



LEAKED ACTA DIGITAL ENFORCEMENT CHAPTER

Frequently Asked Questions

1. Is the Anti-Counterfeiting Trade Agreement (ACTA) only about counterfeiting?

No. Counterfeiting involves the production of fake goods which fraudulently profit from trademark owners and harm consumers' confidence. ACTA does contain provisions strengthening enforcement against counterfeit goods, but it also covers a far greater range of issues, including mandated penalties for non-commercial copyright infringement, worldwide Internet regulation and world trade in generic medicines.

2. What is this document?

This is ACTA's Digital Enforcement Chapter. It is section 4 of Chapter 2, the chapter of the agreement focused on establishing global norms for intellectual property law. Negotiators have stated that ACTA will have six chapters: (1) Initial Provisions and Definitions; (2) the Legal Framework for Enforcement of Intellectual Property Rights covering Civil Enforcement, Border Measures, Criminal Enforcement and Enforcement of Intellectual Property Rights in the Digital Environment; (3) International Cooperation; (4) Enforcement Practices; (5) Institutional Arrangements; and (6) Final Provisions.

3. Is this chapter about counterfeiting?

No. This chapter is mostly about copyright infringement. Although it is vague in this document whether non-commercial infringements are included from this document, provisions from the Border Measures section previously made public indicate that the definition of piracy will change current international norms and expand the scope beyond catching organised criminal networks smuggling goods that this agreement is purported to target. This chapter addresses Internet users and covers non-commercial activities on digital network, not counterfeiters.

4. Does the ACTA Digital Enforcement chapter include a "three-strikes" Internet disconnection approach for alleged repeat copyright infringers?

Yes. Footnote 6 indicates that US negotiators intend that ISPs would be required to adopt Three Strikes Internet disconnection policies in order to get the benefit of "safe harbours" or limitations on ISPs' liability for copyright infringement. This chapter requires countries that sign on to ACTA to have, or introduce, secondary liability for ISPs for copyright infringement. In order to avoid or limit their liability, ISPs will want to take advantage of the safe harbours and will therefore feel obliged to adopt Three Strikes disconnection policies. Thus, although ACTA would not mandate signatory countries to pass Three Strikes legislation, Three Strikes would become the new global norm by creating powerful incentives for ISPs to adopt such measures via self regulation. This would avoid the democratic barriers faced by a Three Strikes systems based on the rule of law.



5. Does the proposal attempt to impose a DMCA-style “notice and takedown” system globally?

Yes. This chapter would require ACTA countries to adopt a “notice and takedown” regime based on the US Digital Millennium Copyright Act. This is clear from section 3.b.2 of the document which describes the process of issuing and receiving notices. The imbalance of power between corporate rightsholders and Internet users under the US regime has shown its vulnerability to private party censorship of critical commentary and political speech, as documented by the Chilling Effects project (<http://www.chillingeffects.org/weather.cgi?archive=all>) and the Electronic Frontier Foundation's Takedown Hall of Fame (<http://www.eff.org/takedowns>).

Without substantial consumer protection and due process safeguards and incentives for ISPs to protect their customers, “notice and takedown” schemes will be abused and will result in the unjust removal of Internet users' content. For these reasons, some countries, such as Canada, previously decided to introduce the notice-notice (see <http://www.michaelgeist.ca/content/view/1705/125/>) regime instead. ACTA would reverse that decision and restrict the options available to countries.

6. What are the dangers of making third parties liable for intellectual property infringements?

The leaked ACTA digital enforcement chapter requires ACTA countries to have or to establish third party liability without defining the circumstances which would trigger that liability. The explanations provided in footnote 1 make it clear that countries will be asked to harmonise to the US standard of secondary liability. The “inducement” standard in footnote 1 comes from the 2005 decision of the US Supreme Court in *MGM et al v. Grokster et al.*

The principles which underlie the concept of “contributory infringement” vary substantially from country to country. There is no international agreement on the standard that should apply. Hence, some of the terms used in footnote 1, for example “inducing”, have no clear meaning at international level or in most Member States and it is thus also unclear whether national provisions on “contributory infringement” would satisfy the proposed standard.

The EU understands the current proposals in this regard as providing for an international minimum harmonisation regarding the issue of what is called in some Member States “contributory copyright infringement”. This concept does not exist in the current body of EU-law (the so-called *acquis communautaire*) and in the law of several Member States. As such, the use of this term should be avoided and inclusion of this term is in clear breach of the negotiating mandate, which does not permit the Commission to go beyond the *acquis*. This is the case regardless of any text that may or may not be added in to the *acquis* in future with regard to “inciting, aiding and abetting.”

The situation is rendered more unclear by the definition of “online service provider” or “provider”. The proposed definition lists several activities as the determining factor. The terminology is not very clear. For example, what is the scope of “providing of connection”: do they intend to cover all networks? Does it only cover digital online? Why is it necessary that the user specifies the points? Changes in technologies may make the definition void. Furthermore, as this definition is not in line with the EU approach, this would imply change to the EU *acquis*.

All of this unclarity would place online intermediaries in a difficult position, whereby more extensive controls and surveillance of their networks would appear to be the safest option to protect



themselves from liability.

6. DMCA-style technical protection measure (TPM) laws and interoperability

The leaked digital enforcement chapter require Parties to provide for "civil remedies, as well as criminal penalties for the circumvention of effective technological measures." Article 11 of the WIPO Copyright Treaty (WCT) and Article 18 of the WIPO Performances and Phonograms Treaty (WPPT) state that "contracting Parties shall provide adequate legal protection and effective legal remedies" without however specifying what this protection would consist of. In addition, Article 6 of the Copyright in the Information Society Directive (CISD) merely refers to "adequate legal protection" against circumvention and any preparatory acts. This provision of the CISD leaves considerable discretion to Member States as regards how they implement this obligation. Therefore the proposed Paragraph 4 clearly goes beyond the current *acquis communautaire*.

The proposal requires that the protection against circumvention of technological measures shall also apply to technological measures which protect merely "access" to a work. The WCT, WPPT and Article 6(3) of the CISD do not require that contracting Parties and Member States shall provide for protection for technical measures beyond acts of reproduction and making available to the public.

The proposed paragraph and accompanying footnote may require that the contracting Parties also provide protection for non-copyright-relevant acts or measures. One example of such measures are a so-called "regional lockout", e.g. a measure preventing that a DVD bought in one country or region (e.g. USA) can be played in DVD players in other countries or regions. It should be made clear that one should only protect TPM that restrict acts which fall within the scope of the exclusive rights (authorised by the right holder).

Footnote 8 appears to be intended to govern "interoperability" issues, i.e. the ability of consumers to play, for example, music which they have downloaded legally, on different players such as an iPhone or a Microsoft Media Player.

Footnote 8 is based on section 1201(c)(3) of the US Copyright statute. That provision - called the "no mandate" provision - provides that nothing in the US TPM law shall require that the design of, or design and selection of parts and components for a consumer electronics, telecommunications or computing product, must respond to any particular TPM, so long as the part or component or product is not otherwise prohibited under the circumvention devices ban.

The provision was intended to protect technology innovators from attempts by content copyright owners to leverage control over technology which interoperates with their copyrighted works. Without such a provision, the DMCA's ban on circumvention devices could be used by copyright owners to ban existing technologies that were not designed to respond to particular TPMs subsequently added to works, or to require technology companies to design technologies to interact with copyright owners' particular TPMs, stifling technological innovation. Although it may have been intended to protect innovation, the text does not require Contracting Parties to ensure that interoperability must be achievable.

As a result, it may be inconsistent with EU law, giving European consumers less protection than they currently enjoy. Recital 48 of the CISD is directed at interoperability. However it uses the wording "implies no obligation", which may be interpreted more broadly than footnote 8. In addition,



footnote 8 appears to contradict recital 53 to the CISD, which can be read as imposing an affirmative obligation. It states that “Compatibility and interoperability of the different systems should be encouraged.”

7. Does the Internet chapter include criminal measures?

Yes, the proposal would require countries to adopt criminal measures, which are outside the body of harmonised EU law. When read alongside the criminal measures provisions made public earlier in the ACTA negotiations, many concerns arise about the increased criminalisation of activities online. Without robust proportionality principles and with insufficient consideration of civil liberties and human rights protections, ACTA is a threat to ordinary behaviour on the Internet. The ineffective strategy of deterrence without balance undermines the legitimacy of the law.

ACTA and the European Union

8. Didn't the European Commission promise that there would be no three strikes?

In response to Parliamentary question E-6094/2009 from Christian Engström MEP, the European Commission responded that:

“ACTA should not contain measures restricting end-users’ access to the Internet that would not be appropriate, proportionate and necessary within a democratic society and without a prior, fair and impartial procedure”.

Even without the admission in footnote 6 that exactly the contrary is proposed in ACTA, it is clear that placing liability on Internet access providers is likely to lead to such restrictions. Any significant level of ISP liability included in the final draft will be in obvious contradiction to the spirit, if not the letter, of the recently adopted EU telecoms package.

In response to the same question, the Commission also stated that *“it is the Commission’s view that ACTA is about tackling large scale illegal activity”*. There is no attempt (nor indeed is it clear what attempt is possible) for ISP liability to be restricted to such activities. Unless it is the Commission’s intention to reject any significant text on ISP liability, the Commission’s response is misleading.

9. Is the European Commission sticking to its obligation under its negotiating mandate not to go beyond the existing body of EU law?

a. Does the proposal respect the E-Commerce Directive (2000/31/EC)?

If adopted, this chapter would turn the EU E-Commerce Directive on its head. Under the Directive, intermediaries *cannot* be held liable for infringements that occur on their networks if they can show that particular criteria were met. The draft ACTA chapter reverses this, calling for third party liability to be imposed for the infringement that is alleged to have taken place unless similar but different circumstances from those described in the E-Commerce Directive are respected.

The chapter also impacts on the scope of the E-Commerce Directive. As that Directive is a



horizontal measure (covering all forms of illegal content), the current ACTA text would confront the EU with one set of criteria to govern ISP liability in the context of IPR enforcement, leaving the existing Directive's criteria to address non-IPR-related infringements.

This confusion is reinforced by ACTA using a different definition of intermediary from the one used in the E-Commerce Directive. The EU relies on the term “online service provider” as found in Directive 98/34/EC as amended by Directive 98/48/EC”.

It is unclear what a “legally sufficient notice of alleged infringement” would mean, although this appears to refer to a system of “notice-and-takedown” as codified in the US Digital Millennium Copyright Act (DMCA). The notice-and-takedown system is not a condition to keep the mere conduit status for ISPs and/or hosts according to 2000/31/EC. The only means of address the unauthorised transmission of materials as proposed by the current text concerning “mere conduit” activities would be an obligation to monitor all traffic in order to prevent certain (or certain types) of material from getting through. Whether this would be a “general” obligation to monitor (because all traffic would be monitored) or not (because it would be monitoring for specific traffic) is far from clear.

b: Does the proposal respect the IPR Enforcement Directive (IPRED)(2004/48/EC)?

No. The paragraph on “General Obligations” states that enforcement procedures shall be “effective” and those remedies shall be “expeditious” and must “constitute a deterrent to further infringement”. This wording appears to be based on Article 41 of the TRIPs (Trade-Related Aspects of IPR) Agreement, Article 14 of the WIPO Copyright Treaty (WCT) (final part of the provision) and Article 3 of Directive 2004/48/EC on enforcement of intellectual property rights (IPRED). However, unlike these latter provisions, the ACTA proposal does not state that the procedures etc. also shall be fair, equitable and/or proportionate in relation to, for example, an alleged infringer. Against this background, it is questionable whether the proposed paragraph is coherent with TRIPs and IPRED.

Europe's role in the world

11. If the EU sticks to the *acquis*, are we not simply exporting a successful regulatory model?

European legislation is already being stretched to the limit with rightsholders plundering peer to peer services for unauthorised collection and processing of the personal data of private users and ISPs in some countries further processing (also without authorisation) that data to send letters to consumers accusing them (often incorrectly) of infringements of intellectual property. The legality of such activities has never been considered definitively. As bad as this situation is in the EU, the rights of consumers in countries outside the EU who do not have the protections offered by the data protection Directives and European Convention on Human Rights would be seriously endangered by importing obligations from the EU's *acquis* without the corresponding rights and protections.

The E-Commerce Directive's wording on “disabling access” to illegal material (which also appears in the DMCA) also creates serious risks for fundamental rights. With, for example, Italy (among others) ignoring the actual intention of that text, expanding its use into “mere conduit” services and demanding the blocking of an ever-growing range of websites, this model could be used with even



more devastating effect in countries with different legal systems and different stages of development. The ACTA text similarly goes beyond the E-Commerce Directive by referring to implementing “a policy” to address unauthorised “transmission” of materials.

"Exporting EU-style enforcement legislation to foreign trading partners is an (un)official goal of EU policy", professor Annette Kur, Max Planck Institute Munich, remarked in a presentation in December 2009. She added: "If and where legislation is (partly) flawed, export is no recommendable option." If we export flawed legislation, the agreement will be binding on all parties. As a result, ACTA countries would be impeded from carrying out their own domestic law reform.

12. How do these proposals square with the EU's role in promoting democracy and human rights in the world?

The EU's external relations website proclaims the aims of, and legal bases for, the EU's work to promote human rights, fundamental freedoms and the rule of law in the world.

(http://ec.europa.eu/external_relations/human_rights/index_en.htm)

The current ACTA text:

- a. Is aimed (as proven by footnote 6) at extra-judicial solutions imposed by industry (i.e. outside the “rule of law”).
- b. Promotes a US-style “notice and takedown” system which has been severely criticised with regard to freedom of expression, thereby threatening fundamental freedoms.
- c. Seeks to export measures from the EU and US where there is legislation mitigating their impact on fundamental rights, to other countries and regions where this is not always the case. This runs directly and obviously contrary to the EU's obligations to promote human rights abroad.

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