

What Makes

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So Controversial

(and why MEPs should care)



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What Makes ACTA So Controversial

What is ACTA?

The Anti-Counterfeiting Trade Agreement (ACTA) is a plurilateral agreement which proposes international standards for enforcement of intellectual property rights. The Agreement, negotiated by a handful of countries¹ in coordination with certain parts of industry, is controversial in both process and substance.

The purpose of this booklet is to briefly outline the issues surrounding the Anti-Counterfeiting Trade Agreement (ACTA), providing an insight into the reasons behind the widespread opposition to the proposal.

The way in which ACTA was negotiated has robbed it of both democratic credibility and legal clarity. If ratified, it will also have major implications for freedom of expression and access to culture, privacy, in addition to harming international trade and stifling innovation.

ACTA will almost certainly fail if the European Parliament votes to reject it. The fact that some countries have already signed (but not ratified) the text has little real meaning in international law.

Given the problems identified with this agreement, the authors of this booklet strongly encourage European policy makers to thoroughly consider the implications of ACTA, and **without satisfactory, credible assurances and clarifications, we urge the European Parliament to vote "no" on ACTA in its upcoming "consent" procedure.**

1. Australia, Canada, the European Union, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States

Lack of Democratic Credibility

ACTA

- > **ACTA has bypassed established multilateral forums**, such as WIPO and the WTO, which are based on democratic principles and openness; with clear procedural guarantees. Multilateral diplomacy will not survive if developed countries simply ignore agreed forums whenever they do not get their way.
- > **ACTA was negotiated behind closed doors**, leaving out most developing countries, with little democratic accountability at UN, EU or national level.
- > **ACTA seeks to create a new institution** out of an opaque process, the "ACTA Committee," without defining the guarantees or obligations for this new body to operate in an open, transparent, and inclusive manner that provides for public scrutiny.²
- > **The unelected "ACTA Committee" will be responsible for the implementation and interpretation of the Agreement**, deciding the meaning of the very vague wording *after* the Parliament have given their approval.³
- > To date, **no party to ACTA has provided full public access to the negotiating documents**, which are necessary to interpret the many ambiguous and unclear elements of the text. US business did have access to some documents, on condition that they sign a non-disclosure agreement. The European Commission still argues that there was and is no secrecy surrounding ACTA.⁴
- > **The Commission did not carry out any impact assessment specifically on ACTA**, but reused old ones produced for the Intellectual Property Enforcement Directives (I and II), despite the wider range of measures proposed in ACTA. No impact assessment on the impact on fundamental rights, particularly in relation to third countries, which will often not have the same privacy, free speech and rule of law safeguards as in the EU, was undertaken.

2. Chapter V Article 36 ACTA.

3. Article 36.2 ACTA.

4. The Electric Frontier Foundation (EFF) and Knowledge Ecology International (KEI) in the US have been denied access to documents. Four months after their original request, EDRI still has not received an adequate response to its request to the European Parliament for access to the documents that it holds.

Threats to Free Speech and Access to Culture

- **As the Economic and Social Committee has stressed in an opinion adopted in January 2012, the interests of rightsholders are put ahead of free speech, privacy,** and other fundamental rights.⁵
- **ACTA would place the regulation of free speech in the hands of private companies** as it imposes obligations on states to encourage third parties to police online content, such as Internet intermediaries (eg, ISPs), who are ill-equipped to regulate online speech.⁶ This approach was specifically condemned by the UN Special Rapporteur on Freedom of Expression.⁷
- **ACTA could impede making use of society's cultural heritage** as it increases the penalties and criminal risks for using works where the owners or copyright holders are difficult or impossible to identify or locate (so-called "orphan works").
- The final wording of the Agreement, the meaning of which won't be clarified until after ACTA has been ratified, is vague and risks being interpreted in ways which **is likely to criminalise large numbers of citizens for trivial offences.**⁸

5. This is explicit in, for example, footnote 13, where Internet intermediary liability protections (which remove incentives on intermediaries to interfere with private Internet traffic of all citizens) are only permissible when the narrow interests of rightsholders are protected. This approach directly contradicts the European Court of Justice rulings in the Scarlet/Sabam (C-70/10) and Telefonica/Promusicae (C-275/06) rulings.

6. Article 27.2 & Article 8.1, ACTA

7. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May, 2011

8. ACTA's vague wording leaves the door open for countries to introduce the so-called three-strikes rule, or other disproportional enforcement measures, which would see Internet users cut off if they continued to download copyrighted material; and the issue of "commercial scale", which includes "direct and indirect economic or commercial advantage".

Dangers to Privacy

- **ACTA pushes internet providers to carry out surveillance of their networks and disclose the personal information of alleged infringers to rightsholders.** As lawyers and alleged copyright owners in Europe already use coercive tactics to exploit innocent users by charging large sums of "settlement" payments to avoid court appearances, this is a policy that the EU should seek to prohibit and not seek to export.⁹
- **Increased intermediary liability would wrongly incentivise internet providers to carry out surveillance of their networks and implement more intrusive means of identifying alleged infringers,** such as wide-scale monitoring of the communications via "deep packet inspection," enabling gross violations of user privacy.

Hindrances to Innovation

- **ACTA could have a chilling effect on innovation.** Bearing in mind that innovation, such as software development, often takes place in legal "grey zones," it appears inevitable that ACTA will inhibit new digital and other industrial initiatives due to the fear of high financial penalties and criminal measures in cases of unintentional breaches of intellectual property.¹⁰
- **Harsher fines will create disincentives for business start ups** who cannot afford to fight litigation.
- **ACTA could encourage anti-competitive behaviour.** As policing responsibilities are imposed on Internet intermediaries, smaller Internet companies will not have the capacity to implement the policing requirements, which will give a significant advantage to larger competitors.

9. Two prominent examples are <http://bit.ly/g9IUsl> and <http://bit.ly/9aHDEn>

10. Section 4: Criminal Offences, ACTA

ACTA

Harm to Trade

- Even though the EU would consider ACTA a legally binding treaty, the United States has already made it clear that it sees ACTA as a non-binding “understanding.” This could create problems of legal uncertainty regarding the status of ACTA and **gives the US increased flexibility that will provide a competitive advantage over the EU.**
- The proposals affecting **privacy and free speech elements in ACTA will be exponentially more dangerous in countries which lack fundamental rights legislation.**
- **ACTA could create unfair barriers to international trade.** As China already proves, informal and non law-based arrangements with Internet providers can easily be used as a non-tariff barrier to trade.

Lack of Legal Clarity

- **The wording of ACTA is vague**, which creates legal uncertainty on various key terms.¹¹
- By introducing higher enforcement standards than those that currently exist (e.g., TRIPS), with only vague and unenforceable references to safeguards, **ACTA is not aligned with current international legal standards.**¹²
- **ACTA fails to meet European standards on the protection and promotion of universality, integrity and openness of the internet** as outlined by the Council of Europe, which has asserted that “States have the responsibility to ensure, in compliance with the standards recognised in international human rights law and with the principles of international law, that their actions do not have an adverse transboundary impact on access to and use of the Internet.”¹³

11. Article 23.1: “commercial scale” could imply criminal procedures for indirect economic advantage and could also imply targeted monitoring on IP addresses to verify the scale of copyright infringement; Article 27.1: no definition of the “digital environment” and “expeditious remedies”; Article 27.2: no definition of “digital networks”

12. ACTA frames “commercial scale” in much broader and vaguer terms than previous agreements like TRIPS, leaving room for interpretation, effectively preventing the determination of proportionate enforcement (Article 23.1)

13. Recommendation CM/Rec(2011)8 of the Committee of Ministers to member states on the protection and promotion of the universality, integrity and openness of the Internet, Adopted on 21st September 2011: <http://bit.ly/rewDvf>

Conclusion

ACTA risks having serious implications as it fails to find the right balance between protecting intellectual property rights and preserving the fundamental rights of society as a whole, such as freedom of expression and access to information, culture, and privacy.

The European Parliament has already highlighted the problematic issues of the Agreement in its own study of ACTA, including its serious legal flaws, stating that it is, **“difficult to point to any significant advantages that ACTA provides for EU citizens beyond the existing international framework.”**

The study advises that, **“Unconditional consent would be an inappropriate response from the European Parliament, given the issues that have been identified with ACTA as it stands.”**¹⁴

We encourage European policy makers to fully consider the implications of ACTA.

Without further satisfactory assurances and clarifications, we request that the European Parliament votes “no” on ACTA in its upcoming “consent” procedure.

14. <http://bit.ly/qwYwF4>

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