ACTA and its impact on fundamental rights

The Internet has become a key enabler of rights such as the fundamental rights to communication and association. Any legislation which aims to regulate this medium must therefore be carefully considered to ensure compatibility with the Charter. At least as importantly, when dealing with countries with less robust fundamental rights protections, the EU must take care that any Internet-related policies it promotes fully respect the EU's Treaty obligation to consolidate democracy and the rule of law in its international relations.[1]

Privatised enforcement outside the rule of law

In Article 27, ACTA imposes an obligation on States to support "cooperative efforts with the business community" to enforce criminal and civil law in the online environment. This obligation legitimises and promotes the policing and even punishment of alleged infringements outside normal judicial frameworks. The scale and extent of such measures is to be decided by private companies.[2] More worrying still, a leaked document published by the European Parliament itself,[3] gives disconnection of users as an example of the private sanctions that could be imposed in such "cooperation". Worse, ACTA does not ensure effective remedies against such interferences with fundamental rights: vague references to "fair process" in the text are not backed up by mandatory processes requiring respect for the Rule of Law (Article 21 TEU).

The UN Special Rapporteur on Freedom of Expression warns of the dangers of this approach in his most recent Annual Report: "[I]ntermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences.[4]

Suspiciousless mass surveillance in violation of the Charter

ACTA requires Internet intermediaries to disclose the personal information of alleged infringers to rightsholders – along the lines of the current IPR Enforcement Directive, which is causing major problems for citizens right across Europe. The practical effects of this Directive have never been assessed and the review process is now starting. There is already evidence of serious problems with this approach, as shown (particularly in Germany and the UK) by lawyers and alleged rightsholders using coercive tactics against innocent users. They use the information obtained under the Directive to contact consumers and give them a "Hobson's choice" between a costly court battle or a "settlement" payment.[5]

ACTA envisages disclosure orders to cover "alleged infringers" in addition to "infringers". The text also explicitly places the interests of rightsholders ahead of free speech, privacy, and other fundamental rights.[6]

The EDPS warns that ACTA could lead to the "unnoticed monitoring of millions of individuals and all users, irrespective of whether they are under suspicion", and "the systematic recording of data [on Internet use]"[7] The ECJ recently ruled that such suspiciousless mass monitoring of Internet users is incompatible with the Charter.[8] ACTA flagrantly breaches this case-law.

Undermining democracy, fundamental freedoms and the rule of law

ACTA jeopardises free speech by prioritising private-sector repressive measures aimed at copyright protection over the fundamental rights to privacy and freedom of communication and association – rights that are prerequisites of democracy - without guarantees of due process and equality of arms.

In Europe, this violates the European Convention on Human Rights and the EU Charter of Fundamental Rights.

In the context of international cooperation, this is a clear violation of Article 21 of the TEU which requires support for democracy and the rule of law in the Union's international relations.

1 Treaty on European Union, Article 21

2 Article 27.2 & Article 8.1, ACTA

3 http://www.edri.org/files/acta_disconnection.pdf

4 Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf (Page 12)

5 One prominent example: Law Society Gaztte: "Two solicitors accused over file-sharing 'bully tactics'" http://bit.ly/9aHDEn

6 This is unequivocal in, for example, footnote 13

7 www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf

8 See cases C-70/10 (Scarlet/Sabam) in particular, as well asC-275/06 (Telefonica/Promusicae) on balance of rights

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ACTA – Criminal sanctions

In theory, most policy-makers agree that intellectual property legislation should focus on ensuring that dangerous products are not sold and that industrial-scale misuse of protected material should be targeted. Despite the fact that such an approach is essential for proportionality, ACTA fails to deliver on both of these priorities. It attempts to address potentially life-threatening physical products and duplication of digital material as if these two very different phenomena were of the same importance and functionally identical.

"Indirect" economic advantage

ACTA provides an extremely low threshold for imposing criminal sanctions. Article 23.1 starts by limiting (as a minimum that can be exceeded by parties) criminal procedures/penalties to wilful offences undertaken on an undefined commercial scale. It then broadens the scope to "acts" which are for direct commercial advantage but also for, also undefined, "economic advantage" or "aiding and abetting" (also undefined).

Such unclear wording is simply inappropriate in a key provision, on whose meaning the proportionality and the legality, of the Agreement rests. As the EDPS stated, "the 'commercial scale' criterion is decisive".[1]

What does this mean in practice?

A member of the German parliament unintentionally put multiple copyright-protected images on his website.[2] Large numbers of visits to the page led to a "commercial scale" reproduction of the image. He received an "indirect economic" advantage by not paying for the images and his service provider "aided and abetted" the "infringement" by not taking action against this repeat "offender". Is he or his Internet provider a criminal? According to ACTA, they are. Unquestionably.

Conflict with existing international law – World Trade Organisation (WTO)

The European Parliament has stated (resolution of 24 April, 2008) that "the WTO plays a key role among the multilateral organisations which contribute to international economic governance." However, the Parliament study on ACTA highlights the fact that the proposed Agreement's focus on intent ("wilful" "offences" for "direct or indirect" "economic *or* commercial" advantage) contradicts the recent WTO decision, which defined commercial scale in relation to the "typical or usual commercial activity with respect to a given product in a given market". The Parliament study comes to the conclusion that "[i]t must therefore be considered that ACTA is not in line with the WTO Panel decision".

Conflict with European Parliament's existing position

When previously seized to give a position on criminal sanctions for IPR enforcement[3], the European Parliament adopted two amendments on "commercial scale" in order to ensure a degree of proportionality:

- it requested that acts "carried out by private users for personal and not-for-profit purposes" be excluded. In the absence of a *de minimis* clause, a definition of "commercial scale" and a definition of "indirect economic advantage, ACTA contradicts this amendment;
- it requested that "fair use" of works for comment, criticism, news reporting, teaching, scolarship and research be excluded from the scope. ACTA's provisions directly contradict this approach.

The fact that the Commission ignored the Parliament's demand for a *de minimis* clause in the ACTA negotiations reinforces the damage done by ACTA's lack of clarity. It will inevitably lead to restrictions on the right to communication both in the EU (at least until ruled illegal by the Court of Justice) and internationally. An explicit *de minimis* rule and an explicit public interest defence would be the minimum required to bring Article 23 into line with the European Convention on Human Rights (ECHR) and the EU Charter.

1 Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement, paragraph 44

2 http://www.spiegel.de/netzwelt/netzpolitik/0,1518,788592,00.html

3 Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (EP-PE_TC1-COD(2005)0127).

ACTA – Innovation and Competition

The logic behind intellectual property protection is to create temporary monopolies on the use of inventions and creations in order to develop an incentive to innovate. By expanding the protection of these monopolies and reducing flexibility, ACTA builds barriers to innovation and competition, thereby undermining its goals.

Chilling effect on innovation

In a knowledge society, exceptions and limitations on copyright create important opportunities for new companies, such as search engines, online video services, digital libraries, etc. In the EU, these exceptions and limitations are not harmonised. 27 Member States must choose to apply some, none or all of the 21 optional exceptions or limitations to the right of reproduction provided for in EU legislation (Directive 2001/29/EC). Innovators can only guess at what is likely to be accepted by the courts in each of the 27 Member States. Because of the complexity of copyright legislation in general and the particular complexity of the patchwork of EU copyright laws, innovative businesses are often forced to operate in a legal "grey zone".

Innovators therefore risk accidentally breaching civil law if they misunderstand the complex current arrangements. Under ACTA, innovators, start-up companies and digitisation projects risk criminal charges and almost unlimited "damages" payments based not on actual losses to the rightsholder but on the retail price of each potential accidental infringement. This goes far beyond current EU law on damages, which, logically and proportionately, is based on actual loss suffered. The companies and projects may also face ACTA's injunctions which go beyond current EU law injunctions.

The undefined "commercial scale" limitation in ACTA is of little practical value as the proposed text goes beyond the simple commercial scale to cover undefined "indirect economic advantage" and further still to undefined "aiding and abetting" – which can only serve to push Internet providers to pre-emptively censor services which they fear might be infringing, in order to avoid possible criminal prosecution.

The European Parliament[1] called on the Commission to harmonise copyright law and for a removal of the obstacles to a single online market. It was ignored. The Parliament asked the Commission to ensure that the provisions of ACTA fully comply with the acquis. It was ignored. If ACTA is adopted, the EU is effectively prohibiting itself from amending key pieces of legislation, such as the IPR Enforcement Directive – abandoning flexibility and democracy and replacing them with an inflexible international agreement.

Anti-competitive consequences

ACTA will have anti-competitive effects stretching beyond the markets it seeks to regulate. It will create an environment where large competitors will have major advantages over smaller firms and start-ups. For example, Internet intermediaries, to avoid the new risks of being found guilty of indirect infringement created by ACTA, will be pushed into investing in more extensive monitoring/filtering technologies. Economies of scale mean that these will be cheaper for larger intermediaries than start-ups.

This monitoring/filtering technology can be re-used by intermediaries to discriminate between online services – discrimination that they are already lobbying in favour of on an EU and international level.[2] These disadvantages will not be suffered by Europe's trading partners that have chosen to avoid restrictive and counterproductive international obligations.

Competitive advantage for the USA

The USA starts from a stronger position than the EU. It has a single market with an innovation-friendly "fair use" regime for the use of copyrighted works. The EU has a fragmented "exceptions and limitations regime". The USA has said that it will not consider itself to be legally bound by ACTA[3] while the EU will be legally bound. The significant innovation gap between the EU and the USA and Japan, highlighted by the European Parliament Study for the INTA Committee,[4] would therefore be reinforced and made permanent by ACTA.

1 http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0340
2 http://www.vodafone.com/content/index/about/about_us/policy/network_neutrality.html
3 http://keionline.org/node/1115
4 DG Expo Study for the INTA Committee quotes the European Innovation Scorecard, published by *PRO INNO Europe* p. 39

The impact of the ACTA on the EU's international relations

Negotiations for the Anti-Counterfeiting Trade Agreement (ACTA) started off with the intention to set a "gold" standard for the enforcement of intellectual property rights. The initial intention was to create a "coalition of the willing" to address important countries, such as India, China or Brazil, that take a different approach from that of the EU. However, the secrecy and exclusionary nature of the negotiations, as well as the rejection of agreed multilateral forums have served to alienate exactly those countries that were the ultimate target of ACTA.

As far back as 2009, India publicly attacked ACTA saying that it "was being negotiated in secrecy and with the exclusion of a vast majority of countries, including developing countries and LDCs" [less developed countries].[1] In 2010, India held talks with like-minded countries, such as Brazil, China and Egypt, to jointly oppose ACTA.[2] Then, on 25 October 2011, at the WTO TRIPS Council, India raised concerns on the scope of ACTA's civil enforcement measures, the potential role of border measures in the seizure of generic medicines, third party liability, and potential damage to WTO Most Favoured Nation status for countries that are not parties to ACTA.[3]

The best approach to gaining broader acceptance would have been to include those countries in the negotiations, "not leave them on the outside in the hope of later pressuring them to comply with an agreement from which they were deliberately excluded."[4] The European Parliament study on ACTA confirms that "the major emerging economies, China, Brazil and India appear not to have been formally invited to participate".[5]

In October 2010, the Mexican Senate demanded a suspension of negotiations.[6] In June 2011, the Mexican Congress approved unanimously a resolution rejecting ACTA.

If the EU ratifies ACTA, it would ignore its obligation to support the rule of law in its international relations. The EU is protected by safeguards in the field of fundamental rights such as the EU Charter and the European Convention on Human Rights. The preamble of ACTA, as well as the "Digital Chapter" specifically promotes policing and enforcement through "cooperation" between private companies. This is an obvious violation of Article 21 of the TEU which re-states the EU's obligation to support democracy and the rule of law in its international relations.

Not only were multilateral forums bypassed by ACTA, their norms have been partly rewritten. The European Parliament study[7] points out "the apparent re-interpretation of the meaning of the term 'commercial scale' as interpreted by the recent China IPRs WTO case[8]". In contrast to that ruling, the logically open-ended norm of 'indirect economic or commercial advantage' (also covering indirect infringements) in ACTA focuses on the intent of the alleged infringer, rather than on assessment of the adverse effects on the market[9]. ACTA's approach therefore is both extremely unclear and in contradiction with agreed international norms.

In other words, the EU finds itself further away from its destination than it was when the ACTA process started - which is the definition of being on the wrong track.

1 'Minutes of Meeting Held In The Centre William Rappard on 27-28 October and 6 November 2009' Council on Trade-related Aspects of Intellectual Property, IP/C/M/61, 12 February 2010, para. 264.

2 India Times, *India plans to nip new piracy law,* 29 May 2010 http://articles.economictimes.indiatimes.com/2010-05-29/news/27599709_1_patent-acta-anti-counterfeiting-trade-agreement

3 Knowledge Ecology International, *WTO TRIPS Council: India raises concerns* http://keionline.org/node/1300

4 Prof. Michael Geist, *India Seeking Allies to Oppose ACTA* http://www.michaelgeist.ca/content/view/5076/125/

5 DG Expo Study, *The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment*, June 2011, p.6.

6 Resolution adopted by the Mexican Senate, 5 October 2010 http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=5385&lg=61

7 European Parliament, DG for External Policies of the Union, Information and Communication Technologies and Human Rights, EXPO/B/DROI/2009/24, PE 410.207, June 2010 (PE 410.207)

8 China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – IPRs), WT/DS362/R, 09/0240, 26/01/2009

9 DG EXPO study, Section 4.1.2

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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-8444/2010) 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.

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