



## **ACTA protesters – do they have the wrong target?**

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The week of February 6, 2012 saw fresh opposition to the ACTA treaty across Europe, including an online petition which received over 2,000,000 signatures<sup>1</sup> and more than 100 protests in major cities on Saturday, February 11.<sup>2</sup> Protesters are calling for the European Parliament to reject the treaty, which they say restricts fundamental rights. Although the European Union and 22 member states have already signed on to ACTA last month, it still needs to be ratified by the European Parliament and implemented by member states.

Yet, a thorough look shows that when it comes to the internet, ACTA may not be as radical as critics claim. This short brief weighs protesters' fears concerning ACTA against its purpose and actual provisions, suggesting that it is the application of ACTA's principles in national and regional legislation that more deserves a thorough public eye.

### **The context of the ACTA treaty**

While the increasingly global sharing of digital files online is certainly a positive trend, the portion of shared material that is pirated is negatively impacting the global economy. Building on OECD data from 2008, one 2011 study estimates worldwide value of digitally pirated products to be \$30 to \$75 billion, and rising to between \$80 and \$240 billion by 2015.<sup>3</sup> Another analysis found that approximately 2.5 million jobs are lost across G20 economies due to counterfeiting and piracy activities.<sup>4</sup>

In this context, the consensus among many policymakers has been that the existing international framework for the enforcement of copyright and trademarks, the TRIPS Agreement, is too broad and outdated to regulate current piracy and counterfeiting. Therefore, they intended ACTA to 'put meat on the bones' of TRIPS by creating concrete standards for how its provisions on enforcement of copyright and trademarks should be applied in the 21st century.<sup>5</sup>

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<sup>1</sup> Avaaz, "ACTA: The new threat to the net", [https://secure.avaaz.org/en/eu\\_save\\_the\\_internet\\_spread/](https://secure.avaaz.org/en/eu_save_the_internet_spread/)

<sup>2</sup> BBC News, "Acta: Europe braced for protests over anti-piracy treaty", 6 Feb 2012, <http://www.bbc.co.uk/news/technology-16906086>

<sup>3</sup> Frontier Economics (2011), *Estimating the global economic and social impacts of counterfeiting and piracy*, <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Global%20Impacts%20-%20Final.pdf>

<sup>4</sup> Frontier Economics (2009), *The Impact of Counterfeiting on Governments and Consumers*, <http://www.icc.se/policy/statements/2009/BASCAP.pdf>

<sup>5</sup> European Parliament, DG External Policies (2011), *The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment*, p.21 [https://www.bof.nl/live/wp-content/uploads/DG\\_EXPO\\_Policy\\_Department\\_Study\\_ACTA\\_assessment1.pdf](https://www.bof.nl/live/wp-content/uploads/DG_EXPO_Policy_Department_Study_ACTA_assessment1.pdf)



## **What are the key objections voiced in recent protests?**

Protesters are mainly worried that ACTA will limit fundamental freedoms of expression and privacy by restricting the activities of internet intermediaries (i.e. internet service providers or ISPs, hosting companies, etc.) as well as users.<sup>6</sup> Other concerns, such as ACTA's effect on the economy, innovation and foreign relations, generally stem from these two main objections.

With regards to freedom of expression, one concern is that ACTA will censor or penalise internet intermediaries as well as individual users who unintentionally access or provide access to pirated material.

They are also concerned that ACTA is too vague when addressing the threshold for imposing criminal sanctions for copyright piracy, not expounding on what is meant by "activities for direct or indirect economic or commercial advantage".<sup>7</sup>

Many protestors worry that as such, ACTA will restrict key internet platforms, stifling the social and economic potential in online networking. In particular, they want internet users to be able to communicate and share information without worrying where it comes from, and intermediaries to facilitate this engagement (as well as derive legitimate economic value from it).<sup>8</sup>

Opponents of ACTA also claim that it will lead to serious breaches of individual privacy, particularly by requiring ISPs to disclose personal information on their users suspected of illegal downloading (including "alleged infringers") to governments or to rightsholders.

## **A closer look at ACTA**

However, an academic assessment prepared for the European Parliament indicates that ACTA itself does not warrant concerns about fundamental rights when it comes to the internet.<sup>9</sup>

Although certain provisions that were discussed during negotiations on ACTA and leaked to the public seemed to involve more restrictive measures – including the removal of safe harbours for ISPs (limitations on their liability for users' actions); rightsholders' ability to request the take-down of online material; and cutting-off of internet service to alleged infringers – the final text does not include these provisions.

In fact, there is no liability for ISPs other than for direct infringement. There are no provisions for take-down notices or a so-called "three-strikes" rule in which ISPs must cut-off users' internet

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<sup>6</sup> Digital Civil Rights in Europe (EDRI), "ACTA Fact Sheet", <http://www.edri.org/ACTAfactsheet>

<sup>7</sup> Anti-Counterfeiting Trade Agreement, Article 23.1

<sup>8</sup> La Quadrature du Net, "Debunking the EU Commission's 'fact-sheet' on ACTA", January 2012, [http://www.laquadrature.net/files/Debunking\\_the\\_EU\\_Commissions\\_fact-sheet\\_on\\_ACTA.pdf](http://www.laquadrature.net/files/Debunking_the_EU_Commissions_fact-sheet_on_ACTA.pdf)

<sup>9</sup> European Parliament (2011), *The Anti-Counterfeiting Trade Agreement: An assessment*, pp.6-7, [http://www.erikjosefsson.eu/sites/default/files/DG\\_EXPO\\_Policy\\_Department\\_Study\\_ACTA\\_assessment.pdf](http://www.erikjosefsson.eu/sites/default/files/DG_EXPO_Policy_Department_Study_ACTA_assessment.pdf)



access in relation to illegal downloading. However, the normal procedures for injunctions and provisional measures will be applied in the digital environment.

Signatories may opt to require ISPs and other intermediaries (infringing and non-infringing) to provide information about subscribers to rightsholders upon request, but importantly, this is up to individual countries and jurisdictions to decide.

In addition, ACTA explicitly qualifies these provisions by requiring signatories to ensure that mechanisms exist to safeguard against their abuse.<sup>10</sup>

This point highlights a crucial fact: even though ACTA is aimed at filling in the gaps in TRIPS, it is nonetheless an international agreement and the intention is that its signatories interpret and implement it individually.

### **It comes down to implementation**

With regards to online piracy, as it stands ACTA is a relatively innocuous and broad agreement. It is intended to fit within many different existing legislative frameworks.

Existing anti-piracy laws are quite diverse.<sup>11</sup> For instance, the UK's Digital Economy Act and France's so-called Hadopi law (both passed in 2010) both focus on notifying illegal downloaders, although while the UK's campaign will provide advice, continuing offenders in France must appear before a judge. On the other hand, the Stop Internet Piracy Act in the US (proposed) and the Sinde law in Spain (2011) focus more on websites "enabling" piracy; they both allow (or would allow) action against hosting websites, including preventing them from doing business with infringing sites. In this context, ACTA has established a broad framework that gives individual countries or regions the freedom to shape their own schemes within it.

As such, it is up to national (and European) lawmakers to define terms like "commercial advantage" and "indirect use". Incidentally, the European Commission has explicitly stated that it does not intend that its implementation of ACTA would focus on individual citizens' use of the internet, but rather on organised crime.<sup>12</sup>

### **Conclusion**

Putting aside the issue of whether existing national anti-piracy legislation violate fundamental rights or not, it is certainly important for civil society to ensure that its governing laws do not

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<sup>10</sup> ACTA, Article 6

<sup>11</sup> See for several examples: BBC Radio 1, "Anti-piracy download laws around the world explained", <http://www.bbc.co.uk/newsbeat/16839637>

<sup>12</sup> DG Trade, "ACTA – Anti-counterfeiting Trade Agreement", <http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/>



become applied in a manner that infringes on its freedoms of expression and privacy. Yet, where its voice is targeted is just as important.

It would seem that the current movement against ACTA should thoroughly re-evaluate its target – in itself, ACTA does not conflict with fundamental rights as they relate to the internet. However, the treaty also does not guarantee that European and national laws could not be shaped and interpreted in a way that erodes them. Protesters' cause would be better served by shifting their focus to the way in which ACTA is implemented at the EU and national levels.