



ACTA – Innovation and Competition

The logic behind intellectual property protection is to create temporary monopolies on the use of inventions and creations in order to develop an incentive to innovate. By expanding the protection of these monopolies and reducing flexibility, ACTA builds barriers to innovation and competition, thereby undermining its goals.

Chilling effect on innovation

In a knowledge society, exceptions and limitations on copyright create important opportunities for new companies, such as search engines, online video services, digital libraries, etc. In the EU, these exceptions and limitations are not harmonised. 27 Member States must choose to apply some, none or all of the 21 optional exceptions or limitations to the right of reproduction provided for in EU legislation (Directive 2001/29/EC). Innovators can only guess at what is likely to be accepted by the courts in each of the 27 Member States. Because of the complexity of copyright legislation in general and the particular complexity of the patchwork of EU copyright laws, innovative businesses are often forced to operate in a legal “grey zone”.

Innovators therefore risk accidentally breaching civil law if they misunderstand the complex current arrangements. Under ACTA, innovators, start-up companies and digitisation projects risk criminal charges and almost unlimited “damages” payments based not on actual losses to the rightsholder but on the retail price of each potential accidental infringement. This goes far beyond current EU law on damages, which, logically and proportionately, is based on actual loss suffered. The companies and projects may also face ACTA’s injunctions which go beyond current EU law injunctions.

The undefined “commercial scale” limitation in ACTA is of little practical value as the proposed text goes beyond the simple commercial scale to cover undefined “indirect economic advantage” and further still to undefined “aiding and abetting” – which can only serve to push Internet providers to pre-emptively censor services which they fear might be infringing, in order to avoid possible criminal prosecution.

The European Parliament¹ called on the Commission to harmonise copyright law and for a removal of the obstacles to a single online market. It was ignored. The Parliament asked the Commission to ensure that the provisions of ACTA fully comply with the *acquis*. It was ignored. If ACTA is adopted, the EU is effectively prohibiting itself from amending key pieces of legislation, such as the IPR Enforcement Directive – abandoning flexibility and democracy and replacing them with an inflexible international agreement.

Anti-competitive consequences

ACTA will have anti-competitive effects stretching beyond the markets it seeks to regulate. It will create an environment where large competitors will have major advantages over smaller firms and start-ups. For example, Internet intermediaries, to avoid the new risks of being found guilty of indirect infringement created by ACTA, will be pushed into investing in more extensive monitoring/filtering technologies. Economies of scale mean that these will be cheaper for larger intermediaries than start-ups.

This monitoring/filtering technology can be re-used by intermediaries to discriminate between online services – discrimination that they are already lobbying in favour of on an EU and international level.² These disadvantages will not be suffered by Europe’s trading partners that have chosen to avoid restrictive and counterproductive international obligations.

Competitive advantage for the USA

The USA starts from a stronger position than the EU. It has a single market with an innovation-friendly “fair use” regime for the use of copyrighted works. The EU has a fragmented “exceptions and limitations regime”. The USA has said that it will not consider itself to be legally bound by ACTA³ while the EU will be legally bound. The significant innovation gap between the EU and the USA and Japan, highlighted by the European Parliament Study for the INTA Committee,⁴ would therefore be reinforced and made permanent by ACTA.

1 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0340>

2 http://www.vodafone.com/content/index/about/about_us/policy/network_neutrality.html

3 <http://keionline.org/node/1115>

4 DG Expo Study for the INTA Committee quotes the European Innovation Scorecard, published by *PRO INNO Europe* p. 39