



Analysis

Support for ACTA wanes following mass protests

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The Agreement will require all signature countries to criminalise copyright infringement and grants private companies an inordinate amount of power to police the internet. A fierce public backlash in Europe has forced the European Commission to refer ACTA to the European Court of Justice.

Ratification of the Anti-Counterfeiting Trade Agreement (ACTA) in Europe has been delayed indefinitely following widespread public protest. This highly secretive and undemocratic agreement, which has been much criticised for its damaging implications for individual privacy and freedom of expression over the internet, has now been referred by the European Commission to the European Court of Justice (ECJ) to rule on its compliance with EU law. ACTA is supposedly a trade agreement but it resembles an international treaty: it would substantially alter the criminal law of signatory countries by requiring them to introduce criminal sanctions for copyright infringement. ACTA's vague wording could lead to websites and internet users being unfairly punished. The agreement also places enormous pressure on internet service providers (ISPs) to monitor the downloading habits of their subscribers and to act in tandem with copyright holders (i.e. the entertainment industry) to prevent infringements. ACTA would thus bestow on private companies an inordinate degree of power to police the internet including "expeditious" enforcement procedures that would bypass legal due process. ACTA's critics have argued that the agreement is in breach of EU law, and its loss of political support following large scale public demonstrations across Europe and subsequent referral to the ECJ has been heralded as a major victory. However, the level of corporate lobbying behind the agreement is so strong that campaigning organisations such as European Digital Rights (EDRi) have been quick to warn that ACTA will not be easily defeated.

The drafting of ACTA

The creation of ACTA was first discussed by the US and Japan in mid-2006. Preliminary talks followed in late 2006 and 2007 and now included the European Union (represented by the European Commission, the EU Presidency and delegates from each of its member states), Canada and Switzerland. Formal negotiations began in June 2008 with the number of participating countries widening further to include Australia, New Zealand, Morocco, Mexico, South Korea and Singapore. Following ten further rounds of negotiations, a final

version of ACTA open to signature was released by the European Commission on 27 May 2011.

ACTA's drafting process has been widely condemned for its lack of transparency and democratic legitimacy. National parliaments and civil society organisations were excluded and major international organisations working in relevant fields were bypassed, such as the World Trade Organisation, the World Intellectual Property Organisation and the Organisation for Economic Cooperation and Development. US diplomatic cables published by Wikileaks reveal how US negotiators deliberately avoided any form of collaboration with these bodies. [1] Instead ACTA will create its own governing body, the "ACTA committee," to monitor implementation, propose changes to the agreement - with no requirement for public consultation - and admit new countries. The European Parliament and US Senate were denied access to the details of ACTA negotiations and, like domestic law-makers and the general public, were forced to rely on leaked documents for information. The Electronic Frontier Foundation concludes: "Both in substance and in process, ACTA embodies an outdated top-down, arbitrary approach to government that is out of step with modern notions of participatory democracy." [2]

It is striking that an Agreement intended to have a global impact was devised by only 38 countries. ACTA has been criticised as an example of powerful western countries dictating policy to the rest of the world. A diplomatic cable published by Wikileaks quotes a Japanese official as saying: "the intent of the agreement is to address the IPR [intellectual property rights] problems of third-nations such as China, Russia, and Brazil, not to negotiate the different interests of like-minded countries." [3] Yet none of these countries, nor India, were invited to attend or contribute to negotiations despite being the world's largest emerging economies as well as major sources of pirated merchandise. The digital rights advocacy group La Quadrature du Net believes that the US's priority has always been "to achieve the highest standards in sanctions and ensure that ACTA's scope is as broad as possible." [4] They argue that the inclusion of Mexico and Morocco – developing countries the US has had favourable dealings with in the past – was an attempt to lend legitimacy to the agreement.

ACTA was signed in October 2011 by the US, Japan, Canada, Australia, New Zealand, Morocco, Singapore and South Korea. In Europe, ACTA must be approved both by individual Member States and the EU because it contains criminal sanctions that fall outside the scope of EU law. Having received varying degrees of scrutiny - in the UK the House of Commons EU Committee deemed ACTA to be a "document not raising legal or political questions requiring a report to the House" - 22 EU Member States signed the agreement in Tokyo on 26 January 2012. [5] Only Cyprus, Estonia, Germany, Holland and Slovakia have yet to do so. The Council of the European Union had already adopted ACTA without prior notice or debate in December 2011 at an unrelated Council meeting on agriculture and fisheries. The European Parliament must now vote on whether to "consent" to the agreement and signature countries must ratify it. If ACTA is not approved by the European Parliament and signed and ratified by every member state it will not come into force anywhere in the EU. Domestic parliaments are responsible for ratification which means that ACTA will finally be in the hands of national parliaments and subjected to at least some degree of democratic due process (with the notable exception of the US where ACTA was signed by the President as an "executive agreement" without Senate approval). At this stage ACTA can only be accepted or rejected in its entirety; it is not open to amendment.

ACTA's impact on the digital world

ACTA requires all signature countries to alter their laws and introduce criminal sanctions for copyright infringement. For a supposed trade agreement this is virtually unprecedented, and makes ACTA's secretive and undemocratic origins all the more objectionable. Intellectual property rights are not covered by EU law because the only proposal to have been made was rejected, and ACTA's provisions are more extensive than those EU lawmakers had proposed. Section 4 states:

*Each party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale. For the purposes of this Section, acts carried out on a **commercial scale** include at least those carried out as commercial activities for direct or **indirect economic or commercial advantage**. [6] (emphasis added)*

This will apply to online activity in addition to counterfeited merchandise (such as fake watches, DVDs etc.). Section 5 stipulates that:

Each Party shall ensure that enforcement procedures...are available under its law so as to permit effective action against an act of infringement of intellectual property rights which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements. [7] (emphasis added)

EDRi has condemned the vague wording of these sections, arguing that poorly defined terms such as **commercial scale** and **indirect economic advantage** – with no mention of criminal intent - will result in extremely low thresholds for the imposition of criminal sanctions. "Such unclear wording is simply inappropriate in a key provision, on whose meaning the proportionality and the legality of the Agreement rests." [8] That ACTA's provisions are open to a wide degree of interpretation makes it difficult to predict precisely how they will be implemented by each signatory country.

Criminalising those who take **indirect economic advantage** from copyright infringement is likely to put enormous pressure on ISPs. Section 4 states specifically that each country "shall ensure that criminal liability for aiding and abetting is available under its law." This could include simply providing a copyright infringer with an internet connection, meaning that ISPs could be held accountable for the illegal downloads of their subscribers and thus would be incentivised to police their online behaviour. To this end ACTA stipulates that ISPs must work closely with copyright holders. Section 5 asserts that "each party shall endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement." Further:

*A Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose **expeditiously** to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement. (emphasis added)*

Copyright holders will therefore be afforded significant power over ISPs and their subscribers. La Quadrature Du Net denounced ACTA as a “bullying weapon for the entertainment industries” that is “incompatible with democratic imperatives and represents a real threat for fundamental freedoms.” [9] Certainly it could have a chilling effect on internet growth and innovation and the free dissemination of information online. ACTA states that each country’s enforcement procedures must cover “the unlawful use of means of widespread distribution for infringing purposes” which La Quadrature Du Net believes could lead to the indirect criminalisation of blogging platforms, free software and peer to peer networks. Further, new criminal sanctions for “aiding and abetting” copyright infringement mean that websites could face punitive measures should they link to or publicise another website that is unlawfully sharing copyrighted content. Simply hosting a copyrighted image without permission – with no intent to sell or redistribute it – could now be penalised for gaining **indirect economic advantage**. This will greatly affect websites that rely on user generated content because they could be held legally responsible for the subject matter of uploads made by their users. These sites may have little choice but to conduct pre-emptive censorship of user contributions, stifling creativity and freedom of expression in the process. New internet companies and websites are likely to have a harder time getting up and running; it is difficult to envisage how sites like YouTube and Flickr could have prospered had they been created under ACTA.

The prominent role afforded to private companies in policing the internet is also alarming, particularly because ACTA allows for **expeditious** enforcement procedures that are likely to bypass legal due process. The implications of this are deeply worrying because establishing culpability in cases of online copyright infringement is typically a difficult process. As the European Data Protection Supervisor emphasises:

[ACTA’s] monitoring is likely to trigger many cases of false positives. Copyright infringement is not a straight ‘yes’ or ‘no’ question. Often Courts have to examine a very significant quantity of technical and legal detail over dozens of pages in order to determine whether there is an infringement. [10]

ACTA fails to acknowledge these complexities and indeed makes little distinction between an internet file sharer and someone selling counterfeit goods. Expeditious punishment could lead to vast numbers of internet users being unfairly targeted and severely punished. Early drafts of ACTA demanded that persistent copyright offenders be disconnected from the internet and though this requirement has since been removed from the text, a private document published by the European Parliament obtained by EDRi indicates that this is the type of sanction that could be meted out. This power already exists in France under the three-strike HADOPI law and will be introduced in the UK if the Digital Economy Act comes into full effect.

Both of these laws, as well as the recently defeated Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA) in the US, were lobbied for heavily by the entertainment industry. ACTA is no exception, with the Motion Picture Association of America one of its most vociferous advocates. Moreover, while the public and domestic parliaments of negotiating countries were denied access to the content of discussions, an advisory board of US-based multinational corporations was consulted frequently on draft versions of ACTA. [11] Freedom of information requests also revealed that companies including Google, eBay, Dell, Intel, the Business Software Alliance, Rupert Murdoch’s News Corporation, Sony Pictures and Time Warner signed non-disclosure agreements and received copies of the text.

The level of corporate involvement in the drafting process and the subsequent power afforded to copyright holders in ACTA's final draft has led to accusations that the Agreement has been introduced in large part to protect the entertainment industry's outdated business model. ACTA's chapter on civil sanctions even goes so far as to substantiate the much discredited notion that an illegal download equates directly to a lost sale. Copyright holders have long used this flawed logic to estimate huge revenue losses and argue for harder sanctions against online copyright infringers. EDRi argues that the prioritisation of "private-sector repressive measures aimed at copyright protection over the fundamental rights to privacy and freedom of communication and association" violates both the European Convention on Human Rights and the EU Charter of Human Rights. Moreover, ACTA itself "is a clear violation of Article 21 of the TEU [Treaty of the European Union] which requires support for democracy and the rule of law in the Union's international relations." [12] An August 2011 report by Douwe Korff, Professor of international law at the London Metropolitan University, and Ian Brown, senior research fellow at the University of Oxford, reached a similar conclusion:

Overall, ACTA tilts the balance of IPR protection manifestly unfairly towards one group of beneficiaries of the right to property, IP right holders, and unfairly against others. It equally disproportionately interferes with a range of other fundamental rights, and provides or allows for the determination of such rights in procedures that fail to allow for the taking into account of the different, competing interests, but rather, stack all the weight at one end. This makes the entire Agreement, in our opinion, incompatible with fundamental European human rights instruments and standards. [13]

The backlash in Europe

The day after 22 EU Member States signed ACTA, the European Parliament's lead negotiator on the Agreement, Kader Arif, resigned in protest. He said:

I want to denounce in the strongest possible manner the entire process that led to the signature of this agreement: no inclusion of civil society organisations, a lack of transparency from the start of the negotiations, repeated postponing of the signature of the text without an explanation being ever given, exclusion of the EU Parliament's demands that were expressed on several occasions in our assembly.

As rapporteur of this text, I have faced never-before-seen manoeuvres from the right wing of this Parliament to impose a rushed calendar before public opinion could be alerted, thus depriving the Parliament of its right to expression and of the tools at its disposal to convey citizens' legitimate demands.

This agreement might have major consequences on citizens' lives, and still, everything is being done to prevent the European Parliament from having its say in this matter. That is why today, as I release this report for which I was in charge, I want to send a strong signal and alert the public opinion about this unacceptable situation. I will not take part in this masquerade. [14]

In Poland, thousands of demonstrators quickly took to the streets to protest against their government's decision to sign the agreement. Government websites were subjected to denial of service attacks and Polish MEPs were sent over 100,000 emails urging them to reject ACTA. Poland's Prime Minister Donald Tusk responded on 3 February by suspending

the country's ratification of the agreement pending wider consultation and more careful analysis. Buoyed by this success, protests soon followed across Europe. They were organised chiefly by civil society groups who, having been marginalised for so long, seized on the opportunity to have a direct influence on ACTA's ratification. On 11 February, demonstrations were held across four continents and in over 200 European cities. The largest protests were staged in Germany where over 100,000 people took to the streets. The German government had already backtracked a day earlier and agreed to postpone signing ACTA until the European Parliament had reached a decision on whether to consent to its implementation. Holland, another of the five EU countries yet to sign the agreement, quickly adopted the same position. Bulgaria followed Poland's lead and announced it would not ratify ACTA until Member States had formulated a unified position. The loss of support for the agreement has been dramatic. The Slovenian ambassador to Japan, who signed the agreement on behalf of his government, went so far as to issue a public apology:

I signed ACTA out of civic carelessness, because I did not pay enough attention. Quite simply, I did not clearly connect the agreement I had been instructed to sign with the agreement that, according to my own civic conviction, limits and withholds the freedom of engagement on the largest and most significant network in human history, and thus limits particularly the future of our children. [15]

The President of the European Parliament, Martin Schulz, publically criticised the agreement on German television: "I don't find it good in its current form." He also said that the balance between copyright protection and the individual rights of internet users was "inadequately anchored in this agreement." [16]

On 22 February the European Commission responded to growing pressure and referred the agreement to the European Court of Justice so that it could "assess whether ACTA is incompatible - in any way - with the EU's fundamental rights and freedoms, such as freedom of expression and information or data protection and the right to property in case[s] of intellectual property." [17] One might ask why this was not done before the European Council and most Member States signed the agreement, but it is a welcome move nonetheless. The European Parliament vote on ACTA was originally intended to be held in June 2012, but given the ECJ typically takes 12 to 24 months to make a ruling it is likely to be pushed back until 2013 or 2014.

The prospect of the European Parliament or a Member State refusing to ratify and thus nullifying ACTA (in the EU at least) is stronger than ever. Member state governments and EU institutions alike were undoubtedly unprepared for the scale of public dissent directed towards the agreement. But while ACTA is floundering, EDRi has been quick to caution against complacency. [18] The now elongated timeframe for ratification could cause ACTA protests to lose momentum and gives lobbyists added time in which to manoeuvre. One strategy lobbyists could pursue would be to encourage the European Parliament to approve ACTA by "conditional consent" on the basis of assurances made by the European Commission of its proper implementation. EDRi also warns that it is by no means certain that the ECJ's judgement will be entirely favourable to those hoping to see ACTA scrapped and could instead be used to legitimise the agreement. The level of corporate lobbying for the agreement has been so intense that it is unlikely to go away quietly.

Endnotes

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