



January 2012

Debunking the EU Commission's "fact-sheet" on ACTA

In a [document](#) published on its website and circulating in the EU Parliament, the Commission conveys more lies about ACTA.

1. "ACTA is important for the EU's external competitiveness, growth and jobs as well as to the safety of citizens"

- ACTA is a direct by-product of the lobbying offensive launched in 2004 by the International Chamber of Commerce, presided by the then CEO of Vivendi-Universal Jean-René Fourtou, whose wife acted as EU Parliament rapporteur for the IPR Enforcement Directive ([IPRED](#)) adopted the same year. It is one of the worst examples of private interests taking over policy-making.
- ACTA may have been negotiated like other trade agreements, but it is not just a trade agreement on tariffs. Instead, ACTA generalizes extreme civil sanctions and broadens the scope of criminal sanctions.
- Binding the EU to such outdated models, and deploying schemes that can be used as anti-competitive weapons will only hamper innovation, competition and growth. Not only in the digital economy, but in many fields which rely on the free sharing of knowledge, from agriculture to healthcare.
- There was never any impact assessment on the need for such a plurilateral agreement. The Commission never proved that tougher enforcement standards worldwide would actually benefit the EU's public interest, much less the rest of the world's.
- Instead of imposing ACTA to developing countries, the EU should urgently look at the broader consequences of its current policies (EUCD, IPRED) on innovation, access to culture and fundamental rights, and reform these policies to lay the foundation of a true knowledge-based economy.
- Contrary to the Commission's claims, transparency on ACTA was only made possible after negotiation documents were leaked by insiders worried of ACTA's consequences. These leaks forced the negotiators to release negotiation texts in the Spring of 2010, more than 3 years after the beginning of the negotiations.
- The negotiation and implementation of ACTA bypasses legitimate international organizations (WTO, WIPO) where copyright, patent and trademarks policy are discussed. This is all the more unacceptable considering that a growing number of countries understand the importance of reforming these policies by breaking away from blind repression.

2. “ACTA is a balanced agreement, providing adequate protection to sectors in need, while safeguarding the rights of citizens and consumers”

- Safeguards in the text are purely generic and declarative, mostly in the general parts of the agreement, where enforcement provisions, generally vaguely worded, are binding to signatories. For instance, a study by legal professors [Kroff and Brown](#) stresses that ACTA “overall significantly strengthens enforcement measures (especially criminal law ones), without any of the safeguards and exceptions needed to ensure a balance of interests between right holders and parties”.
- The Commission says ACTA does not go further than the EU acquis, but leading EU legal scholars have made clear that on important points it does: in particular on criminal measures, for which there is no EU acquis, and on border measures and damages.
- The letter of ACTA may not be contrary to the eCommerce directive, EUCD or IPRED, but strengthens them and prevents EU lawmakers from amending them on crucial points.
- The overall logic of ACTA's digital chapter paves the way for extra-judicial measures, similar to those of SOPA and PIPA, whereby rights holders and ISPs or financial service providers would “cooperate” to take “measures” against alleged infringements that could only amount to censorship mechanisms, bypassing due process and the right to a fair trial.
- This reading is comforted by the criminal sanctions provided for “aiding and abetting” infringements (art. 23.4). Such concerns are also accentuated by the EU Commission's [IPR strategy](#) and the current overhaul of the IPRED and eCommerce directive.

3. “ACTA is about adequately enforcing existing intellectual property rights, but does not create new rights”

- ACTA modifies the scope of criminal sanctions in EU Member States, ensuring they will be applied for cases of infringement on a “commercial scale”, defined as “direct or indirect economic or commercial advantage” (art. 23.1). This term is vague, open to interpretation, and just plainly wrong when it comes to determining the scope of proportionate enforcement, as it does not make any distinction between commercial and non-profit infringement. Widespread social practices, like not-for-profit file-sharing between individuals, as well as editing a successful information website or distributing innovative technological tools, could be interpreted as “commercial scale”.
- By extending the scope of criminal sanctions for “aiding and abetting” to such “infringement on a commercial scale”, ACTA will create legal tools threatening any actor of the Internet. Access, service or hosting providers will therefore suffer from massive legal uncertainty, making them vulnerable to litigation by the entertainment industries.

- The Presidency of the Council of the EU (representing the 27 Member States governments) had to negotiate ACTA in conjunction with the Commission. The Presidency negotiated the “criminal sanction” chapter of ACTA, which could not be negotiated by the Commission as criminal law is part of Member States' competencies. This illustrates that there is no EU acquis on criminal sanctions and proves that ACTA does change EU law.
- Beyond broadening the scope of copyright, patent and trademarks enforcement, ACTA establishes new procedural rules favouring the entertainment industries. These procedures will have a dramatic chilling effect on potential innovators and creators, especially considering ACTA's insane damage provisions (during a trial, right holders will be able to submit their preferred form of damage computation, see art. 9.1).
- In the future, ACTA's scope could also be easily expanded through the “ACTA committee”. The latter will have authority to interpret and modify the agreement after it has been ratified, and propose amendments. Such a parallel legislative process, which amounts to signing a blank check to the ACTA negotiators, would create a precedent to durably bypassing parliaments in crucial policy-making, and is unacceptable in a democracy. This alone should justify that ACTA be rejected.

4. “ACTA has a broad coverage, so as to protect all European creators and innovators, through a broad range of means”

- China, Russia, India and Brazil, countries where most of counterfeiting is produced, are not part of ACTA, and have stated publicly that they will never be. Considering the widespread opposition to ACTA, the agreement has lost any legitimacy on the international stage.
- Again, the Commission has not even proved the need for new enforcement measures nor that existing TRIPS measures are not enough.
- The Commission keeps stepping up repression, when in many instances counterfeiting is at its core a market failure due to the inadequacy of IPR holders' business models and contracts. At the same time, no EU Commission initiative exists to take a positive approach on discussing new financing models for the culture economy fit for the digital environment.
- Geographical indications – a key point for Europe's small businesses and cultural heritage – are mostly excluded from ACTA. The few references to geographical indications in ACTA will have no or very little effect on third countries' national law.

For more information, visit www.lqdn.fr/acta