shield, they cannot be held responsible for copyright infringements carried on by their customers on the Internet.

Furthermore, the limited responsibility is complemented by Article 15.1, which provides that:

“Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”

This regime is essential for the **preservation of Net neutrality**. Net neutrality is a founding principle of the Internet that ensures that users face **no conditions limiting access to applications and services**. Likewise, it rules out any discrimination against the source, destination or actual content of the data transmitted over the network. In the words of Tim Berners-Lee, the inventor of the World Wide Web, it is “the **freedom of connection**, with any application, to any party”⁷.

Contrary to the claims of Neelie Kroes, soon-to-be Commissioner for the Digital Agenda, during her confirmation hearing on January 14th, 2010, **ACTA would therefore result in important changes to EU law**. Indeed, leaked documents⁸ originating from the European Commission regarding the draft Internet chapter of ACTA indicate that this limited liability regime (or “safe harbor”) – which is essential to free speech, privacy and innovation in the digital environment - could be brought to an end in order to deter non-commercial file-sharing. According to these documents:

“to benefit from safe-harbours, ISPs need to put in place policies to deter unauthorised storage and transmission of IP infringing content.”

In particular, Internet Service Providers (ISPs) could be forced to implement:

- **blocking and filtering practices**, in order to disable the exchange of copyrighted works through the network.
- **three strikes policies** – or graduated response – through contract law. The Internet access of suspected infringers would be restricted or cut-off after warnings.

Are the measures that may result from ACTA respectful of fundamental rights and freedoms?

The measures currently considered by the European Commission and other ACTA negotiators would allow private actors to implement “three-strikes” schemes and content filtering, thereby **restricting people's access to the Internet**. But because the Internet is now widely recognized as essential to the practical exercise of the freedom of expression and communication⁹, **restrictions to a free Internet access equate to a deprivation of this freedom**¹⁰.

5 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>

6 See articles 12 to 14 of the directive.

7 For a more thorough account of Net neutrality, see La Quadrature du Net's report: *Protecting Net neutrality in Europe*.

8 In particular, a summary of the draft Internet (http://www.laquadrature.net/wiki/EC_on_ACTA_Internet_Chapter) and a more detailed analysis (http://www.laquadrature.net/wiki/EC_on_ACTA_Internet_Chapter)

9 In its decision against the HADOPI law on June 10th, 2009, the French Constitutional Council stated that the freedom of expression and communication “*implies*” the freedom to access the Internet. See <http://bit.ly/7kFZDd>

10 The right to privacy in the digital environment is also at stake here, given the collateral damages that are inherent to any technical

Yet, in countries that respect the separation of powers and obey the rule of Law, the judiciary branch has the the exclusive power:

- to **assess the illegality** of a content or a situation.
- to declare a given **sentence to be proportionate** to the original offense. This is all the more important when one considers how difficult it is to assess the proportionality of sanctions relating to online activities.

Hence, by allowing restrictions to Internet access without the traditional procedural safeguards attached to judicial due process, ACTA would **patently violate fundamental rights**, as protected by article 6 of Treaty on European Union¹¹.

What to do?

As requested by a worldwide coalition of civil society groups in an open letter¹², negotiators need to **establish transparency by disclosing the provisions under discussion**. Once these extremist IPR enforcement measures are debated democratically, it will become clear that they do not rest on a principled basis; that they do not foster socio-economic progress. **It is up to citizens and public-interest groups all around the world to act so that this fundamental debate can take place.**

Also, the negotiations regarding ACTA and international IPR law should be consistent with the resolution voted in 2008 by the European Parliament¹³, which stated that:

*"the Commission should take into account certain strong criticism of ACTA in its ongoing negotiations, namely that it could **allow trademark and copyright holders to intrude on the privacy of alleged infringers without due legal process**, that it could further **criminalize non commercial copyright and trademark infringements**, that it could reinforce Digital Rights Management (DRM) technologies **at the cost of 'fair use' rights**, that it could establish a dispute settlement procedure outside existing WTO structures and lastly that it could force all signatories to cover the cost of enforcement of copyright and trademark infringements."*

At a time when **digital technologies and the Internet allow people to create and spread information, culture and knowledge at virtually no cost**, these old IPR regimes are undeniably outdated. Exporting such provisions through multilateral agreements will only obstruct necessary reforms of copyright and patent law. It will also impose an illegitimate burden on other countries.

Finally, the EU should **refuse any proposal that would undermine citizens' rights and freedoms** and call for the concrete and effective protection of these rights and freedoms in the in the digital age. In particular, the EU must promote the most demanding interpretation of the protection of rights and freedoms as guaranteed by EU law in every policy or negotiation initiative.

means that allow such restrictions (such as Deep Packet Inspection).

11 Article 6 TUE refers to the Charter of Fundamental Rights of the EU and the European Convention on Human Rights.

12 See <http://www.laquadrature.net/en/acta-a-global-threat-to-freedoms-open-letter>

13 See http://www.laquadrature.net/wiki/EP_Resolution_on_ACTA