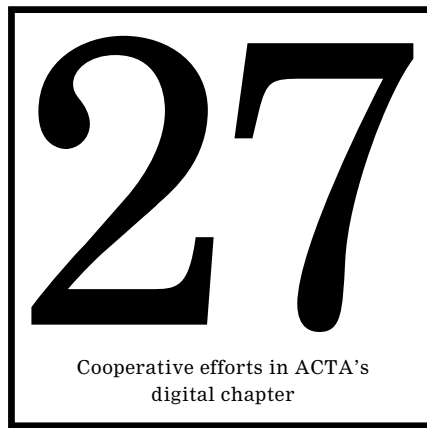


article

27

Cooperative efforts in ACTA's digital chapter



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What does “endeavour to promote cooperative efforts within the business community to effectively address” infringements really mean?

Article 31 of the Vienna Convention on the Law of Treaties explains that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

So, if we take the two biggest parties involved in the negotiations (the United States and the European Union), what is the “ordinary meaning” of enforcement cooperation in those jurisdictions?

UNITED STATES

VOLUNTARY ENFORCEMENT COOPERATION

There are already several examples of voluntary enforcement cooperation in the private sector in the United States. The examples show what the United States currently understands by the reference to “cooperative efforts” in ACTA.

In July 2012, the music/film industry will start monitoring networks and sending allegations of illegal activities to many of the largest Internet providers. These will then lead to a form of graduated response, including the disconnection of citizens’ Internet connections purely on the basis of accusations and outside the rule of law

In October 2011, the US company that runs the global database on which all .COM and .NET domain names (like dictionary.com) rely, requested the power

Voluntary cooperation has already led to web domains being deleted in Europe on the basis of private company interpretations of US law.

of “denial, cancellation or transfer of any registration”⁰¹ that it considered to be abusive”. This would allow the US company to remove any website anywhere in the

world based solely on its own internal decision. There has already been one example of a US domain registration company (that buys the domain names on

Voluntary cooperation has already led to European websites being removed globally by the leading American search engine. 37% of such removals are incorrect.⁰³

behalf of consumers) deleting a European website that was never accused of breaking any law. The Spanish website was removed because the US domain name registrar saw the company on an official government US “watch list” because it provided tours to Cuba.⁰²

In the United States, the Digital Millennium Copyright Act (DMCA) governs the deletion of websites accused of breaching US copyright law. This uses a non-judicial process whereby complainants need to fulfill a list of requirements before the site is automatically removed. Google has now chosen, as a voluntary enforcement measure, to implement the DMCA in

Europe also. As a result, if a complaint is made to Google in the USA under US law about a European website, Google will remove the European site from its global search results.

Ratifying ACTA will require the United States government to encourage US companies to undertake policing and punishment of European citizens through non-judicial measures under US law.

The draft proposed Stop Online Piracy Act (SOPA) makes the United States' understanding of "voluntary measures" is very clear. It proposed extending the types of voluntary enforcement listed above and giving Internet access providers liability protection for blocking innocent websites. It also offers liability protection for all key online intermediaries under US jurisdiction (domain name registries and registrars, advertising networks, payment networks, hosting providers, etc), permitting non-judicial sanctions to be taken under US law against EU citizens.

Article 27 of ACTA would place a binding legal obligation on the US government to encourage 'effective' law enforcement by US companies. Such enforcement already leads to US legislation being implemented in the EU without due process of law.

Ratifying ACTA involves entering into an agreement where the United States would be required to promote the kinds of extra-

territorial "cooperation" described above. ACTA would therefore go against the stated positions of both the Commission and Parliament on extraterritorial effects of third country laws in Europe. The statements on the following page were made in February 2012, at the plenary session of the European Parliament where the damaging extra-territorial effects of the US FISA and PATRIOT Acts in Europe were discussed:

SAFEGUARDS

Despite the wide-ranging implications of requiring states to "encourage" law enforcement by private companies, ACTA does not propose any additional safeguards at all to protect fundamental rights of citizens.

Instead, based entirely on each country's understanding of these terms, the "fundamental principles" of "privacy", "fair process" and "freedom of communication" must be "respected". It is worth noting that there is, in fact, no "fundamental principle" of "fair process" in international law, so this safeguard has no meaning whatsoever. It appears to have been included simply to fill the space where readers would have expected to see "due process of law" – a minimum requirement of any law enforcement process in countries that are based on the rule of law.

SIMON BUSSITIL MEP (EPP COORDINATOR, LIBE): No law of a third country should be able to short-circuit EU law or national law

DIMITRIOS DROUTSAS (S&D): The potential extra-territorial impact of the laws of third countries, in particular the US, and particularly in relation to data protection, is very important for the European Parliament.

SOPHIE IN'T VELD (ALDE): the issue at stake here today is whether we can be certain that our own European laws always apply within Europe, or whether they could be overruled by third country laws.

JAN-PHILIPP ALBRECHT (GREENS/EFA): We are talking today [...] about the application of the law of third countries on European citizens. This is, of course, a question that does not just cover data protection, but in an increasingly networked and globalised world a fundamental question of applicable law. I think that we need answers to this question.

MARISA MATIAS (GUE/NGL): How can we accept that other countries, the US and their legislation, take precedence over the laws of the European Union?

JAROSLAV PAŠKA (EFD): Any interference by third countries to the protected rights of our citizens is unacceptable.

COMMISSION VICE-PRESIDENT VIVIANE REDING: A legal act which is enacted by a third country cannot be directly and automatically applied in the territory of the EU unless “exceptionally” Union law or Member State law explicitly recognises the facts of such an act in their respective jurisdiction.

Can we really condemn the damage done by extra-territorial effects of US law on EU citizens and then enter into a binding agreement with the US to demand that our fundamental rights to privacy and freedom of expression are regulated by US law that is implemented by private companies?

EUROPEAN UNION

VOLUNTARY ENFORCEMENT COOPERATION

The European Commission has also been trying to launch initiatives which seek to privatise law enforcement online. These too make it very clear that the European Commission has a very similar understanding of “cooperative efforts” of the business community to enforce the law.

- In its “dialogue on illegal uploading and downloading” the Commission proposed voluntary implementation of measures such as blocking and filtering of peer to peer traffic. The measures that the European Commission encouraged industry to voluntarily implement were subsequently ruled to be in breach of the Charter on Fundamental Rights. The documents related to this initiative were never published by the Commission.

- In its dialogue on dissemination of illegal content within the European Union, the European Commission urged Internet hosting providers to change their terms of service, to give themselves unlimited powers to delete any website that they consider unacceptable, in probable breach of Article 52 of the Charter on Fundamental Rights.⁰⁴

It should be stressed, however, that the Commission does not restrict itself to breaches of European Union law. A memorandum of understanding on e-commerce was adopted in May 2011⁰⁵ which, while being questionable in many ways, is not as extreme as some of the other proposals made.

Should the EU knowingly sign up to binding agreement which requires the US government to encourage American companies to regulate our fundamental rights to privacy and freedom of expression, based on US law?

MEMBER STATES

VOLUNTARY ENFORCEMENT COOPERATION

Cooperative efforts” by private companies to police the Internet have also been launched in some EU Member States, to the detriment of fundamental rights in those countries.

IRELAND The leading Irish telecommunications operator, Eircom, has implemented a “three strikes” system. The

the scope of their blocking. Most notably, certain mobile operators have followed China’s example⁰⁶ and have started blocking “thetorproject.org”⁰⁷ - a website designed to promote technology that was created by the United States to help Iranian dissidents communicate. Another operator has also started blocking citizens’ rights group La Quadrature Du Net.⁰⁸

A voluntary enforcement measure originally claimed to be a child protection measure is now being used by operators to block entirely legal websites without justification.

data processing used has been condemned by the Irish data protection authority but the abuse of personal data and due process of law is continuing.

UNITED KINGDOM Almost all UK Internet access providers undertake voluntary blocking of websites deemed to be “potentially” illegal by the non-judicial “Internet Watch Foundation”. Recently, the UK operators have started broadening

NETHERLANDS A study⁰⁹ undertaken in 2004 in the Netherlands showed that nearly three-quarters of Internet hosting providers were prepared to delete an obviously legal web page on the basis of an unjustified notice from an anonymous Hotmail address.

While these examples show that enforcement cooperation is possible without ACTA, they are very much the exception at the moment. They would become the binding rule for Member States if ACTA were adopted.

NOTES

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