

# Anti-Counterfeiting Trade Agreement



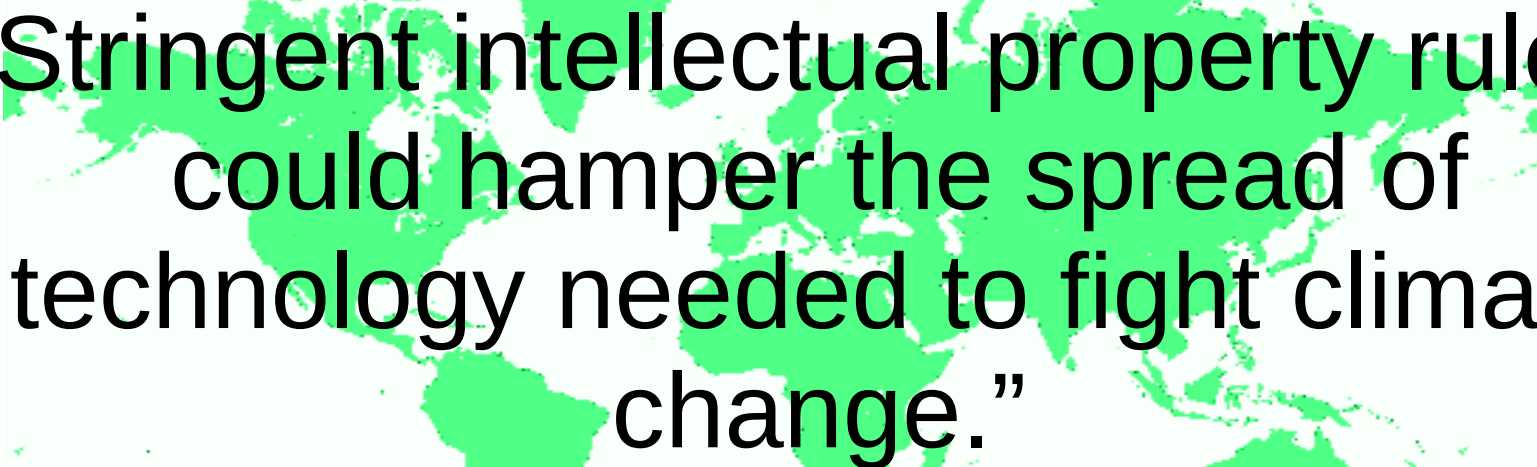
New legislation for a billion people made  
behind closed doors

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HAR, August 15, 2009

# Anti-Counterfeiting Trade Agreement

- introduction: *is it OK to make new legislation for a billion people behind closed doors?*
- official versus leaked documents: *do we want to criminalise the young generation?*
- access to generic medicine: *are patents more important than human lives?*
- counterfeiting or competition: *do we want harsh measures against competitors?*
- EU, transparency & vetoes: *how can we restore parliamentary influence?*

# Anti-Counterfeiting Trade Agreement



“Stringent intellectual property rules could hamper the spread of technology needed to fight climate change.”

Paul David

professor of economics at Stanford University, California

# Anti-Counterfeiting Trade Agreement



“If Hollywood could order intellectual property laws for Christmas, what would they look like? This is pretty close”

David Fewer

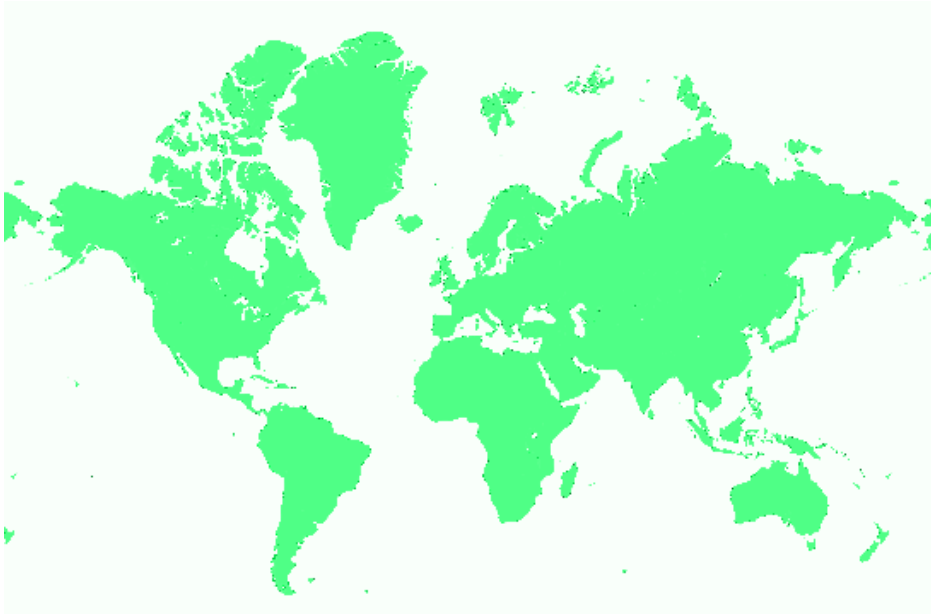
staff counsel at the Canadian Internet Policy and Public Interest Clinic, University of Ottawa

# Anti-Counterfeiting Trade Agreement



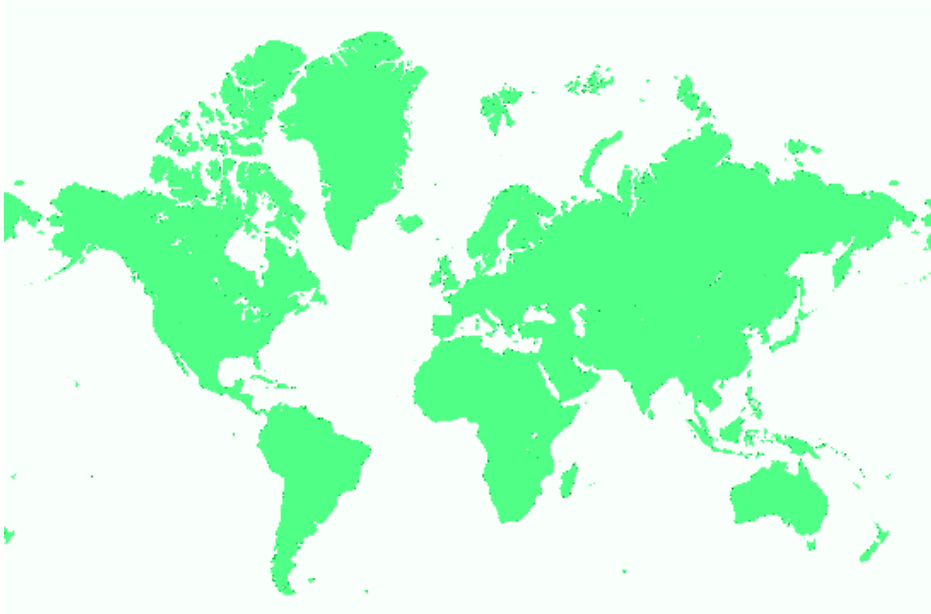
- EU, US, Japan, Canada, ...
- negotiations behind closed doors
- no drafts are published

# Anti-Counterfeiting Trade Agreement



- new rules for the enforcement of
- copyrights
- trade mark rights
- patents
- and other exclusive rights

# Anti-Counterfeiting Trade Agreement



- announced 23 October 2007:
- civil, border and criminal measures
- optical disc piracy
- Internet distribution and information technology

# Executive Agreement



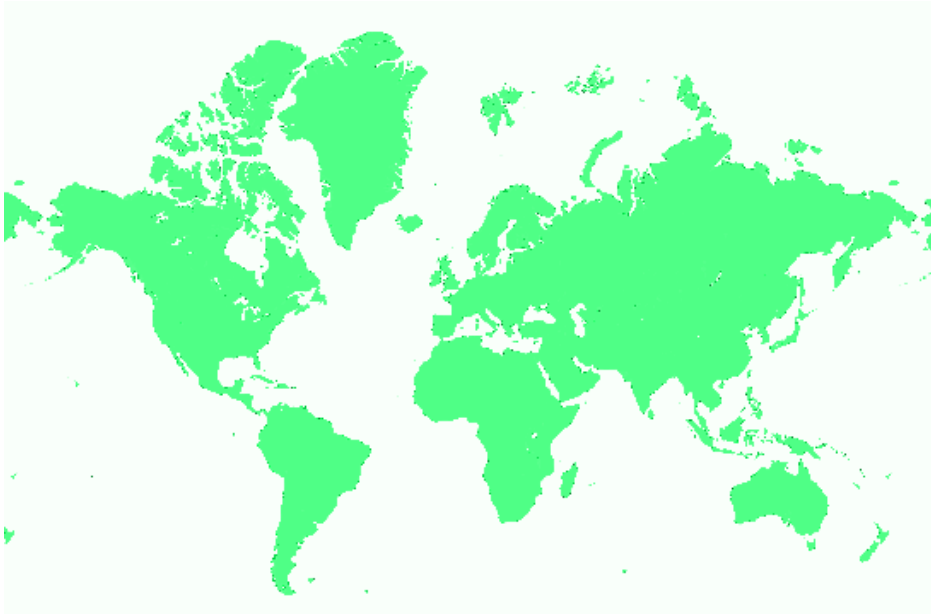
- Congress not involved



# Leaked ACTA discussion paper

- significant willful infringements without motivation for financial gain to such an extent as to prejudicially affect the copyright owner (e.g., Internet piracy),
- criminal measures against infringements ***without motivation for financial gain***

# Secret Counterfeiting Treaty Must be Made Public



- open letter
- more than 100 public interest organizations
- to publish immediately the draft text of the agreement

# U.S. Presidential elections



# Obama president



- Administration declares the ACTA a state secret

# European Union



- EU Council (governments member states)
- will decide
- gave secret mandate
- European Commission negotiates
- criminal measures: Council negotiates

# European Parliament



- asked for the ACTA documents twice
- resolution of on the impact of counterfeiting on international trade, 18 December 2008
- regulation regarding public access to documents, 11 March 2009

# MEP Jens Holms questions



- whether the final draft of the ACTA will be published prior to political agreement in the EU Council
- whether parliaments will have enough time to scrutinise the ACTA

# MEP Jens Holms questions



- whether the Council can ensure that the ACTA is not quietly passed during parliamentary recess



# EU Council



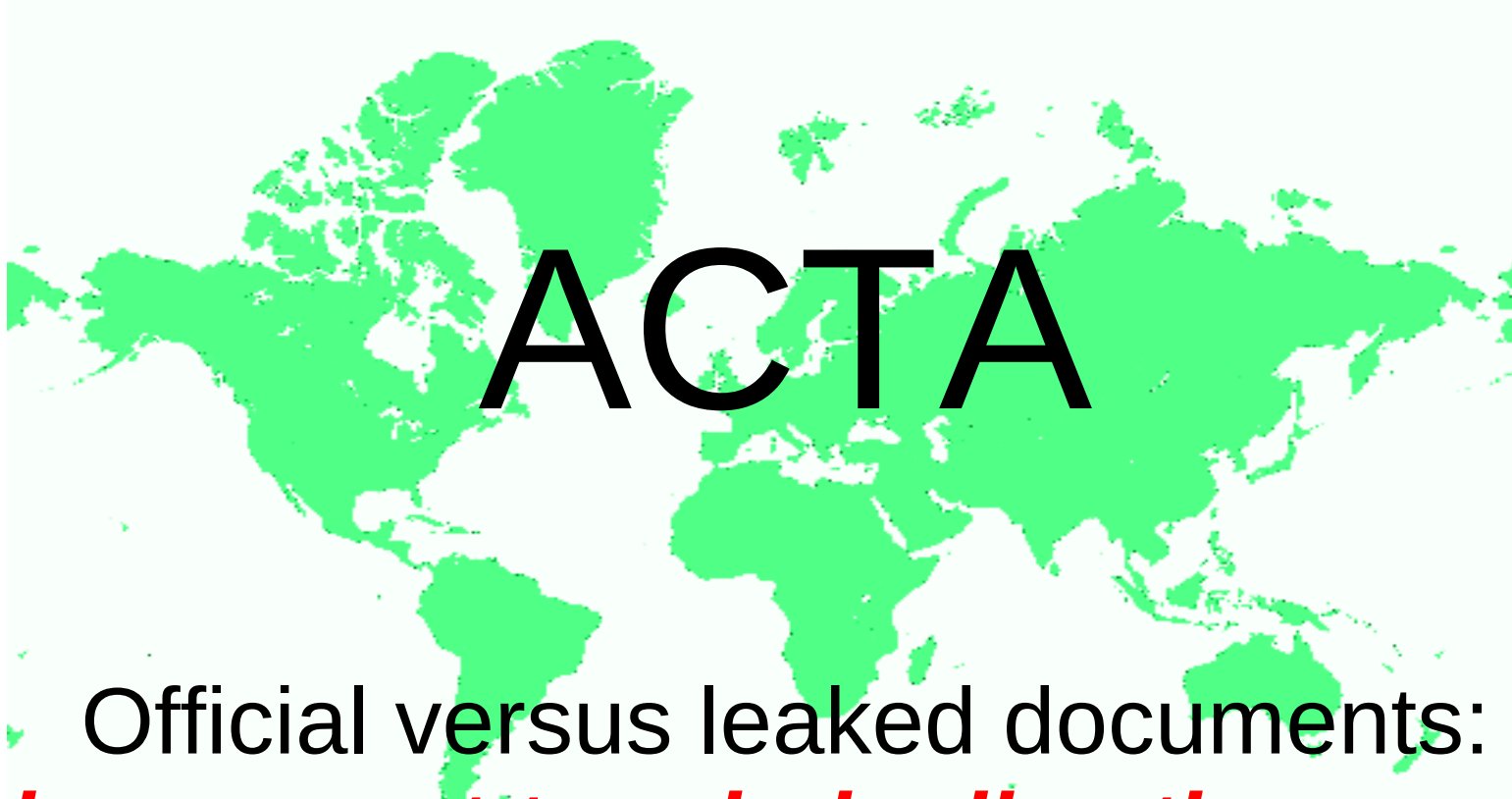
CONSILIUM

- (governments of the member states)
- declined to answer these questions

# ***Political question # 1***

Is it OK to make new legislation for a billion people behind closed doors?

# Anti-Counterfeiting Trade Agreement



Official versus leaked documents:  
*do we want to criminalise the young generation?*

# Office of the US Trade Representative



- measures under discussion
- civil:
- damages, injunctions, remedies
- seizure and destruction of goods

# ***Leaked documents***



- ***huge, deterrent damages***
- ***statutory damages for copyright and trademark infringement (U.S: and patent infringement)***

# *Leaked documents*



- *injunctions*
- *any imminent infringement of an intellectual property right*
- overturns TRIPS 44.2
- buildings under construction
- climate change

# ***Leaked documents***



- ***significant mandated information disclosure***
- privacy

# Office of the US Trade Representative



- border:
- suspend the entry of goods
- forfeiture
- destruction of goods



# *Leaked documents*



- *suspend the release of infringing goods for at least one year, based only on a prima facie claim by the rights holder*

# *Leaked documents*



- *U.S: provision that absolves rights holders of any financial liability for storage or destruction of the infringing goods*

# Ipod searching border guards?



- some countries want a de minimis exception
- permit travelers to bring in goods for personal use

# Ipod searching border guards?



- other countries:
- that would send a signal that purchasing counterfeit products for personal use is acceptable
- lead to the importation of counterfeit medicines

# Office of the US Trade Representative



- criminal:
- criminal penalties
- destruction of goods
- destruction of production materials
- seizure of profits

# Office of the US Trade Representative



- criminal procedures and penalties in cases of
- camcording motion pictures or other audiovisual works

# ***Leaked documents***

- ***U.S. & Japan:***
- ***no direct or indirect motivation of financial gain***



# Anti-Counterfeiting Trade Agreement

- a newspaper, whistleblower or weblog author revealing a document in the public interest





# Anti-Counterfeiting Trade Agreement

- Internet users accused of large scale infringement by copyright holders

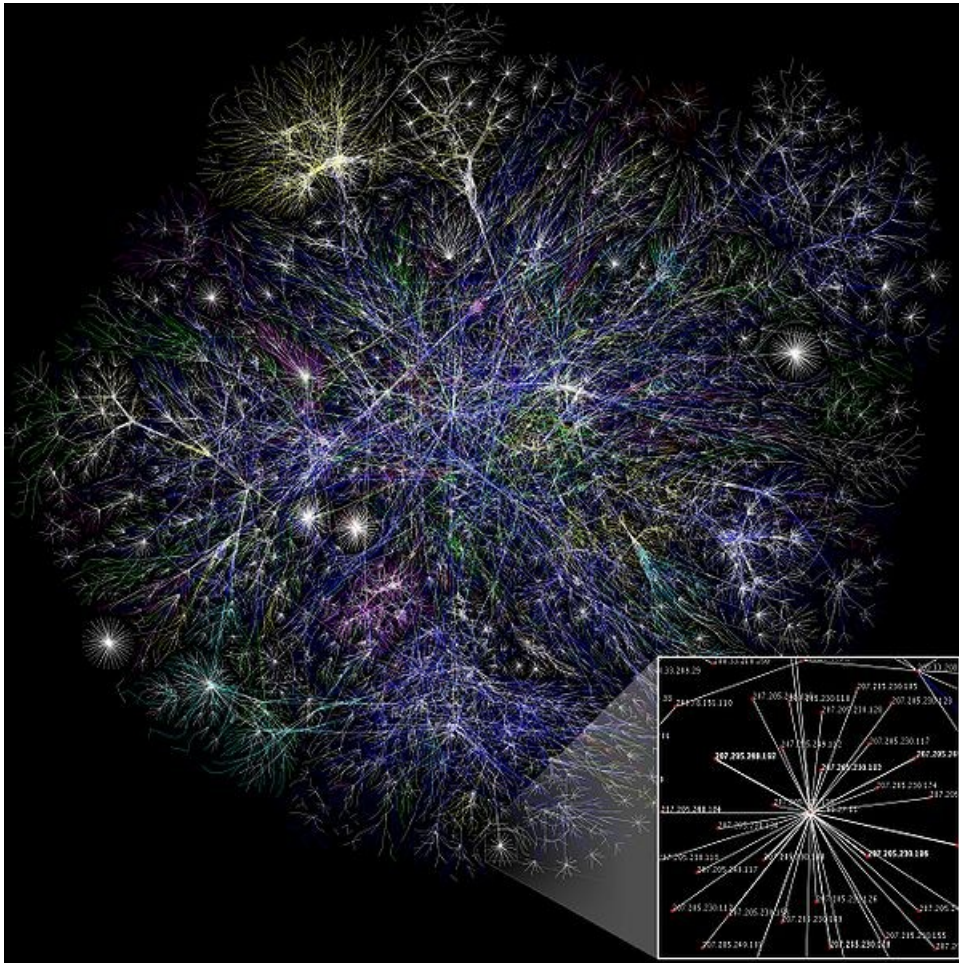


# Imagine

- a kid, 12 years old
- loves to download
- play with it
- upload the result
- should we put him or her in prison?
- should the parents pay huge deterrent damages?

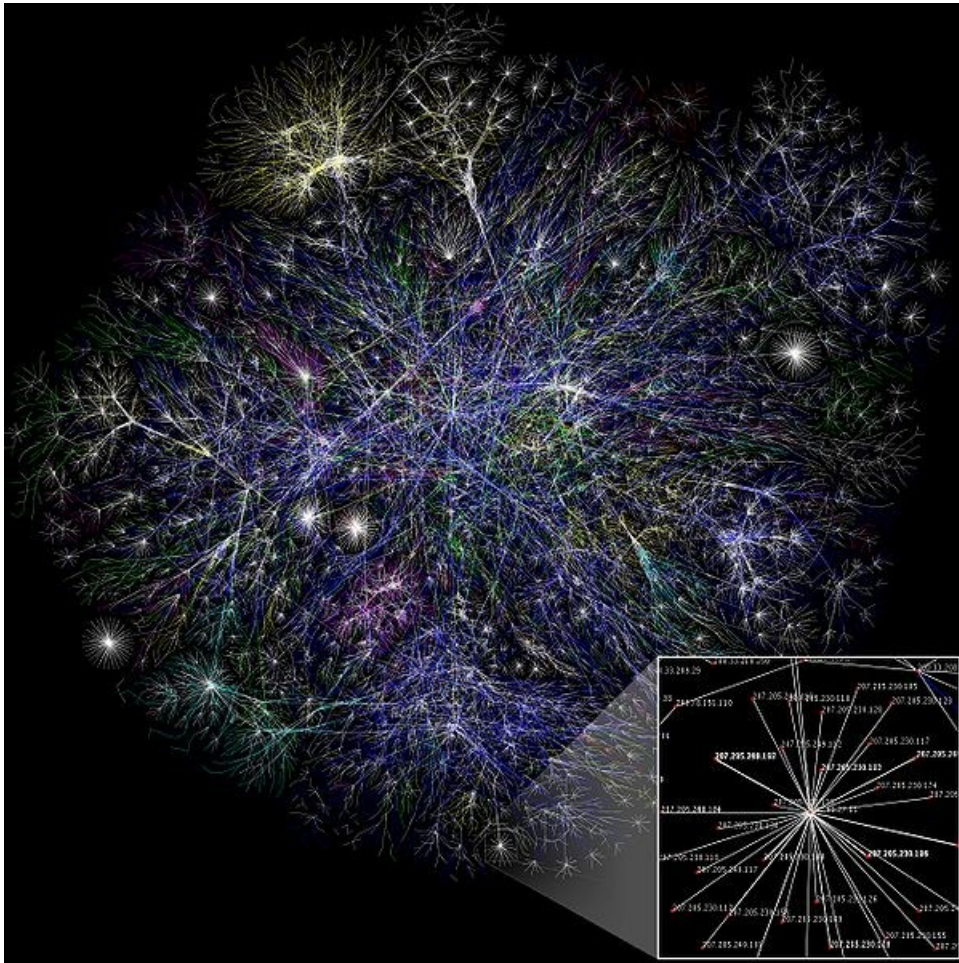


# Office of the US Trade Representative



- chapter: Intellectual Property Rights Enforcement in the Digital Environment
- the possible role and responsibilities of internet service providers in deterring copyright and related rights piracy over the Internet

# Office of the US Trade Representative

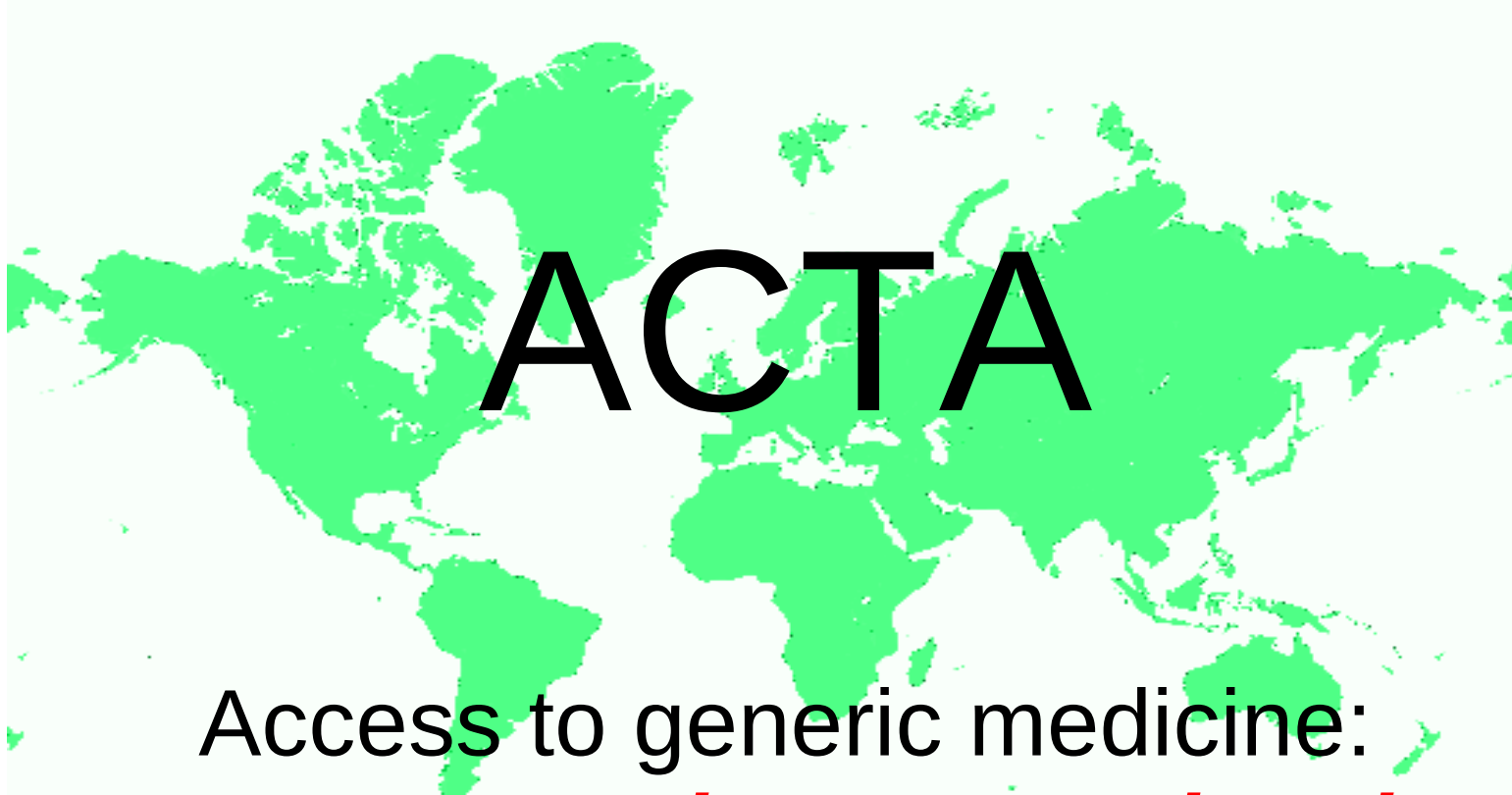


- negotiation partners seem to disagree
- role of Internet Service Providers?
- monitoring, filtering?
- termination of Internet connections?
- due process and privacy rights?
- liability ISPs?

## ***Political question # 2***

Do we want to criminalise the young generation?

# Anti-Counterfeiting Trade Agreement



Access to generic medicine:

***are patents more important than human lives?***

# HIV medicine from India to Nigeria



- financed by UNITAID
- Clinton Foundation programme in Nigeria
- not patented in India
- not patented in Nigeria

# HIV medicine from India to Nigeria



- transit the Netherlands
- U.S. patent holder protested



# HIV medicine from India to Nigeria



- seized by Dutch customs
- European Commission: rules applied correctly

# HIV medicine from India to Nigeria



- protests by public health groups
- letter from the WTO
- Dutch customs released the medicine

# HIV medicine from India to Nigeria



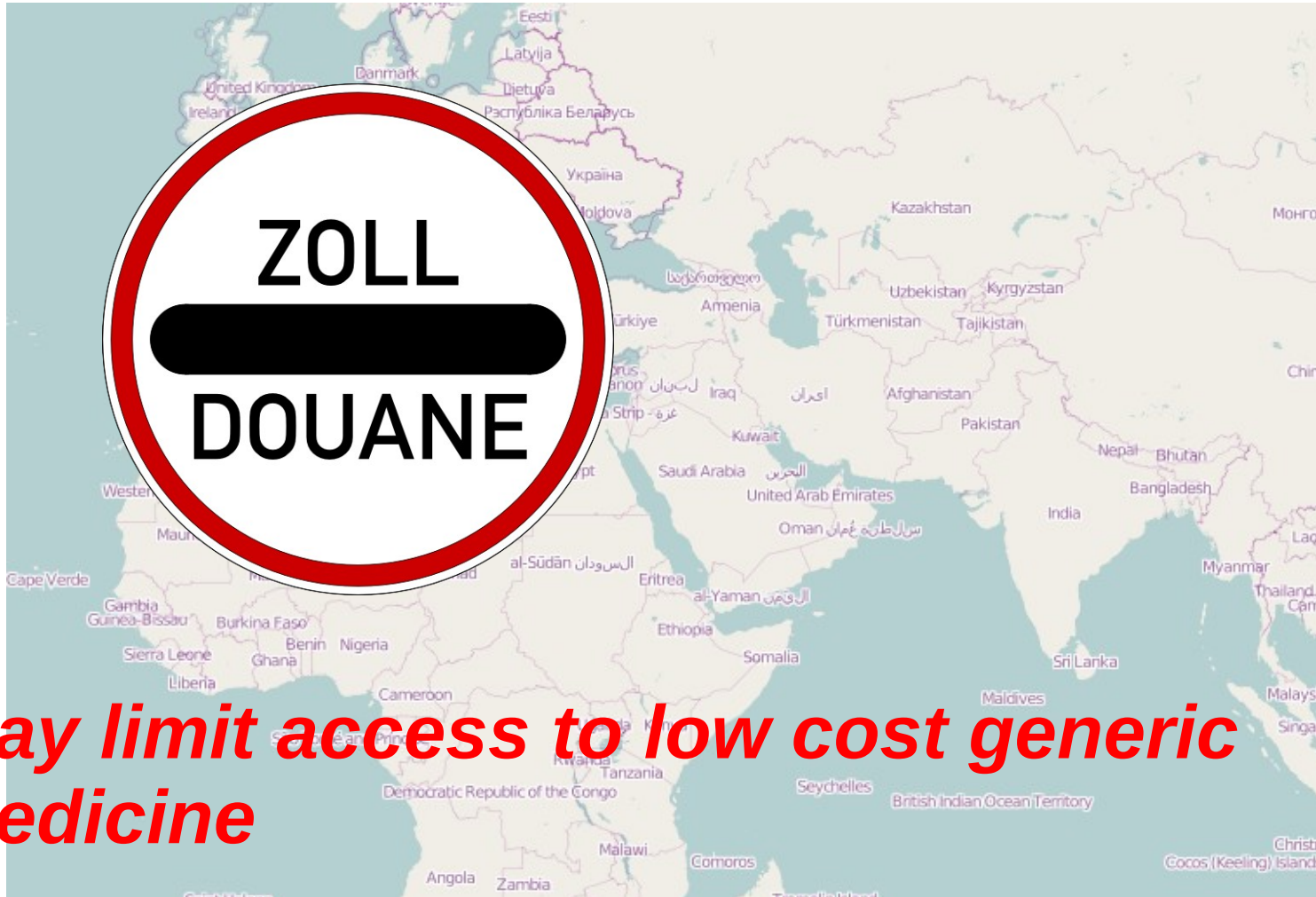
- 17 seizures of legitimate medicine
- Dutch customs should never have intervened

# HIV medicine from India to Nigeria



- Michael Geist reports, based on leaked ACTA documents:
- “The U.S. is pushing for broad provisions that cover import, export, and in-transit shipments.”

# Anti-Counterfeiting Trade Agreement



- *may limit access to low cost generic medicine*
- may make it impossible to change EU rules

# Health Action International



- <http://www.haiweb.org/>

## ***Political question # 3***

Are patents more important than human lives?

# Anti-Counterfeiting Trade Agreement



counterfeiting or competition:

***do we want harsh measures against competitors?***



# Anti-Counterfeiting Trade Agreement



- no distinction between counterfeiting and business conflicts
- in civil and border measures sections
- unclear whether distinction in criminal measures section

# Counterfeiting



- Gucci handbags
- easy to find out
- genuine?
- fake?
- if fake looks genuine
- fraudulent imitation

# Patent conflict



- unclear validity and scope
- civil court
- no counterfeiting
- no fake looks genuine

# Software development



- legal minefield
- full of ideas
- full of patents
- infringement unavoidable
- ignore software patents to some extent

# Patent trolls



- do not produce anything, do not infringe themselves
- broad claims on trivial methods
- infringement is unavoidable
- extort entrepreneurs

The ACTA may give *patent trolls* these tools



- huge, deterrent damages
- statutory damages
- suspend the entry of goods
- suspend the release of infringing goods for at least one year
- destruction of goods

# The state helps the wrong people



- no access to generic medicine
- patent trolls
- solve our environmental problems?

# Harsh anti-counterfeiting measures



- should only be available against fraudulent imitations
- fake looks genuine





# Possible infringement, no counterfeiting



- parallel importation
- spare parts
- Apple Records vs Apple Computer
- libraries making copies
- whistle blowers revealing documents

# Exclusive rights limit competition



- competitors can test validity and scope
- if the price of infringement is *adequate compensation*

# Exclusive rights limit competition



- competitors can ***not*** test validity and scope
- if the price of infringement is ***deterrent damages, seizures and criminal measures***
- ***weak rights become sacrosanct, inviolable***

# Disproportional anti-piracy measures

- limit competition beyond proportion



# Dynamic economy

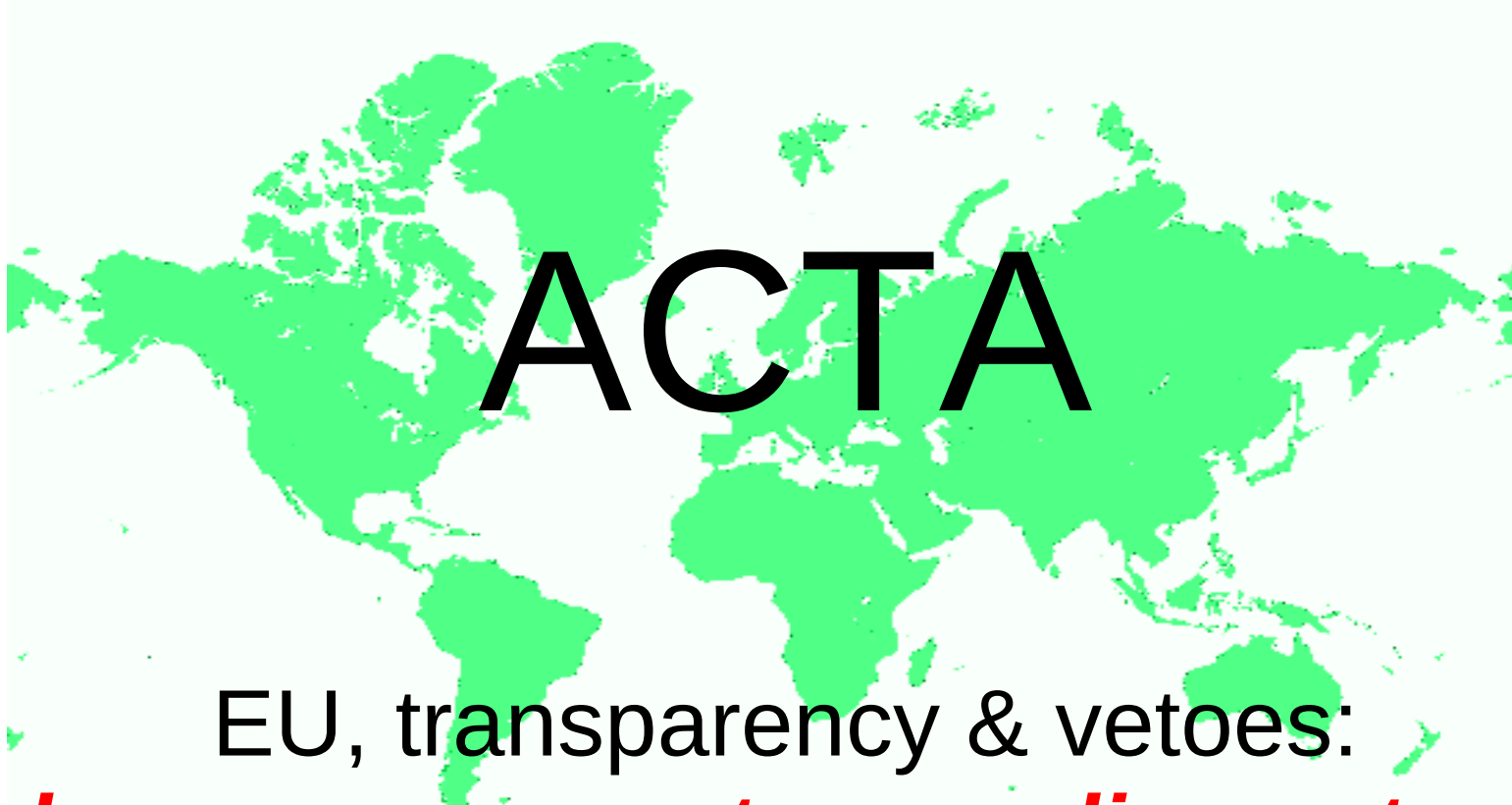


- policy should support the challengers, not the established companies

## *Political question # 4*

do we want to give rights holders  
harsh measures against  
competitors, beyond cases of  
counterfeiting?

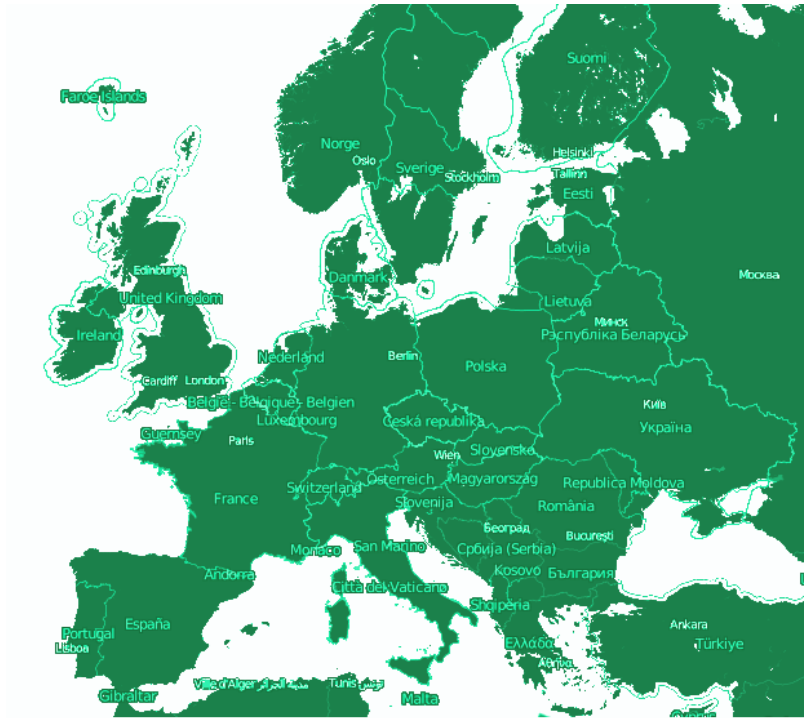
# Anti-Counterfeiting Trade Agreement



EU, transparency & vetoes:

*how can we restore parliamentary  
influence?*

# Transparency



- in the EU, decisions are normally taken as openly as possible and as closely as possible to the citizen
- especially true for the legislative process



# Transparency



- the ACTA will contain a new legal framework
- substantially legislation
- EU Council labeled the ACTA as not legislative

# Transparency



- European Parliament asked for the documents twice
- no access to the ACTA documents

# Transparency



- in the U.S., hundreds of advisors, many of them corporate lobbyists, are considered “cleared advisors”
- they have access to the ACTA documents

# Transparency



- lobbyists have access to documents  
Members of Parliaments do not have access to
- non discrimination principle
- access for all



# Member States vetoes



- the Member States also have vetoes on non-commercial aspects of the ACTA
- and on aspects that regard cultural, audiovisual and educational services







# Vetoes



- without a final draft, the European Parliament and the national parliaments can not assess whether their vetoes apply and should be used



Then we will see whether the  
ACTA  
can face the daylight

# *Political questions*

- is it OK to make new legislation for a billion people behind closed doors?
- do we want to criminalise the young generation?
- are patents more important than human lives?
- do we want to give rights holders harsh measures against competitors, beyond cases of counterfeiting?

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# Thanks

- 
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**Additional slides**

# U.S. Senate Judiciary Committee



- letter to the Trade Representative
- “ACTA will prescribe rules for protection so specifically that it could impede Congress's ability to make constructive policy changes in the future”



# U.S. Senate Judiciary Committee



- “(...) we strongly urge you not to permit the agreement to address issues of liability for service providers or technological protection measures”

# Ed Black

Computer & Communications Industry Association

“The type of IP provisions we are forcing on our trading partners might actually harm the most innovative sectors of our economy. U.S. law includes important exceptions, such as 'fair use' and limitations on secondary liability. These have been critical to the success of companies, including Internet pioneers.

# Ed Black

Computer & Communications Industry Association

Many foreign countries, however, don't have these exceptions. As a result, foreign courts now threaten U.S. companies. They have penalized Google and eBay for conduct that's legal in the United States. (...) Hollywood should direct movies — not trade policy.”

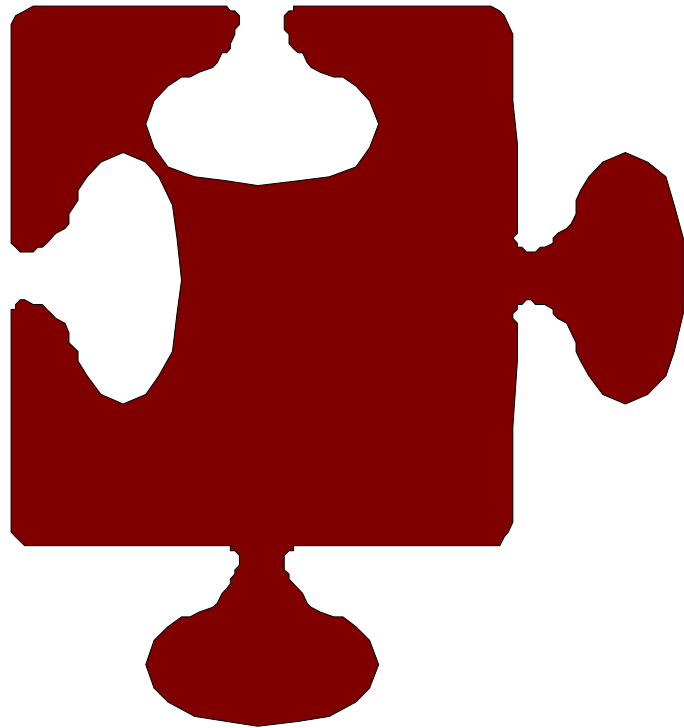
# Trade mark conflict

- Apple Corps Ltd
- founded in 1968
- The Beatles
- Apple Computer Inc
- founded 1976

# Trade mark conflict

- Apple Corps Ltd
- filed a lawsuit
- Apple Computer Inc
- paid some money
- agreed not to enter the music business
- did enter the music business
- infringement
- not counterfeiting

# Spare parts production



- Dyson vacuum cleaners
- Qualtex spare parts
- violate unregistered design right?
- must match & must fit exception
- did not hold, infringement
- not counterfeiting

# Business conflict



- “the flower design on your towels looks too much like the flower design on our towels”
- subtle
- civil court
- infringement?
- not counterfeiting

# Ambiguous infringement



- emailing a list of people
- may infringe an unexamined database right
- unclear scope and validity



# Anti-Counterfeiting Trade Agreement

- a library
- in order to preserve digital sound recordings
- breaking the technical protection measure wrapping the digital recording



# Anti-Counterfeiting Trade Agreement

- parallel importation
- (the buying and selling of genuine products)
- eBay



# Distinction

- 
- business conflict:
  - large scale
  - for profit
  - intentional
  - (intention to compete)
  - ***competing product***
- piracy:

# Distinction

- business conflict:
  - large scale
  - for profit
  - intentional
  - (intention to compete)
  - ***competing product***
- piracy:
  - large scale
  - for profit
  - intentional
  - (intention to copy)
  - ***fraudulent imitation***
  - fake looks genuine

# Distinction

- *competing product*
- *fraudulent imitation*



Would you like to give a ***business competitor*** these tools?



- statutory damages
- suspend the release of infringing goods for at least one year
- destruction of goods
- criminal penalties, forfeiture of profits
- destruction of production materials

# ***State intervention*** in business conflicts

- rights owner:
- leave it to customs and police
- competitor:
- one mistake
- broke
- in jail



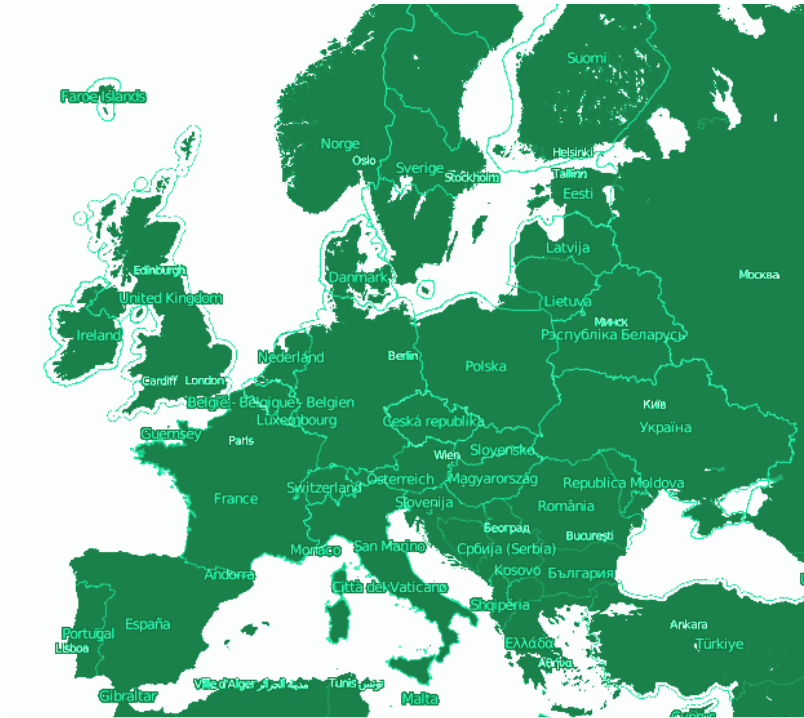
# Rights holders

- try to eliminate competition
- far beyond real cases of piracy and counterfeiting
- leave it to the police and customs





# European Commission



- “We fully support the important work of the G8, WTO, and WIPO, all of which touch on IPR enforcement. The membership and priorities of those organizations simply are not the most conducive to this kind of *path breaking* project.”

# **A.C.T.A** **Path Breaking**

**Recommended by**  
**World leaders**

**ACTA**

**TRIPS +**