



The Anti-Counterfeiting Trade Agreement (ACTA)

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Author: Philip Ward and Jacqui Beard
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The Anti-Counterfeiting Trade Agreement (ACTA) is an international treaty intended to improve global enforcement of intellectual property rights. The UK, with 22 other EU Member States, signed the agreement on 26 January 2012 at the Ministry of Foreign Affairs in Tokyo. The agreement is currently with the European Parliament, with a vote on consent expected to take place towards late summer 2012. The UK Government has indicated that it intends to ratify the agreement in due course. The Commons European Scrutiny Committee reported that the document did not raise questions of sufficient legal or political importance to warrant a substantive report to the House.

ACTA is supported by numerous organisations representing rights-owners who argue it would combat counterfeiting and piracy; it has been criticised by a number of organisations advocating internet freedom for its perceived impact on privacy and innovation. The UK Government argues that it will not create new intellectual property rights, laws, or criminal offences in the UK or EU, but will provide an international framework that strengthens procedures for international enforcement in areas of intellectual property. Opponents argue that ACTA will put the interests of rights-holders ahead of free speech, privacy, and other fundamental rights by pushing internet providers to carry out surveillance of their networks and disclose the personal information of alleged infringers to rights-holders.

This note provides a brief overview of the controversy and includes a summary of the final text of the agreement.

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1 Introduction

The Anti-Counterfeiting Trade Agreement (ACTA) is an agreement between the European Union and a number of other World Trade Organisation members. Negotiations started in 2007 and were finalised in November 2010. The final text of the Agreement, dated 3 December 2010, is available [online](#).

The [Intellectual Property Office](#), part of the Department for Business, Innovation and Skills, describes ACTA as:

(...) a plurilateral treaty that seeks to improve the global enforcement of intellectual property rights through the creation of common enforcement standards and practices and more effective international cooperation.

A summary of the content of the Agreement is given in Appendix 1 below.

The EU and 22 EU Member States, including the UK, [signed ACTA on 26 January 2012](#) in Tokyo. ACTA contains criminal enforcement provisions, an area that is considered of "shared" competence between the EU and its Member States, so needs to be signed and ratified by the EU and by each of the 27 Member States. The remaining Member States are expected to sign on the completion of respective domestic procedures. Various committees of the EU will consider the treaty before a final vote in the EU Parliament.¹

The European Commission has assembled a [factsheet](#) explaining the basic principles of ACTA. The factsheet comments:

¹ See section 3 below for more on the UK ratification process

ACTA will not change the body of EU law as it is already considerably more advanced than the current international standards ... ACTA will only address the way companies and individuals can enforce their rights in court, at the borders or via the internet. It will not create new IP rights, nor will it define their acquisition, duration, scope of protection, registration, etc. ACTA countries will enforce the rights as they are defined domestically.²

ACTA is supported by organisations such as the Motion Picture Association of America and the International Trademark Association who focus on the protection of creators and innovators through the enforcement of intellectual property rights. There is considerable opposition to ACTA, arguing that ACTA will put the interests of rights-holders ahead of free speech, privacy, and other fundamental rights. The process of negotiation has also attracted criticism over alleged secrecy.³

ACTA has been compared to two bills in the United States; the House of Representatives' Stop Online Piracy Act (SOPA) and the Senate's Protect Intellectual Property Act (PIPA). SOPA was introduced into the House of Representatives on 26 October 2011. These bills, designed to tackle online piracy, with particular emphasis on illegal copies of films and other forms of media hosted on foreign servers, have attracted much opposition. The White House said in January 2012 that it will not support the legislation due to concerns over reduced freedom of expression and the undermining of an innovative global internet. It has been reported⁴ that a vote on the bills in the Senate has now been postponed.

2 Estimating the economic cost of counterfeiting and piracy⁵

There are no definitive estimates of the cost to the UK or global economy of counterfeiting and piracy because of a lack of sufficient data on illicit trade.

The most comprehensive assessment of the quantitative evidence on the economic costs of counterfeiting and piracy is a report published by the U.S. Government Accountability Office (GAO) in April 2010 entitled *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*.⁶

The GAO examined numerous widely-cited estimates of the economic costs of counterfeiting and piracy, including digital piracy. They identified a lack of data as the biggest obstacle to producing a credible estimate and noted the extent to which existing estimates compensate for an absence of data by relying heavily on assumptions that may lack external validity:

Because of the lack of data on illicit trade, methods for calculating estimates of economic losses must involve certain assumptions, and the resulting economic loss estimates are highly sensitive to the assumptions used. Two experts told us that the selection and weighting of these assumptions and variables are critical to the results of counterfeit estimates, and the assumptions should, therefore, be identified and evaluated. Transparency in how these estimates are developed is essential for assessing the usefulness of an estimate.⁷

² "What ACTA is about", European Commission, 27 January 2012 (accessed 17 February 2012)

³ See section 4 below for more on the arguments in support and against

⁴ "Sopa and PIPA votes shelved after Congress climbs down on piracy bills", *The Guardian*, 20 January 2012

⁵ This section was contributed by Oliver Hawkins, Social & General Statistics

⁶ U.S. Government Accountability Office, "Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods", April 2010

⁷ *ibid*, p.17

The report found that many estimates of the costs of counterfeiting and piracy lacked the transparency necessary to assess their methodological quality. Details of the methodologies used to produce estimates are often not disclosed, and where they have been examined, are often found to rely on assumptions of unknown validity.

For example, in 2006 the Motion Picture Association of America (a trade association representing six Hollywood studios) published research it had commissioned from L.E.K Consulting estimating that the total cost of film piracy to major U.S. motion picture studios was \$6.1 billion in 2005; 38% of which was due to internet piracy and 62% to hard goods such as counterfeit DVDs.⁸

However, when the GAO evaluated the methodological basis for this finding they concluded that: “It is difficult, based on the information provided in the study, to determine how the authors handled key assumptions such as substitution rates and extrapolation from the survey sample to the broader population”.⁹

The GAO also found that three widely cited estimates of the cost of piracy and counterfeiting often attributed to U.S. government agencies could not be substantiated:

Three commonly cited estimates of U.S. industry losses due to counterfeiting have been sourced to U.S. agencies, but cannot be substantiated or traced back to an underlying data source or methodology. First, a number of industry, media, and government publications have cited an FBI [Federal Bureau of Investigation] estimate that U.S. businesses lose \$200-\$250 billion to counterfeiting on an annual basis. This estimate was contained in a 2002 FBI press release, but FBI officials told us that it has no record of source data or methodology for generating the estimate and that it cannot be corroborated. Second, a 2002 CBP [U.S. Customs and Border Protection] press release contained an estimate that U.S. businesses and industries lose \$200 billion a year in revenue and 750,000 jobs due to counterfeits of merchandise. However, a CBP official stated that these figures are of uncertain origin, have been discredited, and are no longer used by CBP. A March 2009 CBP internal memo was circulated to inform staff not to use the figures. However, another entity within DHS [Department of Homeland Security] continues to use them. Third, the Motor and Equipment Manufacturers Association reported an estimate that the U.S. automotive parts industry has lost \$3 billion in sales due to counterfeit goods and attributed the figure to the Federal Trade Commission (FTC). The OECD has also referenced this estimate in its report on counterfeiting and piracy, citing the association report that is sourced to the FTC. However, when we contacted FTC officials to substantiate the estimate, they were unable to locate any record or source of this estimate within its reports or archives, and officials could not recall the agency ever developing or using this estimate. These estimates attributed to FBI, CBP, and FTC continue to be referenced by various industry and government sources as evidence of the significance of the counterfeiting and piracy problem to the U.S. economy.¹⁰

An independent and transparent estimate of the costs of counterfeiting and piracy has been produced by the Organisation for Economic Co-operation and Development (OECD). In June 2008, the OECD published a report examining *The Economic Impact of Counterfeiting and Piracy*.¹¹ The study concluded that international trade in counterfeit and pirated goods could

⁸ MPA, “[The Cost of Movie Piracy](#)”, 2006

⁹ U.S. Government Accountability Office, “[Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods](#)”, April 2010, pp.21-22

¹⁰ *ibid*, pp.18-19

¹¹ OECD, “[The Economic Impact of Counterfeiting and Piracy](#)”, 2008

have accounted for up to \$200 billion in 2005. An update to the report published in 2009, updated the estimate to \$250 billion in 2007.¹²

The OECD figure only covered the international trade in physical counterfeit goods and did not include either the value of counterfeit goods produced and consumed within domestic markets or the value of digital piracy. It was therefore criticised by the International Anti-Counterfeiting Coalition (IACC) as an underestimate of the true value of the trade in counterfeit and pirated goods.¹³

In February 2011, the economic consultancy Frontier Economics published research commissioned by the International Chamber of Commerce (ICC) that expanded on the OECD's research to include domestically traded counterfeit goods and digital piracy as well as the international trade in physical counterfeits.

Their report, *Estimating the global economic and social impacts of counterfeiting and piracy*, put the total value of counterfeit and pirated goods at between \$455 and \$650 billion in 2008, with additional economy wide costs of \$125 billion to G20 economies.¹⁴

However, in discussions with the GAO, the OECD "heavily qualified" their estimate and drew attention to limitations in the methodology they had used to produce it. As the GAO notes:

In discussing their own effort to develop a global estimate on the scale of counterfeit trade, OECD officials told us that obtaining reliable data is the most important and difficult part of any attempt to quantify the economic impact of counterfeiting and piracy. OECD's 2008 report, *The Economic Impact of Counterfeiting and Piracy*, further states that available information on the scope and magnitude of counterfeiting and piracy provides only a crude indication of how widespread they may be, and that neither governments nor industry were able to provide solid assessments of their respective situations. The report stated that one of the key problems is that data have not been systematically collected or evaluated and, in many cases, assessments "rely excessively on fragmentary and anecdotal information; where data are lacking, unsubstantiated opinions are often treated as facts."

... The OECD estimated that the magnitude of counterfeit and pirated goods in international trade could have accounted for up to \$200 billion in 2005, and later updated this estimate to \$250 billion based on 2005-2007 world trade data. As noted by the OECD, most of the international trade data were supplied by national governments and relevant industries, and the OECD did not independently assess the reliability of the figures. Its methodology is based on matching, to the best of its knowledge, the industry data with customs seizure data from the OECD members, acknowledging the limitations of working with customs seizure data. OECD heavily qualified this estimate, however, reporting that "the overall degree to which products are being counterfeited and pirated is unknown and there do not appear to be any methodologies that could be employed to develop an acceptable overall estimate."¹⁵

The GAO report says the evidence suggests the scale of both counterfeiting and piracy is large, but concludes it is impossible to produce a robust quantitative estimate of their

¹² OECD, "Magnitude of Counterfeiting and Piracy of Tangible Products: An Update", 2009

¹³ See "Knock-offs catch on", *The Economist*, 4 March 2010

¹⁴ Frontier Economics, "Estimating the global economic and social impacts of counterfeiting and piracy", February 2011 – See page 5 of the Executive Summary for a complete breakdown of their estimates.

¹⁵ U.S. Government Accountability Office, "Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods", April 2010, p.16 & p.24

economic impact due to the lack of sufficient data and the absence of a methodology with which they could be accurately measured:

According to experts we spoke with and literature we reviewed, estimating the economic impact of IP infringements is extremely difficult, and assumptions must be used due to the absence of data. Assumptions, such as the rate at which consumers would substitute counterfeit goods for legitimate products, can have enormous impacts on the resulting estimates and heighten the importance of transparency. Because of the significant differences in types of counterfeit and pirated goods and industries involved, no single method can be used to develop estimates, and each method has limitations. Nonetheless, research in specific industries suggests that the problem is sizeable. Most experts we spoke with and the literature we reviewed observed that despite significant efforts, it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole.¹⁶

3 Scrutiny and ratification

3.1 UK Parliament

The European Commission's proposal for the signing and agreement of ACTA cleared scrutiny in the House of Commons on 7 September 2011.¹⁷ It was considered as a document that did not raise questions of sufficient legal or political importance to warrant a substantive report to the House. It cleared scrutiny in the House of Lords on 14 October 2011.¹⁸ The Government confirmed its position in a written answer on 9 February 2012:

Dr Huppert: To ask the Secretary of State for Business, Innovation and Skills with reference to the 40th Report from the European Scrutiny Committee, HC 428-xxxv, if he will assess the level of scrutiny in the House of the Anti-Counterfeiting Trade Agreement. [94407]

Norman Lamb: The Department for Business, Innovation and Skills fully followed the EU scrutiny process with respect to the Draft Council Decisions on the conclusion and signing of the Anti-Counterfeiting Trade Agreement. The European Scrutiny Committee felt that these did not raise questions of sufficient legal or political importance to warrant a substantive report to the House.¹⁹

There have been other parliamentary questions recently concerning the potential effects of ACTA and representations made to the IPO during the negotiations:

Jonathan Edwards: To ask the Secretary of State for Business, Innovation and Skills what assessment he has made of the potential effects of implementing the Anti-Counterfeiting Trade Agreement in (a) the UK and (b) the EU. [93309]

Norman Lamb: The Anti-Counterfeiting Trade Agreement (ACTA) has been reviewed by Government lawyers and the European Commission Legal Services who confirm that ACTA will not create new intellectual property rights, laws or criminal offences in the UK or EU.

¹⁶ U.S. Government Accountability Office, "[Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods](#)", April 2010, pp.15-16

¹⁷ European Scrutiny Committee, *Fortieth Report*, 20 September 2011, HC 428-xxxv 2010-12

¹⁸ European Union Committee, *Progress of Scrutiny 24th Ed.* 24 January 2012, EUC-24 2010-12

¹⁹ [HC Deb 9 February 2012 cc392-3W](#)

Implementing ACTA will provide EU and UK industry and creators with better protection in overseas markets, through the creation of common enforcement standards and practices and more effective international cooperation.²⁰

Chi Onwurah: To ask the Secretary of State for Business, Innovation and Skills what representations he has received on the Anti-Counterfeiting Trade Agreement. [94113]

Norman Lamb: The Intellectual Property Office held a number of stakeholder meetings during the Anti-Counterfeiting Trade Agreement (ACTA) negotiations. A range of stakeholders including business, internet service providers and consumer interest and open rights groups participated. The last stakeholder consultation was held in September 2010 prior to the final round of negotiations. Interested parties were also invited to submit comments via the Intellectual Property Office ACTA website.²¹

For UK ratification, the treaty will need to be laid before both Houses of Parliament for 21 sitting days without either House having resolved that it should not be ratified. This will be subject to a negative resolution and it will not therefore be voted on. The *Constitutional Reform and Governance Act 2010* details the procedures required if either House resolves that a treaty should not be ratified. When a treaty is laid before Parliament it is accompanied by an Explanatory Memorandum which explains the provisions of the treaty and the reason for seeking ratification.²² In view of the legal advice received that “ACTA will not create new intellectual property rights, laws or criminal offences in the UK or EU”, no implementing legislation is expected in the UK.²³

There is a parallel process which needs to happen for the European Parliament to give consent to ACTA. An IPO official has told us that once the likely timetable for action at the European level is known, efforts will be made to complete UK ratification around the same time: “This is likely to be in the second half of 2012, but this is subject to change.”

3.2 European Parliament

The Chair of the International Trade Committee (ITC) at the European Parliament, which is to scrutinise ACTA and recommend whether the Parliament as a whole supports its adoption, has said:

“ACTA simply involves an update of the means, mechanisms and remedies to protect intellectual property rights... It does not change the content, everything that was allowed continues to be allowed, everything that was forbidden keeps on being forbidden. It is about being more effective when it comes to infringements of intellectual property rights.”²⁴

The opinion of the European Parliament’s Legal Service (December 2011) on the conformity of ACTA with EU law was made public in January 2012. A [copy of the opinion](#) can be found through the website [infojustice.org](#), a site which states that it is a “blog about issues related to international IP, open access initiatives, and efforts to expand access to knowledge-based goods”.²⁵

²⁰ [HC Deb 7 February 2012 c245W](#)

²¹ [HC Deb 7 February 2012 c244W](#)

²² For more on this process see [Publication of treaties: introductory note](#) on the FCO website

²³ Information in this paragraph supplied by an official at the Intellectual Property Office

²⁴ “[ACTA will not change scope of IP protection, MEP claims](#)”, [Out-law.com](#), 3 February 2012 (accessed 17 February 2012)

²⁵ [Infojustice.org](#) website (accessed 17 February 2012)

The legal opinion concludes that:

The conclusion of ACTA *prima facie* does not require the Union to adapt its *acquis* in the area of intellectual property rights and their enforcement, including legal acts relating to the digital environment.²⁶

In a 29 February 2012 press release from the European Parliament, it was stated that David Martin MEP, who will draft the committee's recommendation, asked the committee to back his plan to refer ACTA to the European Court of Justice, for a ruling on questions to be prepared by Parliament:

Mr Martin suggested that while the Court of Justice referral is being prepared, the time set aside for Parliament's assent to ACTA should instead be used to prepare an interim report setting out questions to the European Commission and EU Member States on how it is to be enforced.²⁷

The Committee on International Trade of the European Parliament held a workshop on ACTA on 1 March 2012. Details of the programme can be found [online](#).

3.3 European Commission

The European Commission published a document on the [transparency of the ACTA negotiations](#) on 13 Feb 2012. Also available online is a [list of written questions](#) from the European Commission answered by the European Parliament on ACTA from January 2012.

The European Commission has referred ACTA to the European Court of Justice. The EU Trade Commissioner Karel De Gucht said in a press release on 22 February 2012:

I believe that putting ACTA before the European Court of Justice is a needed step. This debate must be based upon facts and not upon the misinformation or rumour that has dominated social media sites and blogs in recent weeks.

As I have explained before the European Parliament on several occasions, ACTA is an agreement that aims to raise global standards of enforcement of intellectual property rights. These very standards are already enshrined in European law. What counts for us is getting other countries to adopt them so that European companies can defend themselves against blatant rip-offs of their products and works when they do business around the world.

This means that ACTA will not change anything in the European Union, but will matter for the European Union.

(...)

Let's cut through this fog of uncertainty and put ACTA in the spotlight of our highest independent judicial authority: the European Court of Justice.

This clarity should help support a calm, reasoned, open and democratic discussion on ACTA - whether at the national or at the European level. We will also be in contact with the other European institutions to explain this step and why it would make sense that they make the same move.²⁸

²⁶ Legal Opinion Re: Anti-Counterfeiting Trade Agreement (ACTA) – Conforming with European Union Law, 8 December 2011

²⁷ European Parliament press release, [ACTA: MEPs want clarity before taking a decision](#), 29 February 2012

²⁸ European Commission press release, [Statement by Commissioner Karel De Gucht on ACTA \(Anti-Counterfeiting Trade Agreement\)](#), 22 February 2012

On the referral to the ECJ, Jérémie Zimmermann, co-founder of the internet advocacy group La Quadrature du Net is reported to have said “No legal debate can fix Acta or give it a legitimacy that by design it cannot have”.²⁹

3.4 Criticisms of the negotiation process

There has been controversy over the negotiation of ACTA. The European Parliament's rapporteur for ACTA [resigned from the post](#) in protest over the conduct of the negotiations. He said:

I condemn the whole process which led to the signature of this agreement: no consultation of the civil society, lack of transparency since the beginning of negotiations, repeated delays of the signature of the text without any explanation given, reject of Parliament's recommendations as given in several resolutions of our assembly.³⁰

The UK Government was asked for its response to the rapporteur's action:

Dr Huppert: To ask the Secretary of State for Business, Innovation and Skills if he will reconsider his policy on the Anti-Counterfeiting Trade Agreement (ACTA) in the light of the resignation of and comments made by Kader Arif, European Rapporteur for ACTA. [94404]

Norman Lamb: The UK has supported the Anti-Counterfeiting Trade Agreement (ACTA) from the outset and continues to support the agreement. Kader Arif, European Rapporteur for ACTA, made comments that there was

“no consultation of the civil society”

and

“lack of transparency since the beginning of negotiations”.

It is normal for international negotiations to be confidential but there are clear rules on how the Members of the European Parliament should be informed and these have been followed. The European Commission also organised four stakeholder conferences and the Intellectual Property Office held a number of stakeholder meetings during the ACTA negotiations. The range of stakeholders included business, internet service providers and consumer interest and open rights groups.

Dr Huppert: To ask the Secretary of State for Business, Innovation and Skills what assessment he has made of the extent to which the concerns of the European Parliament on the transparency and status of the Anti-Counterfeiting Trade Agreement negotiation expressed in its resolution of 10 March 2010 have been addressed. [94405]

Norman Lamb: The rules on how the Members of the European Parliament should be informed about international negotiations have been followed. Members of the European Parliament's Committee on International Trade have had access to successive versions of the Anti-Counterfeiting Trade Agreement (ACTA) text. The full text has been fully public since April 2010. The European Commission also organised four stakeholder conferences and the Intellectual Property Office held a number of stakeholder meetings during the ACTA negotiations. The range of stakeholders

²⁹ [“Acta approval stalled by European commission”](#), *The Guardian*, 22 February 2012

³⁰ [“European Parliament rapporteur quits in Acta protest”](#), BBC Online, 27 January 2012 (accessed 17 February 2012)

included business, internet service providers and consumer interest and open rights groups.

The final ACTA text has been reviewed by government lawyers and the European Commission Legal Services who confirm that ACTA will not create new intellectual property rights, laws or criminal offences in the UK or EU. As such, the agreement does not affect the protection of fundamental rights, privacy or data protection and it respects the important role of the internet.³¹

The magazine *Wired* claims that ACTA was “slipped through the European Council in an agriculture and fisheries meeting in December”. Their article also questions whether ACTA really is a trade agreement.

Acta has been negotiated as a trade agreement, which has allowed it certain freedoms from democratic scrutiny. Critics argue that this is copyright legislation being pushed through under the guise of a trade agreement so that it doesn't get debated as much. Unusually for a trade agreement, there are criminal sanctions.

Trade Agreements can usually be agreed in Europe by the European Commission on behalf of the EU. However, the European Commission was not allowed to negotiate over Article 23 -- the controversial part of the treaty which not only insists on criminal penalties for piracy but also for those accused of "aiding and abetting" copyright infringement -- the member states had to be represented at the table. They negotiated these new criminal sanctions behind closed doors

Acta is such an unusual beast that when the European Commission pledged to create a guide about how Acta could be ratified, it took months instead of weeks. It has been described as a "mixed agreement".³²

Recently, the MEPs of the European Parliament International Trade Committee have joined those complaining about a lack of transparency. A press release from 29 February 2012 states:

Mr Martin and other speakers objected to the "lack of transparency" in the ACTA negotiations to date and reiterated Parliament's many requests to be more closely involved, and not merely left with the option of accepting or rejecting the existing text.

French Green Yannick Jadot complained that "procedural excuses" had been used to avoid involving Parliament, and noted that MEPs had learned of the Commission decision to refer ACTA to the Court of Justice from the press. "I'm not sure that this is in line with our inter-institutional agreement with the Commission", he said.

Swedish Green Carl Schlyter complained that emerging economies were not involved in ACTA negotiations, noting that 95% of all counterfeiting takes place in countries that will not be affected by ACTA. He also observed that if the aim now was to spread ACTA via bilateral agreements with countries not yet party to it, this would not be a democratic way to influence other countries.³³

³¹ [HC Deb 9 February 2012 cc391-2W](#)

³² [“What is Acta and why should you be worried about it?”](#), *Wired*, 24 January 2012

³³ European Parliament press release, [ACTA: MEPs want clarity before taking a decision](#), 29 February 2012

4 Reaction

4.1 Voices in support

Supporters of ACTA include the [International Trademark Association](#) (INTA) which, on a [website page](#) on the topic, states:

ACTA would be one of the first international agreements designed specifically to combat counterfeiting in a harmonized and coordinated way, which is absolutely necessary to fight the highly sophisticated counterfeiting networks spanning multiple countries. INTA supports ACTA provisions that call for:

- higher standards and stronger cooperation on combating counterfeiting
- stronger border enforcement especially with relation to goods in transit
- more effective criminal penalties
- stronger international cooperation between enforcement bodies of the signatory countries
- increased cooperation between government and industry

INTA has joined with other industry groups in Europe to produce an advocacy document on ACTA titled "[ACTA why you should support it](#)".³⁴ In this document INTA argues that ACTA will:

- protect European creators and innovators
- create and preserve millions of European jobs
- spur European economic recovery, competitiveness and growth
- provide significant benefits for European citizens beyond the existing international framework
- foster international trade, development and the rule of law
- promote innovation, creativity, technological advancement and investment
- give European creators and export businesses of every size the confidence to promote their products without the fear of widespread counterfeiting and piracy
- encourage businesses to take risks and to attract investment for the development of new products and services
- protect the health and safety of European consumers

The [Motion Picture Association of America](#) (MPAA) has also stated its support for ACTA. In September 2011, the MPAA CEO and Chairman Chris Dodd said:

"The Anti-Counterfeiting Trade Agreement is an important step forward in developing strengthened international cooperation and enforcement of intellectual property rights. It is also a strong signal that the world's largest economies recognize the critical value of intellectual property rights to their global competitiveness and are committed to moving ahead together to protect the jobs of the millions of men and women working in

³⁴ "[ACTA why you should support it](#)", INTA.org, January 2012 (accessed 17 February 2012)

film and other creative industries. We commend the U.S. Trade Representative and its partners for their hard work and dedication in reaching this landmark agreement.³⁵

The [International Federation of the Phonographic Industry](#) (IFPI) has also expressed support for ACTA. On 26 January 2012 Frances Moore, CEO of IFPI, said:

IFPI commends the EU and those Member States who signed the ACTA agreement today. ACTA will protect EU jobs and investment in creative content against counterfeiting and piracy in third countries. The treaty highlights the EU's ongoing support for intellectual property. We urge the European Parliament to complete the adoption process by giving its assent to the treaty.³⁶

4.2 Voices in opposition

ACTA has been criticised by, among others, the [Open Rights Group](#) who describe it as having "very serious consequences for the free flow of information online". Open Rights Group is a non-profit organisation founded in 2005 and campaigns on issues of freedom of expression, privacy, innovation, creativity and consumer rights on the internet. The group argues that ACTA has no democratic accountability, threatens privacy and freedom of speech, would be a hindrance to innovation and could hurt developing countries.

The group [European Digital Rights](#) (EDR) (an international non-profit association under Belgian law) has produced a set of [Frequently Asked Questions](#) about ACTA and five one page briefing documents as part of its "[what's wrong with ACTA week](#)". These examine aspects of ACTA including criminal sanctions and safeguards and ACTA's impact on individual rights and international relations.

EDR argues that ACTA will put the interests of rights-holders ahead of free speech, privacy, and other fundamental rights by pushing internet providers to carry out surveillance of their networks and disclose the personal information of alleged infringers to rights-holders. EDR is concerned that ACTA "provides an extremely low threshold for imposing criminal sanctions", and addresses "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". EDR says that ACTA "builds barriers to innovation and competition" and "will create an environment where large competitors will have major advantages over smaller firms and start-ups".³⁷

The magazine *Wired* summarised what it saw as the main criticisms of ACTA in an article, "[What is Acta and why should you be worried about it?](#)". Firstly that it is undemocratic. The article says that "Acta has been largely negotiated behind closed doors, with many participating parties being forced to sign NDAs [Non-Disclosure Agreements] before being allowed to see Acta documents". The article asserts that ACTA is "even being negotiated outside of existing trade bodies such as the World Trade Organisation and the World Intellectual Property Organisation. The article's second criticism is that ACTA "blurs the lines between piracy and counterfeiting". It states, "piracy and counterfeiting are not the same thing. Counterfeiting generally requires the person receiving the copied goods to be deceived into thinking it is real". The third criticism mentioned in the article is that ACTA criminalises copyright infringement when there are civil sanctions already:

³⁵ Motion Picture Association of America News Release, [Statement by MPAA CEO and Chairman Chris Dodd on the upcoming signing ceremony for the Anti-Counterfeiting Trade Agreement](#), 29 September 2011

³⁶ International Federation of the Phonographic Industry News Story, [IFPI welcomes ACTA signature](#), 26 January 2012

³⁷ "[ACTA Factsheet](#)", EDRI.org, 2 February 2012 (accessed 17 February 2012)

According to the controversial Article 23, criminal penalties should be applied "in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale", although the phrase "commercial scale" is not clearly defined and specifically removes the intentionality, i.e. it doesn't matter whether a company intends to make a profit from the pirated content, it only matters whether it has the scale of a commercial operation. Criminal sanctions should also be made available for those "aiding and abetting" infringement on a commercial scale. Critics argue that this means that ISPs and data centres would potentially be liable for aiding and abetting any commercial website that features a copyright infringing piece of content. "This is the nuclear weapon against any actor on the internet," says Jérémie Zimmermann [from the French lobbying group La Quadrature du Net]. He believes that the criminal section of Acta will be used as a weapon to ensure that ISPs cooperate with rights holders.

Finally the article says that ACTA creates a barrier to changing national law in that it "takes away from democratic governments the right to set their own copyright policy or patent policy".³⁸

Further criticism has come from the United States where critics say it will:

... put Internet service providers in an untenable position, making them potentially liable for their customers' alleged actions and thereby forcing them to comply with requests from copyright holders for user data, with no due process.³⁹

There has been public opposition across Europe with protest and petitions [reportedly](#) being organised in many countries. In the UK a "Say no to ACTA" [e-petition](#) has been created on the direct.gov.uk website, which claims that "ACTA would impose new criminal sanctions forcing internet actors to monitor and censor online communications".

³⁸ "What is Acta and why should you be worried about it?", *Wired*, 24 January 2012

³⁹ "Meet SOPA's evil twin, ACTA", *tech.fortune.cnn.com*, 26 January 2012

Appendix 1: summary of ACTA text⁴⁰

A. The introductory Annex sets out the overarching aim and purpose of ACTA that the Parties agree to when signing.

B. Chapter I - Initial Provision and General Definitions;

Article 1 recognises the existing obligations of the Parties to existing agreement, including TRIPS [trade-related aspects of intellectual property rights];

Article 2 defines the nature and scope of the obligations; allowing Parties to implement ACTA as they see fit within their own domestic legal system but without contravening ACTA should their domestic law be more extensive; Parties are not obliged to divert additional resources to enforcement of IP rights and; Articles 7 and 8 of TRIPS shall apply, *mutatis mutandis*.

Article 3 recognises the provisions in a Party's law for governing the availability, scope and maintenance of intellectual property rights (IPR) and recognising that a Party is not obliged to create protection for an IPR that does not exist in their law.

Article 4 recognises privacy and protects against disclosure of certain information between Parties.

Article 5 sets out the definitions of terms and wording in relations to ACTA, such as "competent authority" and "counterfeit trademark goods".

C. Chapter II – Legal Framework for Enforcement;

Article 6 sets out the obligations of a Party for enforcement procedures for infringement of IPRs covered in ACTA.

Article 7 sets out the availability and extent of **civil** procedures to rights holders.

Article 8 sets out the requirement for provision for application of injunctions to prevent goods that infringe IPR from entering channels of commerce.

Article 9 sets out the conditions and systems available for awarding damages for infringement of IPRs.

Article 10 sets out other civil remedies available for infringement of IPRs, such as destruction of goods at the expense of the infringer.

Article 11 establishes authority to acquire, nature and the protection of information relevant to infringement of IPRs.

Article 12 sets out provisional measures for prevention of infringement of IPRs, including acting expeditiously without the presence of the defendant being heard, seizure of suspect goods, provision of security and compensation for frivolous or unsubstantiated claims.

Article 13 defines the scope of **border measures** addressing balance of IPR protection and creation of barriers to trade.

Article 14 defines the exclusion for goods of a non-commercial nature in personal luggage and inclusion of goods of a commercial nature in small consignments.

⁴⁰ Supplied by the IPO

Article 15 defines permissions for request for information to be made available by a right holder by competent authorities.

Article 16 sets out procedural requirements with respect of suspect imported, exported and in-transit goods.

Article 17 sets out the criteria for the supply of adequate evidence from the rights holder, for the competent authorities to decide that there is *prima facie* an infringement of his IPR and applications to suspend the release of goods.

Article 18 sets out the provision and nature of reasonable security or assurance to protect the defendant and competent authorities.

Article 19 requires Parties to put in place procedures for competent authorities to determine whether an infringement has taken place.

Article 20 sets out the provision for authority to order remedies, which include destruction, removal of offending item (for example trade mark) and administrative penalties.

Article 21 defines the nature of application fees charged by competent authorities in relation to seized goods.

Article 22 defines the nature and occasions for disclosure of information to right holder by competent authority.

Article 23 defines the scope of infringements that are subject to **criminal** procedures, penalties and liabilities.

Article 24 sets out the provision of and scope of penalties.

Article 25 sets out the conditions for seizure, forfeiture and destruction of goods, information and assets derived from the alleged offence by competent authorities.

Article 26 provides *ex officio* action in criminal enforcement to competent authorities.

Article 27 sets out criminal enforcement procedures against acts of IPR infringement which take place in the **digital environment** while preserving legitimate competition and preserving fundamental principles such as freedom of expression.

D. Chapter III – Enforcement Expertise, Information and Domestic Coordination;

Article 28 sets out conditions for development of specialised expertise, sharing information and co-ordination on best practice for preventing and combating IPR infringement and engaging with stakeholders.

Article 29 sets out the requirement and conditions for Parties to manage risk at the border through consultation and sharing of information.

Article 30 promotes transparency in the administration of IPR enforcement systems of the Parties.

Article 31 promotes enhancement of public awareness of IPRs and the effect of their infringement.

Article 32 considers the environmental impact of destruction of infringing goods.

E. Chapter IV – International Cooperation;

Article 33 recognises the value of effective promotion of cooperation by Parties, for example through law enforcement and border measures authorities.

Article 34 seeks a Party's best endeavour to share mutually agreed information.

Article 35 seeks a Party's best endeavour to provide for capacity building and technical assistance.

F. Chapter V – Institutional Arrangements;

Article 36 establishes and defines the remit of the ACTA Committee.

Article 37 establishes the provision of contact points in each Party.

Article 38 establishes the procedures for consultations among Parties.

G. Chapter VI – Final Provisions;

Articles 39 – 45 set out the provisions for agreement, entry into force, withdrawal, amendment, accession, language and depositary of ACTA.

Appendix 2: latest news

[“ACTA approval stalled by European commission”](#) *The Guardian*, 22 February 2012

Approval of the controversial international anti-counterfeiting treaty Acta has been stalled by the European commission, which is to ask Europe's highest court whether implementing it would violate any fundamental EU rights.

The decision comes as the treaty faces growing opposition in parliaments, city streets and the internet, with some countries including Germany, the Netherlands and Poland declaring they would not approve the agreement in its current form – a stance that would make it impossible to ratify, because it requires every European country to sign up and approve it.

[“ACTA loses more support in Europe”](#), *The Guardian*, 15 February 2012

Bulgaria will not ratify the Anti-Counterfeiting Trade Agreement over fears it will curb freedom to download movies and music for free and encourage internet surveillance, economy minister Traicho Traikov said.

[“ACTA criticised after thousands protest in Europe”](#), *The Guardian*, 13 February 2012

European Parliament president Martin Schulz, speaking to Germany's ARD television on Sunday about the Anti-Counterfeiting Trade Agreement (Acta), said: "I don't find it good in its current form."

He said the necessary balance between copyright protection and the individual rights of internet users was only very inadequately anchored in the agreement.

(...)

The signing was hailed as a step toward bringing Acta into effect. However, it still has to be ratified by national parliaments.

The UK has not yet signed officially, but its copyright and counterfeiting laws are already as strong as any suggested in Acta.

Negotiations over Acta have been taking place for several years. Some European countries have signed Acta but it has not yet been signed or ratified in many countries.

[“ACTA up”](#), *The Economist*, 11 February 2012

No sooner was the Anti-Counterfeiting Trade Agreement (ACTA) signed than Kader Arif, the European Union's chief negotiator, called it a “masquerade” and resigned. Slovenia's envoy, who signed the deal at a powwow in Japan, called her own behaviour an act of “civic carelessness”. Romania's prime minister (now resigned) admitted he couldn't say why his country had signed it. In Poland, where lawmakers protested by wearing Guy Fawkes masks associated with the Anonymous hacker-activist collective, the prime minister said he would suspend ratification. The Czech Republic and Slovakia (which has not signed it) later did the same.

[“ACTA: Germany delays signing anti-piracy agreement”](#), *BBC News Online*, 10 February 2012

Germany has halted signing a controversial anti-piracy accord, the Anti-Counterfeiting Trade Agreement (Acta), after the justice ministry voiced concerns.

A foreign ministry spokesperson told AFP that the delay was to “give us time to carry out further discussions”.

Latvia put off ratification on Friday. Poland, the Czech Republic and Slovakia have already delayed the process.

[“ACTA's EU future in doubt after Polish pause”](#), *Zdnet.co.uk*, 3 February 2012

Because ACTA deals in part with criminal law, the application of which is entirely up to national governments, it qualifies in the EU as a 'mixed agreement'. This is why it was signed in January by a European Commission representative as well as by ambassadors from EU member states, including Poland and the UK.

The rules around mixed agreements say the legislatures of every EU member state, as well as the European Parliament, all have to provide ratification. The European Commission confirmed to ZDNet UK that if just one member state does not ratify ACTA, the deal will not enter into force anywhere within the EU.

As yet, none of ACTA's 31 signatories has ratified it, and seven countries, including EU member states Cyprus, Estonia, Germany, the Netherlands and Slovakia, have so far declined to sign the document at all.