ACTA and its "safeguards"

In any national or international legal document which touches on fundamental rights, such as the freedom of communication and the right to privacy, it is clearly crucial to build in robust safeguards. This is essential to ensure balance and proportionality. ACTA contains far-reaching demands on injunctions, access to personal information, criminalisation and policing of communications by private companies. Are its safeguards robust enough to ensure balance, both in the EU and – in order to respect the EU's treaty obligations to advance fundamental rights in international relations – in third countries?

Criminal sanctions restricted to "commercial scale" infringements

ACTA refers to "commercial activities" but fails to define them. It then broadens its scope to activities undertaken for "direct *or indirect* " economic advantage. As *any* infringement of any intellectual property right involves an indirect economic advantage, this broadening of the scope appears to render the restriction meaningless. The scope is then further extended to "aiding and abetting" which would apply to third parties, such as Internet intermediaries. Would failure to incur the cost of imposing widespread surveillance of networks be considered an indirect economic advantage? Would failure to disconnect a paying customer, who is accused (but not convicted) of infringements be considered "aiding and abetting" the alleged infringement? This would clearly be grossly disproportionate but possible, despite the "safeguards".

Disclosure of information

Article 4.1 of ACTA is written wholly as a safeguard clause. However, it only relies on whatever privacy legislation that may have already existed in the countries that sign up to the Agreement. ACTA's provisions include disclosure of personal information and processing of personal data within the context of enforcement and cooperation in the private sector. Parties to ACTA have no obligation whatsoever to protect privacy as a result of this "safeguard". The only protection provided is that ACTA does not oblige (but does not prohibit) parties to contradict their existing privacy legislation.

Digital chapter and support for "fundamental principles"

The digital chapter (Articles 27.2, 27.3 and 27.4) refers to the need to preserve "fundamental principles such as freedom of expression, fair process, and privacy". In the absence of any clarity about what "fundamental principles" might mean (the drafters chose not to refer to "fundamental *rights*"), this appears to be entirely unenforceable and, as a result, meaningless.

Worse still, the negotiators chose to avoid referring to either the right to a "fair trial" or the right to "due process" and referred to a "fundamental principle" of international law: "fair process". Fair process, as confirmed by the European Commission in response to Parliamentary question (E-8444/2011) is not a principle, let alone a "fundamental principle" of international law at all. This legal fiction is repeated no fewer than three times in Article 27 of ACTA.

Imbalance of rights

The basically meaningless "safeguard" in Article 27 is further undermined by the associated footnote. It explains that Internet intermediary liability protections – which are a core element of an open Internet and are central to its success - are only permissible if the interests of rightsholders are first taken into account. A situation where one narrow business interest (IPR) is given the same importance as both the interests of another business interest (Internet providers) and the whole of society, is in direct contradiction to the case-law of the European Court of Justice in the Telefonica/Promusicae (C275/06) and, in particular, the Scarlet/Sabam (C70/10). The latter explained that one set of rights (as in ACTA) may not be given precedence over another, but that a "fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other." Footnote 13 of ACTA gives the interests of rightsholders clear precedence and is, consequently, in contradiction with EU law.

The "safeguards" in ACTA are meaningless.

European Digital Rights
Rue Montoyer 39/9, B-1000 Brussels Tel:+32 (0)2 550 4112
E-Mail: brussels@edri.org, http://www.edri.org