-----Oprindelig meddelelse-----
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Sendt: 14. oktober 2011 10:33
Til: Signe Riis Andersen
Emne: FFII urges EP Civil Liberties Committee to formulate opinion on ACTA

Dear Members of Cosac, Dear Permanent Representatives,

Please find below an FFII letter to the European Parliament Civil Liberties
Committee.

Yours sincerely,

Ante Wessels

--

Dear Members of the Civil Liberties Committee,

In the coming months, the Parliament will have to take a decision on whether to
give consent to ACTA (Anti-Counterfeiting Trade Agreement). Research has shown
serious fundamental rights issues. We call upon you to formulate an opinion on
ACTA.

A group of prominent European academics published an opinion on ACTA. They conclude
that certain ACTA provisions are not entirely compatible with EU law and will
directly or indirectly require additional action on the EU level. They invite "the
European institutions, in particular the European Parliament, and the national
legislators and governments, to carefully consider the above mentioned points and,
as long as significant deviations from the EU acquis or serious concerns on
fundamental rights, data protection, and a fair balance of interests are not
properly addressed, to withhold consent." [1]

An INTA Committee commissioned study acknowledges deviations from EU law. The study
concludes: "There does not therefore appear to be any immediate benefit from ACTA
for EU citizens". [2]

The Greens / EFA group commissioned two studies, on ACTA and Access to Medicines

[3] and on the compatibility of ACTA with the European Convention on Human Rights &
the EU Charter of Fundamental Rights [4]. The second study was written by Professor
Douwe Korff, London Metropolitan University, and Ian Brown, Senior Research Fellow,
Oxford Internet Institute, University of Oxford, both fundamental rights experts.
In their opinion, ACTA is incompatible with fundamental European human rights
instruments and standards. Below we attach the Summary & conclusions of this study.

If after careful considerations doubts still exist, we believe Parliament should
ask the European Court of Justice an opinion on the delicate issue of ACTA's
compatibility with fundamental European human rights instruments and standards.
Only the Court may decisively resolve the uncertainties.

Yours sincerely,

Ante Wessels
Foundation for a Free Information Infrastructure

Attachment

SUMMARY & CONCLUSIONS

ACTA was negotiated in unwarranted secrecy, without adequate input from civil
society or parliamentarians, but in close cooperation with major IP right holders.
Not surprisingly, this resulted in a text that gives disproportionate protection to
big business; fails to level the playing field between developed and developing
nations in international trade relations; hampers innovation (especially by SMEs);
fails to promote grassroots culture; and could impede the dissemination of
knowledge for people across the world (and access to health care and generic
medicines).

Human rights were effective ignored, apart from the inclusion in the Agreement of
vague and ineffective without prejudice clauses that fail to redress the balance,
and are little more than fig-leaves. The inclusion of a detailed provision on the
need to respect human rights in the protection of IPR, on the lines of the 138
Amendment to Directive 2002/21/EC, was rejected as not needed .

This was wrong. Our analysis shows that ACTA, as currently drafted, seriously threatens fundamental rights in the EU and in other countries, at various levels. Specifically:

THE RIGHT TO FREEDOM OF EXPRESSION AND INFORMATION:

Re Application of ACTA to trivial or small-scale, not-for-profit technical infringements of IP rights, and to the dissemination of IP-protected information without the agreement of the right holder where this is justified on higher public interest grounds:

Article 23 ACTA requires State parties to lower the criminal threshold for IPR infringements, and to widen the scope of the criminal offences, without a de minimis exception;

Without such an exception and/or similar exceptions on the lines of the U.S. fair use and fair comment rules, IPR enforcement will disproportionately restrict the freedom to seek, receive and impart information and ideas;

Since a de minimis exception can be seen as a limitation on procedural matters rather than on the substance of IP rights, this is not remedied by the fact that ACTA allows States to retain substantive exceptions to IP law;

In our opinion, an explicit de minimis rule and an explicit public interest defence are the minimum that are required to bring Article 23 in accordance with the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (CFR).

Re Application of ACTA to evasion of Digital Rights Management systems:

ACTA too easily assumes that right holders rights always trump user rights, that right holders can impose whatever kinds of DRM restrictions they like, and that these are always lawful in terms of contract- and consumer law, no matter how draconian.

In our opinion, in specific contexts, this will not be right, and this approach

therefore unduly and disproportionally restricts access to information, or the free dissemination of information, in violation of Article 10 ECHR and Article 11 CFR.

Re Three strikes and extended ISP liability:

the revised, final text of Article 27.1   3. ACTA no longer requires States to adopt the kind of draconian measures   excessive ISP liability, three strike rules, etc.   that were clearly originally in the minds of the drafters, and that the European Data Protection Superviser (EDPS) has shown to be clearly incompatible with European human rights and data protection law;

However, it still suffers from some of the same defects as the criminal enforcement provision mentioned above. Article 27 is still excessively vague; it encourages non-EU States to adopt such human rights-unfriendly measures in support of mainly U.S. and EU corporations, who could not rely on such measures in their own regions; and it could still be misread or misconstrued by EU States to adopt such measures.

In our opinion, without clear stipulations that require States that sign up to the Agreement not to allow private-sector-imposed three strike rules and not to impose excessive ISP liability in respect of IPR infringements, ACTA fails to ensure that it will be applied (by EU and non-EU States) in accordance with European and international human rights standards.

THE RIGHT TO PROTECTION OF PERSONAL DATA:

Articles 11 and 27(4) allow for the following:

the surreptitious monitoring of the Internet use of millions of individuals without any concrete suspicion of illegality, and the systematic recording and analyses of information on their Internet use;

the disclosure of the information gleaned from such surveillance to right holders, even though it may be wildly unreliable as an indicator of illegality, without any real safeguards to ensure that only information is disclosed which seriously suggests widespread infringement by identified individuals;

on the basis of completely unclear standards (essentially, mere claims by right holders);

by judicial and other authorities, i.e. also by authorities that are neither independent nor impartial in these respects;

across borders, including from EU Member States with strict data protection laws to non-EU Member States with inadequate data protection laws (or no data protection laws at all) ; and

in proceedings to which the individuals do not have access, and in which they are not heard (inaudita altera parte).

The above-mentioned suspicionless monitoring and disclosures of unreliable but sensitive personal data are incompatible with European human rights and data protection law, except under very stringent conditions, as outlined in our Opinion with reference to the Opinion of the EDPS, which include:

limiting such monitoring to clear cases of major IPR infringements , and even then only subject to a prior check by the relevant national data protection authority;

limiting transborder disclosures to right holders and law enforcement agencies in non-EU countries that ensure adequate protection of the received data, but in either case again only subject to such a prior check ;

imposing serious checks on the validity of non-EU personal data disclosure orders, and on assurances of limiting the use of the data by the non-EU recipient to the purpose of the disclosure (which is not properly ensured by ACTA, in spite of phrases suggesting this).

In our opinion, the absence of such stringent conditions in ACTA means that the Agreement in these respects is incompatible with the ECHR, the CFR, and European data protection rules.

FAIR TRIAL/DUE PROCESS ISSUES RELATED TO OTHER FUNDAMENTAL RIGHTS:

Re Criminal law enforcement of IPR under ACTA:

In our opinion, ACTA, by not including a de minimis exception to its compulsory and draconian enforcement regime, fails to ensure adequate protection of the right to freedom to obtain and disseminate information, the right to freedom from unreasonable search and arrest, the right to inviolability of the home, and the right to the peaceful enjoyment of one s possessions, and thus violates those rights.

Re Civil-law enforcement of IPR under ACTA (including injunctions, provisional measures, and the awarding of damages):

In our opinion, without clear provisions stressing that injunctions should be the exception, and inaudita proceedings the high exception, and that for both, there must be strong counterbalancing safeguards to preserve the equality of arms in IPR enforcement proceedings, ACTA is incompatible with the fair trial guarantees in the ECHR and the CFR.

Re Privatisation of IPR law under ACTA

Rather than contributing to the upholding of freedom of expression and due process rights by the dominant, private-sector players on the Internet, ACTA erodes the development of the Rule of Law in that realm. It encourages the regulation of human rights-sensitive matters by private entities, outside the formal frameworks, and without ensuring compliance with off-line human rights standards.

This privatisation of the IPR regime therefore, in effect, deprives individuals from their right to have crucial issues of Internet freedom properly adjudicated in proceedings that meet all the requirements of Article 6 ECHR/Article 47 CFR.

Overall, ACTA tilts the balance of IPR protection manifestly unfairly towards one group of beneficiaries of the right to property, IP right holders, and unfairly against others. It equally disproportionately interferes with a range of other fundamental rights, and provides or allows for the determination of such rights in procedures that fail to allow for the taking into account of the different, competing interests, but rather, stack all the weight at one end.

This makes the entire Agreement, in our opinion, incompatible with fundamental
European human rights instruments and -standards.

Douwe Korff & Ian Brown

Cambridge/London Oxford

8 October 2011

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[1] Opinion European Academics on ACTA:
http://www.iri.uni-hannover.de/acta-1668.html

[2] EP INTA study
http://acta.ffii.org/?p=681

[3] ACTA and Access to Medicines
http://rfc.act-on-acta.eu/access-to-medicine

[4] Opinion on the compatibility of ACTA with the European Convention on Human
Rights & the EU Charter of Fundamental Rights
http://rfc.act-on-acta.eu/fundamental-rights