STATEMENT

European Parliament: Reject Anti-Counterfeiting Trade Agreement (ACTA)

The European Council will adopt a decision today, 15 December 2011, authorising EU Member States to sign the Anti-Counterfeiting Trade Agreement (ACTA). Following signatures by each EU Member State this weekend, the fate of ACTA will be left to a vote by the European Parliament.

ARTICLE 19 urges the European Parliament to reject ACTA. The intellectual property enforcement regime promoted in ACTA was negotiated in secret and fails to provide sufficient safeguards for the rights to freedom of expression and information. Intellectual property should not be protected at all costs and requires an enforcement framework that complies with international standards on freedom of expression and information.

ARTICLE 19 believes that the Anti-Counterfeiting Trade Agreement (ACTA), if ratified by the European Union (EU), has the potential to greatly restrict the free flow of information and the free exchange of ideas between individuals globally and particularly via the internet. The ACTA enforcement regime imposes a nineteenth century view of intellectual property (IP) that fails to acknowledge the changed relationship between individuals and information in the modern electronic age. Consequently, the IP interests of corporations are disproportionately protected at the expense of individuals' rights to freedom of expression and information. ARTICLE 19 finds the ACTA regime in violation of these fundamental rights by encouraging governments and private parties to engage in large-scale surveillance of the internet and by imposing draconian criminal and civil liability on those associated with even the most innocuous infringement of IP. If enacted by the EU, ACTA will undermine online freedom and stifle creativity and innovation.

The purposes of ACTA

ACTA is a multilateral trade agreement that proposes international standards for the enforcement of IP law related to the counterfeiting of trademarked goods and the infringement of copyright. Proponents of ACTA claim that increased harmonisation of enforcement mechanisms is necessary to prevent the undermining of trade and competitiveness, which they allege will have negative repercussions on economic growth and jobs. It has further been argued, by entities including the European Commission, that, as an enforcement regime, ACTA does not seek to augment IP rights themselves, but strengthen the enforcement regime for rights that already exist.

Negotiations on ACTA began in 2006 with Japan and the US; followed by Canada, the EU and Switzerland in 2008; and joined more recently by Australia, Mexico, Morocco, New Zealand, South Korea, Singapore, Jordan and the United Arab Emirates. The final text was reached in November 2010.[1]

[1] The full text of ACTA can be found at: http://www.dfat.gov.au/trade/acta/Final-ACTA-text-following-legal-verification.pdf

The ratification process

The text of ACTA was adopted on 3 December 2010 and has now been submitted to the negotiating parties for ratification. To date, the United States, Australia, Canada, Japan, Morocco, New Zealand, Singapore and South Korea have ratified ACTA. At the EU level, it is necessary as part of the regional arrangement for the European Council and European Parliament to approve ACTA before it passes to individual Member State parliaments for ratification.

The European Council will adopt a decision today, 15 December 2011, authorising Member States to sign ACTA. Following signatures by Member States, ACTA will then be submitted to the European Parliament for their approval. Four parliamentary committees have nominated themselves to submit opinions on ACTA before the parliamentary vote; these are JURI (legal affairs), LIBE (civil liberties), ITRE (industry), and DEVE (development). Following the submission of these reports, the International Trade Committee (INTA) will collate a final report that should reflect the opinions expressed at the committee stage.

Members of the European Parliament (MEPs) will have the opportunity to consider these various reports before being asked to vote either in favour or against the ratification of ACTA. If accepted by a majority vote, ACTA will then pass to individual member states for ratification at the national level. The European Parliament vote is therefore crucial, as it is the next available opportunity to block the passage of ACTA.

Transparency in the drafting process

ARTICLE 19 is concerned that the drafting process for ACTA was conducted in secret, and the ACTA committee, tasked with leading the process, has been highly selective with the stakeholders it has chosen to consult with. The Trade Representative for the United States drafted a confidentiality agreement that was signed by all parties and prohibited negotiating states from disclosing information on the negotiations.[2] We note that there has been no engagement with civil society organisations during the drafting process. Indeed, requests from civil society organisations for information on the ACTA negotiations have been denied in both US and EU freedom of information requests. Even the European Commission has refused to provide drafts of ACTA to the European Parliament.[3]

Corporate stakeholders with significant commercial interests in a strengthened international IP enforcement regime have been given access to ACTA negotiations. These parties are reported to include Google, IBM, eBay, Dell, Intel, Business Software Alliance, News Corporation, Sony Pictures, Time Warner, the Motion Picture Association of America, and Verizon.[4] These corporate entities have been given access to information that has not been disclosed to other concerned stakeholders, and have had numerous opportunities to contribute the perspective of the IP industry into negotiations and thereby influence their outcome. Moreover, this participation has not been subject to public scrutiny, and demonstrates a concerning asymmetry in the ACTA committee's already opaque policy on stakeholder participation.

The drafting process has also bypassed the established multilateral fora for intellectual trade agreements, including the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO). These organisations have established transparency policies that would have

[2] See: https://www.eff.org/files/filenode/EFF_PK_v_USTR/foia-ustr-acta-response2-doc1_0_0.pdf
[3] See, for example, freedom of information request by the Electronic Digital Rights Institute: http://www.edri.org/files/ACTA/01EPCoverletterACTA.pdf
[4] The full list of "cleared advisors" permitted to view ACTA documents was reported at: http://www.keionline.org/blogs/2009/03/13/who-are-cleared-advisors and http://www.keionline.org/node/660

prohibited the secret nature of discussions to date. So far, the negotiations have been conducted only between states that are party to the agreement - to the exclusion of emerging economies such as Brazil, Russia, India and China. Political concerns have been expressed that the ACTA enforcement mechanism may be "exported" to these countries and others through bilateral trade agreements in the future. This is potentially problematic from a freedom of expression perspective, particularly if the adoption of more draconian "optional" enforcement provisions is compelled through such negotiations. Brazil reportedly even considered enacting an anti-ACTA statute to prevent the exportation of ACTA enforcement principles through trade agreements.[5]

As a matter of international law, there is disagreement within the United States and between the United States and other ACTA parties whether the agreement is legally enforceable and subject to the Vienna Convention on the Law of Treaties 1969 (VCLT). Article 32 of VCLT requires that where the language of a treaty provision is ambiguous, obscure or manifestly absurd or unreasonable, one should refer to the preparatory work (*travaux préparatoires*) of the treaty to aid the interpretation of it. As detailed below, a number of provisions in ACTA are ambiguous, and it would therefore be necessary as a matter of treaty interpretation to have access to the documents that have, to date, been declined following freedom of information requests. Keeping the *travaux préparatoires* secret is counterproductive to the legal certainty of the document, and may even undermine its credibility and enforceability in the future.

ACTA and the rights to freedom of expression and information

In light of the lack of transparency or consultation with civil society in the negotiating process, it is perhaps not surprising that ACTA gives disproportionate protections to IP interests at the expense of the rights to freedom of expression and information. Indeed, during the drafting process, no EU institution conducted an impact assessment on the affect ACTA would have on fundamental human rights. The following comments highlight aspects of ACTA that undermine the right to freedom of expression and information.

Guarantees for Freedom of Expression, Freedom of Information and Cultural Rights

The issues the negotiating parties have chosen to prioritise in the preamble to ACTA are illuminating. In setting out the objectives of ACTA, the parties emphasised the importance of creating an IP enforcement regime that promotes economic growth and combats crime associated with IP infringement. Interestingly, neither the preamble nor any substantive provisions contain any direct reference to ensure that creators enjoy the material benefits of their work, nor that those benefits are shared as broadly as possible, as required by Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Moreover, in striking the balance between these competing interests there is no overarching standard on guaranteeing the right to freedom of expression. Indeed, where the right is referenced it is often used to qualify provisions that are not antithetical to these rights.

The preamble speaks in general terms of achieving a balance between rights and interests, but makes this assurance in terms that assumes that IP infringement can always and only be a problem:

> *"Desiring **to address the problem** of infringement of intellectual property rights, including infringement taking place in the digital environment, in particular with respect to copyright or related rights, **in a manner that balances the rights and interests of the relevant right holders, service providers, and users**;"*

[5] Reported at: http://www.techdirt.com/articles/20111004/04402516196/brazil-drafts-anti-acta-civil-rights-based-framework-internet.shtml

As the preamble to a treaty has no legally binding effect under international law, it is significant that the operative portion of the ACTA text contains no overarching provision protecting the rights to freedom of expression and information. Limited references to fundamental rights are made in Article 6, which commits to a "fair and equitable" enforcement process that provides for "the rights of all participants." No further guidance is given, and as noted below, subsequent provisions in ACTA appear to encourage departure from even these vague norms.

The right to freedom of expression is only mentioned in a minority of sub-clauses that qualify specific digital enforcement provisions under Article 27 of ACTA. One may infer from this selectivity that states are encouraged not to consider the right to freedom of expression in relation to the enforcement of other provisions. The right is only referenced so that the enforcement measures avoid the "creation of barriers to legitimate activity, including electronic commerce." It is telling that this is the only example of legitimate activity that ACTA indicates that IP interests should be subservient to.

Moreover, ACTA provides no guidance on *how* states ought to strike the balance between competing rights, including the right to freedom of expression. The European Commission has defended the decision not to impose a uniform standard:

> *"**Obviously**, not all ACTA parties share exactly the same view on how to put this balance into practice, which is why, rather than setting out every detail, ACTA provides the Parties with the necessary flexibility to establish a balance which takes account of their economic, political and social objectives, as well as their legal traditions."*[6]

This defence disregards the international human rights standards that all ACTA states are bound to, and that they hold in common. In relation to the right to freedom of expression, it is unclear what legal, political, economic or social traditions the European Commission believe would justify departure from Article 19 of the ICCPR, which states that restrictions be provided by law, pursue a legitimate aim, and be necessary and proportionate to that aim. The "flexibility" promoted by ACTA appears to be designed to encourage states to enact laws that ostensibly comply with ACTA but do not comply with international standards on the right to freedom of expression. Furthermore, this negative impact is likely to be more pronounced in states with less robust domestic constitutional protections for the rights to freedom of expression and information.

No De Minimis Exceptions

ACTA is reflective of a general trend in international IP agreements, which is to harmonise protections for IP while leaving policies on exception regimes to the initiative of individual state parties. Historically, *de minimis* exception regimes have acted as a break on the augmentation of IP interests, promoting the rights to freedom of expression and information. However, the disparity of interests promoted at the international level has diminished the perceived importance of exception regimes. As a consequence, we have a system that emphasises the importance of protections for IP at the expense of freedom of expression and information.

ACTA accentuates this problem, requiring states to use the full force of the criminal law to punish and prevent infringements of IP, without attempting to harmonise or even noting the importance of *de minimis* exception regimes for achieving the appropriate balance between fundamental rights. In many ways this is perhaps unsurprising, as it reflects the interests of the corporate parties that were most intimately associated with the negotiating process for ACTA.

Criminal provisions

[6] See: http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf

Section 4 of ACTA requires states to criminalise infringements of IP law, including digital infringements of copyright, and uses incredibly broad terms. ARTICLE 19 strongly believes that acts of free expression and information-sharing should not attract criminal sanctions except in the most severe of circumstances, for example in cases of incitement to hatred or violence. Restrictions on free expression must pursue the least intrusive means of achieving a legitimate objective, and therefore civil remedies will almost always provide adequate legal redress.

Article 23.1 of ACTA requires states to "at least" provide criminal penalties in cases of "wilful … copyright or related rights piracy on a commercial scale." The breadth of this prohibition is evident from the definition of "commercial scale", which includes any IP infringement carried out for "direct or indirect economic or commercial advantage." This terminology is as vague as it is broad, and if transplanted directly into domestic criminal law would not be considered to have the qualities of legal accessibility or certainty required by Article 19 of the ICCPR.

The concept of "indirect economic advantage" potentially encompasses innocuous copyright infringements that would not ordinarily be considered "commercial".. For example, an individual transferring a digital copy of a book between their electronic devices in breach of copyright may receive an "indirect" economic advantage by avoiding the cost of buying a second copy. The language of ACTA allows such conduct and similar trivial infringements to be framed as criminal, and therefore worthy of punitive custodial sentences, fines, and a permanent criminal record.

The necessity or proportionality of criminalising copyright infringements in this manner is unclear. As only "economic advantage" needs to be proven, criminal charges may be imposed even where no harm has been caused to the copyright holder, who does not even need to complain for a prosecution to be initiated (Article 26). What is the necessity of using the criminal law when no harm to an individual has been proven? One may argue that the economic advantage to the user in the example above has a corresponding economic loss for the copyright holder, for example in the form of a lost sale. Such an assertion can only ever be speculative, and discounts the possible economic benefits that a secondary market in electronic data may have for a copyright holder. In any case, ACTA does not require the need to entertain this evaluation, as the infringement itself is a criminal offence irrespective of the impact on the copyright holder.

Under Article 23.4 of ACTA, a state is also required to provide criminal penalties for "aiding and abetting" "commercial scale" infringements of copyright. There is no requirement to show that this conduct was intentional; nor that it was committed for direct or indirect economic gain. This potentially provides a basis for imposing strict criminal liability on intermediaries such as ISPs that provide the infrastructure and services that allow for the sharing of online content. Imposing or even encouraging intermediary liability would incentivise these entities to pre-emptively censor internet communications, in violation of principles of net neutrality[7] and freedom of expression.

There are further concerns in respect of the proportionality of penalties under Section 4 of ACTA. Article 24 of ACTA states that offences under Article 23.1 and Article 23.4 should be punished with imprisonment and monetary fines "sufficiently high to provide a deterrent to future acts of infringement". It is unclear what level of custodial or financial penalties would have the desired "deterrent effect". Deterrence is an inherently inexact science, especially when one considers the social acceptability of IP infringement and the relatively small likelihood of infringements being detected. It is unlikely in these circumstances that one could achieve this "deterrent" effect while also complying with the proportionality principle. Such heightened penalties would also be counter-productive to the stated aims of ACTA, as it may also deter new businesses from acts of innovation and creativity and therefore undermine commerce and growth.

[7] For an explanation of ARTICLE 19's policy on net neutrality, see:
http://www.article19.org/resources.php/resource/2824/en/net-neutrality:-stronger-rules-needed-in-us-and-eu

The practical enforcement of Section 4 of ACTA raises further concerns from a privacy and freedom of expression perspective. In order to enforce criminal laws against digital "commercial-scale" infringements of IP, it would be necessary to sanction massive surveillance of all online data sharing. Not only does this raise significant privacy concerns under Article 17 of the ICCPR, but also undermines the sense of security individuals have in private online communications. Such a monitoring operation would therefore have a chilling-effect on *all* digital expression. The Court of Justice for the European Union recently held that it violates fundamental human rights for a state to require internet service providers to implement filtering systems to monitor and prevent illegal downloading on peer-to-peer networks.[8] This brings into question how ACTA envisages EU states legitimately implementing its provisions.

Civil Provisions

Section 2 of ACTA aims to harmonise civil law enforcement protections for IP. Unlike the criminal provisions under Section 4, there is no requirement that an IP infringement be made "wilfully" or that it be of a "commercial scale" before civil liability arises. Under ACTA, a copyright holder only has to allege copyright infringement to secure a judicial injunction temporarily restraining that individual's conduct. ACTA requires that where found a party is found to be liable, they must pay compensation, calculated according to formulas that are heavily weighted in favour of the copyright holder.

Under Article 8 of ACTA, a copyright holder may obtain a judicial injunction to prevent the infringing content "entering the channels of commerce". These injunctions can be directed at the infringing party or a third party, such as an intermediary. No guidance is given on the permissible scope of these injunctions. To the extent that they interfere with the right to freedom of expression, international standards would require them to be no broader than is necessary and proportionate for achieving a legitimate objective. An injunction would violate these standards if, for example, it imposed a generic ban on an individual's use of the internet or certain software rather than be narrowly tailored to protect further infringement of the particular copyrighted material in question. Similarly, injunctions targeted at intermediaries also risk being overbroad, and may encourage intermediaries to engage in online surveillance and to pre-emptively censor content that it fears will attract litigation.

Article 9 of ACTA concerns the remedy of damages. Article 9.1 provides that any person who "knowingly or with reasonable grounds to know" infringes copyright should be made to compensate the right holder for the injury they suffered. This form of constructive intent allows damages to be imposed when the infringing party acted without intent, creating an incredibly broad remedy for copyright holders.

In determining damages, Article 9.1 also requires the judiciary to consider any "legitimate" measure of value the right holder submits, which may include lost profits, the value of the infringed goods, or services measured by the market price, or the suggested retail price. Article 9.2 requires states to allow compensation that at a minimum reflects the profits they derived from the infringement, which may be "presumed" (i.e. an evidentiary assumption) to be equivalent to the markers set forth in Article 9.1.

Calculating damages in this manner, particularly in the context of peer-to-peer sharing, will lead to astronomic compensation awards that are grossly disproportionate to the actual harm suffered and the seriousness of the infringing conduct. The calculation is based upon the false assertion that a single copyright infringement equates to an economic harm for the rights holder that is as

[8] For ARTICLE 19's statement on the case of Scarlet Extended SA v SABAM, see: http://www.article19.org/resources.php/resource/2872/en/landmark-digital-free-speech-ruling-at-european-court-of-justice

significant as a lost sale. There is a practical argument to be made that copyright infringement may actually boost the popularity of a copyright work, and therefore promote sales of it. On this argument, a Spanish court recently refused to require a copyright infringer to pay compensation to a rights holder on the basis that determining whether there was loss was impossible.[9]

Article 9.3 of ACTA is also problematic as it requires states to implement one of a number of standardised damages measures that are heavily weighted in favour of copyright holders. These include "pre-established damages", "presumptions" that include formulas for calculating the cost for multiple-infringements on the assumption that each infringement is the equivalent of a lost sale, and an unexplained provision simply called "additional damages". The rights holder is given the choice of which damages calculation to pursue.

The Privatisation of Enforcement in the "Digital Environment"

Further to the provisions on criminal and civil enforcement of IP law, ACTA provides in Section 5 supplementary measures on enforcement of IP rights in the "digital environment". These provisions apply to all IP infringements and not only those that are wilful or of a commercial scale. The digital environment is not defined, but is likely to capture all forms of electronic information transmission.

ARTICLE 19 is concerned that Section 5 of ACTA encourages states to require private entities to act as law enforcement officers against IP infringement in the digital sphere. ACTA promotes at Article 27.3 "cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement." Although not compulsory, this suggests that states will be encouraged to enact laws requiring private parties, including intermediaries like ISPs, to cooperate with copyright holders to monitor and report IP infringements online. These private parties do not have the institutional knowledge or experience to make these determinations in a manner that guarantees the due process and privacy rights of service users, nor is it clear what level of transparency obligations they will be subject to.

ACTA also encourages states to enact nominal state authorisation procedures that would require internet intermediaries to provide information to rights holders that identify *alleged* copyright infringers. Article 27.4 states that "competent authorities" may be provided with the authority to "order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was *allegedly* used for infringement." Competent authorities are defined in Article 5 to include administrative tribunals and law enforcement authorities. Such bodies are not independent from government and, especially in the case of law enforcement authorities, do not grant the same protections as the judiciary would to the due process rights of those subject to information requests. The requisite burden on the rights holder for attaining an information disclosure order is unclear, as ACTA only requires them to make a "legally sufficient" claim of an "alleged" copyright infringement. The nature of the "expeditious" proceedings are also not detailed, but the terminology suggests speedy procedures that are therefore likely to be *ex parte* and provide few due process guarantees for the "alleged" infringer before their information is communicated. This process is likely to further incentivise the pre-emptive monitoring and censoring of online content by intermediaries, and threatens the privacy and free expression rights of those services' users.

Both of these provisions contain qualifying clauses that require their implementation to be "consistent with that Party's law, preserv[ing] fundamental principles such as freedom of expression, fair process, and privacy." These clauses incorrectly assume that the domestic laws of ACTA states comply with international standards freedom of expression, which is not the case.

[9] See Piracy May Boost Sales, Torrent Freak, 2 November 2011, available at: http://torrentfreak.com/piracy-may-boost-sales-111102/

Under Article 19 of the ICCPR, these processes would have to be provided for by law, and be necessary and proportionate to pursue a legitimate aim. It is not clear that the processes recommended by Section 5 of ACTA can be reconciled with this standard, in particular the expeditious processes for disclosure of the personal information of alleged copyright infringers.

Digital Rights Management Systems

Digital rights management systems are technological measures that essentially allow producers of electronic content to control how that information is used, even where that electronic content has been legitimately purchased. The legitimacy of rights holders exercising this level of control over information that they sell to users is contested. While these measures may be targeted at preventing large-scale infringements of copyright, they also prevent individuals from engaging in trivial conduct, such as storing the content on multiple devices.

Article 27.5 of ACTA requires states to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures" that are used by authors to restrict unauthorised acts in respect of their works. Effectiveness is defined by the ability of those measures to give the author complete control over the use of the product. This assumes that, even where works are sold through legitimate channels to an end-user, the author should retain absolute control over that work, thus significantly restricting how the end-user enjoys that product. Article 27.6 and 27.7 further requires states to make it an offense to "make available" devices that allow the circumvention of digital rights management systems, even if these devices have legitimate dual uses.

Allowing a copyright holder to control the use of their work forever is an unnecessary and disproportionate restriction on freedom of expression and freedom of information. Moreover, it is unnecessary to provide additional redress to the rights holder for circumvention of these technological measures when they may seek adequate redress for the IP infringement itself.

Education of the public

Article 31 on "public awareness" provides further insight to the purposes of ACTA and demonstrates the agreement's bias towards the protection of intellectual property while disregarding the potential impact on fundamental human rights. This provision requires that states "enhance public awareness of the importance of respecting intellectual property right and the detrimental effects of intellectual property rights infringement." There is no corresponding obligation to educate the public on their fundamental human rights to freedom of expression or to freedom of information, or to increase awareness on rights to cultural information.

Conclusion

ARTICLE 19 finds that ACTA fundamentally flawed from a freedom of expression and information perspective. If enacted, it will greatly endanger the free-flow of information and the free exchange of ideas, particularly on the internet. The privileged status conferred on a number of IP corporations during the secretive negotiations process has led to an agreement that disproportionately protects the interests of those corporations at the expense of individuals' fundamental human rights.

In light of the impact ACTA will have on the exercise of freedom of expression and information, we urge all MEPs to vote against ACTA in the European Parliament.

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