Anti-Counterfeiting Trade Agreement

ACTA

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

Paul David
professor of economics at Stanford University, California
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“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
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- EU, US, Japan, Canada, ...
- negotiations behind closed doors
- no drafts are published
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- new rules for the enforcement of
- copyrights
- trademark rights
- patents
- and other exclusive rights
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- 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

- (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?
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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
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- a newspaper, whistle blower or weblog author revealing a document in the public interest
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- 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?
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?
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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
Michael Geist reports, based on leaked ACTA documents:

“The U.S. is pushing for broad provisions that cover import, export, and in-transit shipments.”
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- 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?
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counterfeiting or competition:

*do we want harsh measures against competitors?*
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- 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
do we want to give rights holders harsh measures against competitors, beyond cases of counterfeiting?
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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 documents.
- Non-discrimination principle.
- Access for all.
Member States vetoes

- the Member States of the EU have vetoes on the criminal measures in the ACTA
- a dedicated parliament can make a difference
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
European Parliament vetoes

- the European Parliament has a veto if the ACTA changes EU legislation
European Parliament vetoes

- the European Parliament also has a veto if a specific institutional framework is established by instituting cooperation procedures

- see FFII analysis
Vetoes

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

- the parliaments of the Member States should make parliamentary scrutiny reservations
- this way they can block silent adoption in the Council
- enforce transparency
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?
Thanks

- http://action.ffii.org/acta/
- http://www.michaelgeist.ca/
- http://www.keionline.org/
- http://www.eff.org/
- http://ipjustice.org/
- http://www.vrijxschrift.org/
- ante@ffii.org
- license: CC-BY
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”
“(...) we strongly urge you not to permit the agreement to address issues of liability for service providers or technological protection measures”
“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.
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
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- a library
- in order to preserve digital sound recordings
- breaking the technical protection measure wrapping the digital recording
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- parallel importation
- (the buying and selling of genuine products)
- eBay
Distinction

- business conflict:
- large scale
- for profit
- intentional
- (intention to compete)

- piracy:
- competing product
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
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
“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