Three core reasons for rejecting ACTA

One after the other, leaked documents unveil the truth regarding the negotiations of the Anti-Counterfeiting Trade Agreement (ACTA). Public comments focus on specific points or nuances in the positions of the various negotiating parties. In this context of partial information, La Quadrature du Net stresses three core reasons for rejecting the principle of ACTA itself: policy laundering; a "one-size-fits-all" approach that confuses different domains or activities in a manner that is dangerous for access to knowledge, health and innovation; strong risks for fundamental rights such as freedom of expression.

These three points have been repeatedly documented in each and every piece of information that has been disclosed, since the beginning of the ACTA process:

1. **ACTA is policy laundering[1] in which an international negotiation is used to circumvent democratic debates at national or European level and adopt policy that the Parliaments will have no choice but to reject completely or adopt as a whole. Congress might not even be consulted in the case of the United States.**

The intention to circumvent democratic debates was apparent from the start: in July 2007, David O'Sullivan, then Director General for DG Trade of the European Commission, sent a cover letter on the negotiating guidelines for ACTA in inter-service consultation. The letter said that the aim of ACTA was *"an increased cooperation among 'like-minded countries'"* and that the agreement *"should include provisions on criminal liability, as well as on procedural rules [...] Finally, it would foresee 'soft law' commitments about increased cooperation and coordination among enforcement authorities, technical assistance and partnerships with industry"*. The accompanying discussion paper planned to establish criminal sanctions for *"significant willful infringements without motivation for financial gain to such an extent as to prejudicially affect the copyright owner (e.g. Internet piracy)"*, thus indisputably trying to change the existing EU legal framework. While formally respecting the obligation to inform and obtain a mandate from EU Member States, negotiations have left European citizens, their elected representatives and member countries of multilateral organizations in a cloud of misinformation. A typical example lies in the fact that, despite repeated announcements that the agreement would not create harsher enforcement than current EU law (*acquis*), leaked texts demonstrate that EU negotiators have pushed for provisions that are seriously endangering fundamental rights and are not in the present community acquis (see point 3 below). In the US, the risk of policy laundering is no less evident: President Obama has announced that he would adopt ACTA as a "sole executive agreement" (without parliamentary approval). Eminent legal scholars argue that such a procedure raises constitutional concerns

2. **The promoters and drafters of ACTA have created a mixed bag of titles[2], types of infringement and enforcement measures, in which life-endangering fake products and organized crime activities are considered together with non-for-profit activities that play a role in access to knowledge, innovation, culture and freedom of expression. ACTA would create a *de facto* presumption of infringement.**

Though the treaty is titled as "anti-counterfeiting", its real scope includes "piracy" in the most misleading sense, including unauthorized non-commercial copying. The promoters of ACTA claim that it will not change the nature of "intellectual property rights" (IPR), just enforcement. However, new types of enforcement can radically alter the nature of a monopoly right. The application of extreme preventive measures to alleged patent infringement transform them into nuclear weapons against access to innovation and reverse in practice the burden of proof of infringement. The generalization of abusive sanctions for the circumvention of technical protection measures negates in practice many user prerogatives that are essential to creative activity, access to culture or even basic education in developing countries. It would also create important competitive barriers for authors and users of free software. When associated with hardware implementation[3] these provisions are a giant gift to the dictatorial regimes to come. ACTA promoters see the world as a war field between good right owners and criminal infringers[4]. However, the real world is more complex: many legitimate activities find themselves the target of allegations of infringements. For copyright it can be the case for fair use, exceptions, limitations and other recognized user prerogatives. For patents, non-infringing innovation and products can be claimed to infringe and standardization can be hindered. Trademarks can be abusively used against freedom of expression. If a legal framework is adopted that creates -even indirectly- a form of presumption of infringement, the public interest will be a collateral victim of this simplistic view. The mixed-bag approach is not only harmful to innovation, knowledge and culture, it is also dangerous for strong enforcement itself where it is necessary.

3. **In the negotiations, the EU is pushing the worse parts of the former directive proposal on criminal sanctions for IPR enforcement (IPRED2, withdrawn because of uncertain legal basis), that is criminal sanctions for abetting or inciting to infringement**.

Taken to the extreme, this could lead to a repressive legislation criminalizing those who disagree with it: let us remember that the IPRED 2 proposal was criminalizing "inciting" to "commercial-scale infringement" even when the inciting itself had no commercial aim. Even if the application of such provisions was limited to those who are currently accused by IPR interests or some goverments of inciting or abetting infringement, one should remember that the scope of these accusations actually includes linking, Internet Service Providers, and the very neutral nature of the Internet itself.

ACTA represents also an unprecedented step in extending the interpretation of "commercial scale" as including activities without motivation for financial gain. This Newspeak definition departs from all the valuable tradition of copyright and author rights, by turning them against the public.

1 "Just as money laundering consists in dissimulating the criminal origin of funds by recycling them in legal activities, policy laundering uses international organizations to put in place policy that is resisted by national institutions. Adopted as decisions which states are forced to implement, these policies circumvent democratic debate: 'Laundering is thus obtained at the cost of a circumvention of legislative processes'." Mireille Delmas-Marty, *Libertés et sûreté dans un monde dangereux*, Seuil, 2010, p. 133, our translation. The quote in the quote is from Colombe Camus, in *La guerre contre le terrorisme*, Editions du Félin, p. 109.

2 Patents, copyright, trademarks, utility models, etc.

3 For instance, the so-called Trusted Computing chips.

4 Let's us remind a recent case of "non-authorized" posting of copyrighted videos where strong allegations exist that they were committed on behalf of right holders. Such situations are not exceptions.