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ACTA: "Usurps Congressional Authority", "Threatens Numerous Public Interests", "Backroom Special Interest Deal", a "Masquerade"

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SOPA, PIPA, ACTA … What's Next?

We just beat back SOPA and PIPA with the web blackout.

Now everyone is talking about ACTA. But – because ACTA is complicated, and is just starting to receive coverage – most are not sure exactly what ACTA really is, or why we should be concerned about it.

We'll give you an executive summary of what you need to know.

Instead of giving you the specifics about what's actually in the bill (we provide links at the end for those who want to know), we'll explain why the procedure used is a recipe for disaster.

Why are we stressing procedure over substance?

Because, as awful as ACTA is, there are other horrible bills such as the Trans Pacific Partnership Agreement waiting in the wings … which may be even worse than ACTA.

Unless we understand the rotten, anti-democratic process which is causing these bad bills to be introduced, we will be caught off-guard by the introduction of one draconian bill after another … and we will lose the fight for Internet freedom.

(The problem is that powerful men are making laws in secret to protect their interests.)

Hollywood Tries to Ram U.S. IP Policies Down the Throat of Europe

On the most superficial level, ACTA is an attempt to ram American intellectual property policies down Europe's throat.

As the Electronic Frontier Foundation's Eva Galperin told me:

> The United States will continue to use multi-national treaties negotiated in secret without the consultation of civil society or other key stakeholders as a way of ramming US IP policy down the throats of other countries.

But this is a superficial analysis. Specifically, it is also an attempt to ram Hollywood's

interests down the throats of the American people … and Congress.

A Handful of Powerful Men Are Trying to Railroad Democracy and the Constitution to Protect Their Interests

The fastest way to understand ACTA is to look at the way in which its backers have tried to trample the normal democratic processes in the U.S., Europe and elsewhere in order to railroad it through.

As an international treaty, ACTA is supposed to be ratified by the American Senate and other appropriate government legislatures. But this is not at all what has happened.

Instead, ACTA has been negotiated for years in secret, without disclosing its contents – let alone seeking approval from – Congress or other legislatures.

In the United States, for example, President Bush and President Obama hid ACTA negotiations under the veil of "National Security", thus keeping it away from prying eyes … including Congress.

Republican Congressman Darrell Issa says that ACTA is more dangerous than SOPA:

> As a member of Congress, it's more dangerous than SOPA. It's not coming to me for a vote. It purports that it does not change existing laws. But once implemented, it creates a whole new enforcement system and will virtually tie the hands of Congress to undo it.

Democratic Senator Wyden has argued for years – in letters to USTR ambassador Ron Kirk, President Obama, and the administration's top international law expert Harold Koh. – that adoption of ACTA is unconstitutional unless without Senate approval.

For example, Wyden wrote last October:

> Regardless of whether the agreement requires changes in U.S. law, the executive branch lacks constitutional authority to enter a binding international agreement covering issues delegated by the Constitution to Congress' authority, absent congressional approval.

The Member of the European Parliament who was appointed to be the rapporteur for ACTA in the European Parliament (Kader Arif) quit last week in protest. Arif said:

> I want to denounce in the strongest possible manner the entire process that led to the signature of this agreement: no inclusion of civil society organisations, a lack of transparency from the start of the negotiations, repeated postponing of the signature of the text without an explanation being ever given, exclusion of the EU Parliament's demands that were expressed on several occasions in our assembly.

As rapporteur of this text, I have faced never-before-seen manoeuvres from the right wing of this Parliament to impose a rushed calendar before public opinion could be alerted, thus depriving the Parliament of its right to expression and of the tools at its disposal to convey

citizens' legitimate demands."

Everyone knows the ACTA agreement is problematic, whether it is its impact on civil liberties, the way it makes Internet access providers liable, its consequences on generic drugs manufacturing, or how little protection it gives to our geographical indications.

This agreement might have major consequences on citizens' lives, and still, everything is being done to prevent the European Parliament from having its say in this matter. That is why today, as I release this report for which I was in charge, I want to send a strong signal and alert the public opinion about this unacceptable situation. I will not take part in this masquerade.

As Harvard professors Jack Goldsmith and Lawrence Lessig wrote in the Washington Post in March 2010:

> The much-criticized cloak of secrecy that has surrounded the Obama administration's negotiation of the multilateral Anti-Counterfeiting Trade Agreement was broken Wednesday. Theleaked draft of ACTA belies the U.S. trade representative's assertions that the agreement would not alter U.S. intellectual property law. And it raises the stakes on the constitutionally dubious method by which the administration proposes to make the agreement binding on the United States.
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> Normal constitutional procedures would require the administration to submit the final text of the agreement for Senate approval as a treaty or to Congress as a "congressional-executive" agreement. But the Obama administration has suggested it will adopt the pact as a "sole executive agreement" that requires only the president's approval.
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> Such an assertion of unilateral executive power is usually reserved for insignificant matters. It has sometimes been employed in more important contexts, such as when Jimmy Carter ended the Iran hostage crisis and when Franklin Roosevelt recognized and settled expropriation claims with the Soviet Union.
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> The president has no independent constitutional authority over intellectual property or communications policy, and there is no long historical practice of making sole executive agreements in this area. To the contrary, the Constitution gives primary authority over these matters to Congress, which is charged with making laws that regulate foreign commerce and intellectual property.
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> When the George W. Bush administration suggested it might reach a deal with Russia on nuclear arms reduction by sole executive agreement, then-Sen. Joe Biden wrote to Secretary of State Colin Powell insisting that the Constitution required Senate consent and implicitly threatening inter-branch retaliation if it was not given.The Bush administration complied.
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> Congress should follow Biden's lead. If the president succeeds in expanding his power of sole executive agreement here, he will have established a precedent to bypass Congress on other international matters related to trade, intellectual

> property and communications policy.
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> Congress should resist this attempt to evade the checks established by our Framers.

Over 75 law professors – some of them quite prominent – wrote a letter to President Obama in October 2010 stating:

> ACTA's negotiation has been conducted behind closed doors, subject to intense but needless secrecy, with the public shut out and a small group of special interests very much involved. The United States Trade Representative (USTR) has been involved in negotiations relating to ACTA for several years, and there have been drafts of portions of the agreement circulating among the negotiators since the start of negotiations. Despite that, the first official release of a draft text took place only in April, 2010. And following that release the USTR has not held a single public on-the-record meeting to invite comments on the text. Worse, in every subsequent meeting of the negotiating parties, the U.S. has blocked the public release of updated text.
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> This degree of secrecy is unacceptable, unwise.... Rather than seeking meaningful public input from the outset, your Administration has allowed the bulk of the public debate to be based upon, at best, hearsay and speculation. Yet, ACTA is a trade agreement setting out a range of new international rules governing intellectual property; as the G-8 called it, a "new international framework." It is not (the claims of the USTR notwithstanding) related in any way to any standard definition of "national security" or any other interest of the United States similarly pressing or sensitive. The Administration's determination to hide ACTA from the public creates the impression that ACTA is precisely the kind of backroom special interest deal – undertaken in this case on behalf of a narrow group of U.S. content producers, and without meaningful input from the American public – that you have so often publicly opposed.
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> Second, the Administration has stated that ACTA will be negotiated and implemented not as a treaty, but as a sole executive agreement. We believe that this course may be unlawful, and it is certainly unwise.
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> Now that a near-final version of the ACTA text has been released, it is clear that ACTA would usurp congressional authority over intellectual property policy in a number of ways. Some of ACTA's provisions fail to explicitly incorporate current congressional policy, particularly in the areas of damages and injunctions.[1] Other sections lock in substantive law that may not be well-adapted to the present context, much less the future.[2] And in other areas, the agreement may complicate legislative efforts to solve widely recognized policy dilemmas, including in the area of orphan works, patent reform, secondary copyright liability and the creation of incentives for innovation in areas where the patent system may not be adequate.[3] The agreement is also likely to affect courts' interpretation of U.S. law.[4]
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> The use of a sole executive agreement for ACTA appears unconstitutional.[5] The President may only make sole executive agreements that are within his independent constitutional authority.[6] The President has no independent constitutional authority over intellectual property or communications policy, the core subjects of ACTA. To the contrary, the Constitution gives primary authority over these matters to Congress, which is charged with making laws

> that regulate foreign commerce and intellectual property.[7] ACTA should not be pursued further without congressional oversight and a meaningful opportunity for public debate.
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> The USTR has insisted that ACTA's provisions are merely procedural and only about enforcing existing rights. These assertions are simply false. Nearly 100 international intellectual property experts from six continents gathered in Washington, DC in June, 2010 to analyze the potential public interest impacts of the officially released text. Those experts – joined by over 650 other experts and organizations – found that "the terms of the publicly released draft of ACTA threaten numerous public interests, including every concern specifically disclaimed by negotiators."
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> Academics and other neutral intellectual property experts have not had time to sufficiently analyze the current text and are unlikely to do so as long as there is no open public forum to submit such analysis in a meaningful process.
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> Finally, we are concerned that the purpose that animates ACTA is being deliberately misrepresented to the American people. The treaty is named the "Anti-Counterfeiting Trade Agreement". But it has little to do with counterfeiting or controlling the international trade in counterfeit goods.
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> Our conclusion is simple: Any agreement of this scope and consequence must be based on a broad and meaningful consultative process, in public, on the record and with open on-going access to proposed negotiating text and must reflect a full range of public interest concerns. For the reasons detailed above, the ACTA negotiations fail to meet these standards.

Indeed, just as most copyright lawyers actually oppose SOPA and PIPA, the secrecy and dishonest end-run which has characterized the ACTA process mean that the main U.S. and international intellectual property organizations have had no input into the drafting of ACTA.

We Can Still Stop It

While ACTA has already been signed by dozens of countries, it will not go into effect unless the European Union parliament ratifies it in a couple of months.

We can still stop it. And see this and this.

* Note: Many others have given substantive critiques of ACTA. See this, this, this, this, this, this, this and this.

Articles by: **Washington's Blog**