

Dear Members of the JURI Committee,
Dear Members of the LIBE Committee,

We are writing to express our concerns with the Anti-Counterfeiting Trade Agreement's criminal measures. They criminalise ordinary companies and individuals.

First, unlike the TRIPS agreement, the Anti-Counterfeiting Trade Agreement (ACTA) is not limited to unauthorised distribution. ACTA also includes unauthorised use of copyrighted works. At the WTO Council for TRIPS (October 2010), the US Trade Representative made clear ACTA also includes companies using unauthorised software.
[1]

Second, ACTA removes the scale element from the definition of the crime. While in public the Commission mentions large scale criminal activities, in a secret document the Commission actually makes clear that the ACTA definition overturns the decision of the WTO dispute settlement panel in the recent China-Enforcement case.
[2]

Third, ACTA's footnote 9 extends the criminalisation to importation (taking home a laptop after a business trip).

The consequences are far-reaching. ACTA can be used to criminalise newspapers revealing a document, office workers forwarding a file and private downloaders; whistle blowers and weblog authors revealing documents in the public interest and remixers and others sharing a file if there is an advantage. This advantage may be indirect, a concept we believe to be too unclear to incorporate in criminal law.

It is a basic misconception to use a civil law definition for criminal law. ACTA's definition of commercial scale is as broad as possible: "For the purposes of this section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage."

This definition is not limited to large scale activities, does not contain a de minimis exception, does not contain other exceptions, is not limited to software and also covers companies and individuals. While ACTA's border measures contain a de minimis exception, the criminal measures do not, opening up the possibility of laptop and iPod searches just after border control. The criminalisation is so broad, that the threshold for being guilty of aiding and abetting may easily be passed.

The European Parliament has to answer the question whether it wants to massively criminalise Europe's entrepreneurs, office workers and adolescents.

ACTA countries account for a predominant percentage of world trade, there is a clear threat that these norms will carry into the World Trade Organization and become global norms. For generations to come, there may be no way back.

ACTA already contains harsh civil and border measures, we seriously doubt the necessity and proportionality of adding intrusive criminal measures (beyond the TRIPS agreement). We urge the European Parliament to obtain the opinion of the Court of Justice as to whether ACTA is compatible with the Treaties.

Yours sincerely,

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Foundation for a Free Information Infrastructure

[1] <http://www.keionline.org/node/1008>

[2] http://keionline.org/sites/default/files/Innovative-elements-of-ACTA-final_0.doc