To the President and the Members of the Court of Justice of the European Union

Amicus curiae brief on the European Commission's request for an opinion on the Anti-Counterfeiting Trade Agreement (ACTA)

Table of contents

FFII 3
FFII's interest in this case 3
Admissibility 3
Substance 3
1. Opinions and responses 4
2. A lack of necessity 6
3. A lack of proportionality 7
4. ACTA will make existing problems worse 8
4.1 Access to medicine 8
4.2 Access to music, movies, games, and software 10
4.3 Green innovation and diffusion of green technology 12
4.3.1 General remarks 12
4.3.2 Diffusion of green technology 13
4.3.3 Green innovation 15
4.4 Seeds 16
4.5 Growing tensions related to technological developments 16
4.6 Extraterritorial privatised enforcement 17
5. The ACTA negotiations 19
5.1 Lack of openness 19
5.2 Harm to international organizations 20
5.3 Harm to developing world countries 20
6. Compatibility analysis 20
6.1 Access to knowledge and culture 21
6.2 Remix, independent rediscovery, and follow up innovation 23
6.2.1 Remix is a human right 23
6.2.2 Put the inventors back in the driver's seat 24
6.3 The Union's extraterritorial obligations 25
6.3.1 ACTA violates the Union's extraterritorial obligations in the area of economic, social, and cultural rights 25
6.4 Human rights impact assessments 27
6.5 ACTA's cooperative efforts and the Guiding Principles on Business and Human Rights 30
6.6 ACTA is not compatible with the European Treaties 31
7. Conclusion 33

FFII

The Foundation for a Free Information Infrastructure (FFII) is a not-for-profit association active in twenty European countries, dedicated to the development of information goods for the public benefit, based on copyright, free competition and open standards.

FFII's interest in this case

The European Commission has asked the Court: "*Is the Anti-Counterfeiting Trade Agreement (ACTA) compatible with the European Treaties, in particular with the Charter of Fundamental Rights of the European Union?*"

Citizens' rights are involved, but citizens are not involved in this referral – this referral is about the people, without the people.

For more than four years, the FFII has followed the ACTA negotiations and the political process, as closely as possible, and published many articles on the agreement. We would like to present a human rights based view on ACTA. We respectfully ask the Court to consider our observations.

Admissibility

In our opinion, the Commission's request for an opinion on ACTA is not admissible. In its opinion 1/94 of 15 November 1994 ECR I-5267, the Court considers "*12) The Court may be called upon to state its opinion pursuant to Article 228(6) of the Treaty at any time before the Community's consent to be bound by the agreement is finally expressed. Unless and until that consent is given, the agreement remains an envisaged agreement. Consequently, there is nothing to render this request inadmissible."*

In that case, the Commission and member states wanted to ratify the agreements, they only disagreed on competence. Since then, the Lisbon Treaty entered into force, giving the European Parliament a decisive role. The Parliament already rejected ACTA. The agreement is not envisaged by the Parliament, which plays a decisive role.

The Parliament's decision was partly based on fundamental rights concerns, partly on other concerns, such as innovation, development and access to medicine. The Parliament's assessment was broader than the Court's assessment can be. Since ACTA failed the political test, a more limited legal test is unnecessary.

Substance

In case the Court finds the ACTA referral admissible, we would like to make some observations. We will argue that ACTA is not compatible with international human rights instruments, the European Convention on Human Rights, the EU Charter of Fundamental Rights, or the European Treaties.

1. Opinions and responses

In this section, we refer to opinions finding ACTA not compatible with fundamental rights and the European Treaties. We discuss the main arguments against these opinions. In our opinion, the rebuttals fail to convince.

A group of European Academics [1], Korff and Brown [2], the European Data Protection Supervisor [3], ARTICLE 19 [4], and the Parliament's committee on Civil Liberties, Justice and Home Affairs [5] published opinions finding ACTA not compatible with fundamental rights and the European Treaties.

In response, the Commission [6], the Parliament's legal service [7], Gallo (the Parliament's Legal Affairs committee rapporteur for ACTA) [8], and Vrins [9] argued in defence of ACTA.

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1 European Academics, (2011), Opinion of European Academics on Anti-Counterfeiting Trade Agreement, Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC) 2011, Vol. 2, 65 or http://www.iri.uni-hannover.de/acta-1668.html

2 Korff, D. and Brown, I., (2011), Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights, http://rfc.act-on-acta.eu/fundamental-rights

3 EDPS, (2010), Opinion of the European Data Protection Supervisor on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement, (2010/C 147/01), http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf; EDPS, (2012), Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-04-24_ACTA_EN.pdf

4 ARTICLE 19, (2011), European Parliament: Reject Anti-Counterfeiting Trade Agreement (ACTA), http://www.article19.org/resources.php/resource/2901/en/european-parliament:-reject-anti-counterfeiting-trade-agreement-%28acta%29

5 European Parliament Committee on Civil Liberties, Justice and Home Affairs, (2012), Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on International Trade on the compatibility of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America with the rights enshrined in the Charter of Fundamental Rights of the European Union (12195/2011 – C7-0027/2012 – 2011/0167(NLE)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-480.574%2b02%2bDOC%2bPDF%2bV0%2f%2fEN

6 European Commission, (2011), Commission Services Working Paper, “Comments on the ‘Opinion of European Academics on Anti-Counterfeiting Trade Agreement’ ”, Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC) 2011, Vol. 2, 171, http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf

7 European Parliament legal service, (2011), Legal Opinion, Re: Anti-Counterfeiting Trade Agreement (ACTA) -- Conformity with European Union law, http://lists.act-on-acta.eu/pipermail/hub/attachments/20111219/59f3ebe6/attachment-0010.pdf

8 Gallo, M., (2012) Draft Opinion on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, the Republic of Korea, the United States of America, Japan, the Kingdom of Morocco, the United Mexican States, New Zealand, the Republic of Singapore and the Swiss Confederation – Committee on Legal Affairs PE 487.684v01-00 10 April 2012, http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-487.684&secondRef=01&language=EN

9 Vrins, O., (2012) The Impact of ACTA on the EU Acquis and Civil Liberties, European Parliament Policy Department DG External Policies, http://www.europarl.europa.eu/committees/nl/studiesdownload.html?

They note that ACTA contains horizontal safeguards and point out that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Union which include the principle that all Union acts must respect fundamental rights.

In her draft Legal Affairs committee opinion (later rejected by the committee), Gallo writes: *"As a result, the CJEU would immediately punish any transposition measures that infringed fundamental rights."*

We note multiple issues with the approach taken by the Commission and others.

First, Gallo's argument that the Court would *"immediately punish any transposition measures that infringed fundamental rights"* is unfounded. Such a mechanism does not exist.

Second, ACTA's intrusive civil, border, and criminal provisions lack precise limitations and conflict with the horizontal safeguards. The conflicts will have to be resolved through implementation and court cases. We risk many years of disproportionality and legal uncertainty, until the Court has finally sorted out the issues – if that ever happens.

Third, specialised IP courts are experts in IP law, not in fundamental rights law. They may be inclined to value protection of IP more than protection of fundamental rights.

Fourth, the Commission does not have the intention to exclude patents from the scope of ACTA's civil section. Patent specialists want to deny general courts, including the Court, a role in patent cases. If the UK gets its way, the Court will not decide on patent cases. [10]

Fifth, the approach taken presupposes a level playing field, equality of arms. Such a level playing field often does not exist. For instance, in the Netherlands, in an ex parte case against art student Nadia Plesner, transnational company Vuitton managed to outlaw her painting Darfurnica. [11] In such cases, it takes courage, support, and often funding to later challenge the court ruling.

Sixth, the Union's IP system often disregards access to knowledge and culture rights and denies remix artists, independent rediscovery inventors, and follow up inventors their human rights. We will work this out below. Legislators and courts have not been successful in avoiding and solving these human rights violations. In *"Intellectual Property and Human Rights in the Nonmultilateral Era",* Yu concludes it is imperative that countries strike a more appropriate balance between the protection and enforcement of IP rights and the commitments made in international or regional human rights instruments. [12]

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languageDocument=EN&file=73311

10 Cross, M., (2012) Three-way split for European patent court, http://www.lawgazette.co.uk/news/three-way-split-european-patent-court

11 Wikipedia, (2012), http://en.wikipedia.org/wiki/Nadia_Plesner

12 All references to Yu refer to: Yu, P. K., (2011) Intellectual Property and Human Rights in the Nonmultilateral Era (September 12, 2011). Florida Law Review, Vol. 64, pp. 1045-1100, Drake University Law School Research Paper No. 11-04. Available at SSRN: http://ssrn.com/abstract=1926102

Finally, Korff and Brown noted that any complicity by the Union in undermining fundamental rights in third countries would violate the principle in the Treaty on European Union (TEU) that the Union will encourage respect for human rights in such other countries. The Court can not *"immediately punish any transposition measures that infringed fundamental rights"* in third countries.

In our opinion, the rebuttals against opinions finding ACTA not compatible with fundamental rights and the European Treaties, fail to convince.

2. A lack of necessity

Interference with fundamental rights is only justified if the interference is necessary and proportional. In this section we will explain that the Commission did not show the necessity of fighting counterfeiting. The counterfeiting numbers used by the Commission are massively overstated. As a result, any interference of ACTA with fundamental rights – as shown by this or other opinions – lacks justification. Furthermore, the lack of necessity makes ACTA incompatible with TEU article 5.

The Commission refers to OECD numbers on counterfeiting. On March 1, 2012, Commissioner De Gucht even called them the *"most conservative estimates"*. [13] As we will see below, the counterfeiting numbers the Commission refers to are massively overstated.

The Netherlands Court of Audit is very critical about the counterfeiting numbers (*"grote gebreken"*, major shortcomings). The Court of Audit writes that the shortcomings are known, but still the numbers are used in public documents and for new policy. [14]

The 2008 OECD report itself says: *"To date, no rigorous quantitative analysis has been carried out to measure the overall magnitude of counterfeiting and piracy. (...) Analysis carried out in this report indicates that international trade in counterfeit and pirated products could have been up to USD 200 billion in 2005."* [15] The OECD only provides the highest estimate.

Financial journalist Felix Salmon used the OECD's own data to try to come up with a realistic estimate: *"If 8% of counterfeit imports are worth $385 million, then the total value of counterfeit trade is $4.8 billion. A far cry from $200 billion, to be sure."* Then he analyses how the OECD arrived at its $200 billion number. He concludes: *"And that, ladies and gentlemen, is where the $200 billion number comes from. You guess what the maximum amount of counterfeiting is in the countries where it's most prevalent, being careful to use no empirical data in the process. You then double that number, double it again, and apply it to the amount of world trade: presto, you've got $200 billion."* [16]

In 2009 the OECD published an update. [17] Using a complicated calculation, the estimate is raised. The complicated calculation hides the fact the original numbers, which are raised, were massively

13 De Gucht, K., Why we need ACTA, (2012), http://trade.ec.europa.eu/doclib/press/index.cfm?id=783
14 Algemene Rekenkamer, EU-trendrapport 2010, http://www.rekenkamer.nl/dsresource?objectid=87173&type=org
15 http://www.oecd.org/document/50/0,3343,en_2649_34173_39542514_1_1_1_1,00.html
16 Salmon, F., (2007), Counterfeiting: Much Less Prevalent Than You Think, http://www.portfolio.com/views/blogs/market-movers/2007/10/26/counterfeiting-much-less-prevalent-than-you-think/
17 http://www.oecd.org/document/4/0,3343,en_2649_34173_40876868_1_1_1_1,00.html

overstated.

In his 2012 report for the European Parliament's International Trade committee (INTA), Geist, referring to ACTA's preamble, writes: *"This preamble provides a useful context for ACTA, yet it contains several assumptions about financial losses due to counterfeiting, the role of organized crime, and public risks that are the subject of considerable debate. Multiple studies have called into question the these assumptions, making it difficult to conclude that the agreement will be effective, since too little is known about the scope and source of the problem."* [18]

Geist concludes: *"If there is to be a serious attempt to develop global policies aimed at curbing harmful counterfeiting activities, it should start with a serious evidence gathering effort to better understand the scope of the problem and possible solutions."*

In our opinion, ACTA suffers from a lack of necessity, any interference of the agreement with fundamental rights – as shown by this or other opinions – lacks justification. Furthermore, ACTA is incompatible with TEU article 5.

3. A lack of proportionality

Interference with fundamental rights is only justified if the interference is necessary and proportional. In this section we will show that ACTA will be ineffective, disregards adverse effects of fighting counterfeiting and lacks proper focus in targeting dangerous products. As an ineffective instrument with negative effects, the agreement is disproportional. Furthermore, the disproportionality makes ACTA incompatible with TEU article 5.

According to the Commission, 84.92% of counterfeits in the EU come from China. [19] China will not sign and ratify ACTA.

A 2011 European Parliament INTA study concludes: *"There does not therefore appear to be any immediate benefit from ACTA for EU citizens."* [20]

In his 2012 report for the INTA committee, mentioned above, Geist labels ACTA *"A Counterfeiting Agreement Without the Counterfeiters"*. He notes: *"The decision to exclude major sources of counterfeiting represents one of ACTA's biggest flaws. Addressing ongoing global counterfeiting concerns necessitates an inclusive dialogue that brings together developed and developing world countries. The decision to exclude many countries vital to an effective anti-counterfeiting strategy undermines the agreement's likely effectiveness and points to the need for ACTA partners to re-engage*

18 All references to Geist, except one, refer to this report: Geist, M., (2012-a) The Trouble with ACTA: An Analysis of the Anti-Counterfeiting Trade Agreement, European Parliament Policy Department DG External Policies, http://www.europarl.europa.eu/committees/nl/studiesdownload.html?languageDocument=EN&file=73311

19 European Commission, (2011), Detention of counterfeit and pirated goods at EU borders in 2010 – Frequently Asked Questions, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/506&format=HTML&aged=0&language=en&guiLanguage=en

20 Kamperman Sanders, A., Bafana Shabalala, D., Moerland, A., Pugatch, M., Vergano, P. R., (2011), The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment, http://www.europarl.europa.eu/committees/en/INTA/studiesdownload.html?languageDocument=EN&file=43731

on this issue with a global invitation to address counterfeiting concerns, ideally within an existing multilateral framework."

Fighting counterfeiting has adverse effects. Kur, in general on counterfeiting: *"Lastly, some rather 'incorrect' thoughts... The modern plagues of counterfeiting and piracy did not come out of nowhere – to some extent, they are rooted in the development of IP protection itself. The wider the gap becomes between production costs and the gains achieved by protected items, the more illegal copying it will attract... If right holders are compensated for their losses by granting ever stronger rights, also the attraction will increase, and so on. It is doubtful whether imposing (ever more) drastic sanctions is able to break the vicious circle – experiences in other areas tell a different, sad story."* [21]

Dangerous products may or may not infringe IP rights. To target dangerous products, fighting IP infringements is not the proper focus. It leads to inefficient spending of limited resources. In the presentation mentioned above, Kur continued: *"What to do? It is unlikely that the battle against infringement in general, and counterfeiting in particular, will be won by deploying more, and harsher sanctions. It is at least equally important that the IP system as such re-gains general acceptance and approval. Contrary to what is often held, this is not just a matter of 'education' – it might mean that the system has to change. Apart from that, serious crimes such as making and selling fake inefficient or hazardous medicaments should be targeted for what they are – not (primarily) as IP infringements, but as criminal acts jeopardizing public health and safety."*

Geist concludes that ACTA's harm greatly exceeds its potential benefits.

In our opinion, ACTA will be ineffective, disregards adverse effects of fighting counterfeiting and is not the right approach for targeting dangerous products. ACTA is disproportional. Any interference of the agreement with fundamental rights – as shown by this or other opinions – lacks justification. Furthermore, ACTA is incompatible with TEU article 5.

4. ACTA will make existing problems worse

4.1 Access to medicine

In this subsection, we will explain that there are serious access to medicine problems, and that ACTA will likely make affordable medicines more scarce and dear in many countries.

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) created global pricing problems. In the 90ties, in sub-Saharan Africa alone more than 17 million people have died because of AIDS. Using IP protection, pharmaceutical companies sold AIDS medicine in South Africa for prices even higher than in the US, while incomes in South Africa are much lower. The companies only served the upper side of the market. In 1997, President Mandela of South Africa signed a law to ensure the supply of affordable medicines. The US and the EU started to pressure South Africa, the US prepared trade sanctions. Forty-one pharmaceutical companies sued Mandela. Then, public outrage

21 Kur, A., (2009), Enforcing European Intellectual Property Rights in Europe and in Third Countries - The Quest for Balance, http://www.se2009.eu/polopoly_fs/1.28342!menu/standard/file/Kur%2C%20Max%20Planck.pdf

over what was happening forced companies and governments to withdraw. [22] Ultimately, this led to the Doha Declaration on the TRIPS Agreement and Public Health, WTO, 2001, a declaration that affirms the right of countries to protect the health of their populations.

It took public outrage to resolve some of the problems created by the TRIPS agreement. A system that relies on public outrage to rebalance itself, is not robust with regards to human rights.

Despite the Doha Declaration, the access to medicine problem still exists. Pulitzer Prize winner Tina Rosenberg wrote on the NY Times Opinionator blog: *"The new strategy is to treat people in Egypt, Paraguay, Turkmenistan or China — middle-income countries, all — as if they or their governments could pay hundreds or even thousands of dollars a year each for AIDS drugs. This low-volume high-profit strategy might make business sense. But in terms of the war against AIDS, it means surrender"* [23].

There is a need to regulate. But developments took a wrong turn. Since the Doha Declaration, there are fights over definitions. The US and EU interpretation of the Doha Declaration is more limited than the original WTO interpretation. [24] According to Indian Ambassador Ujal Bhatia, there is a pattern of *"efforts to confuse the IP issues with those of substandard or spurious medicines."* taking place at a number of international fora. [25] In 2008 and 2009, claiming to follow EU rules, Dutch customs seized essential medicines. Generic AIDS medicine not patented in India, nor in, for instance, Nigeria, was seized while in transit in the EU. [26]

There are possibilities to regulate in the right way. Stiglitz identifies the TRIPS agreement as the cause of the global pricing problems. Stiglitz calls on developed countries to create a medical prize fund:

"Monopolies distort the economy. Restricting the use of medical knowledge not only affects economic efficiency, but also life itself. (...) In 1995 the Uruguay round trade negotiations concluded in the establishment of the World Trade Organization, which imposed US style intellectual property rights around the world. These rights were intended to reduce access to generic medicines and they succeeded. As generic medicines cost a fraction of their brand name counterparts, billions could no longer afford the drugs they needed. (...) Research needs money, but the current system results in limited funds being spent in the wrong way. (...) A medical prize fund provides an alternative. (...) The power of competitive markets would ensure a wide distribution at the lowest possible price, unlike the current system, which uses monopoly power, with its high prices and limited usage. (...) Money spent in this way might do as much to improve the wellbeing of people in the developing world – and even their productivity – as any other that they are given. (...) The most important ideas that emerge from basic science have never been protected by patents and never should be." [27]

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22 Drahos, P., with Braithwaite, J., (2002), Information Feudalism, Who Owns the Knowledge Economy?, Earthscan Publications Ltd, http://www.anu.edu.au/fellows/pdrahos/books/Information%20Feudalism.pdf

23 Rosenberg, T., (2012), A Trade Barrier to Defeating AIDS, http://opinionator.blogs.nytimes.com/2011/07/26/a-trade-barrier-to-defeating-aids/

24 Love, J., (2011), What the 2001 Doha Declaration Changed, http://keionline.org/node/1267

25 Mara, K., (2010), Counterfeit Medicines In WTO Dispute Process, Heating Up At WHO, http://www.ip-watch.org/weblog/2010/05/12/counterfeit-medicines-in-wto-dispute-process-heating-up-at-who/

26 Mara, K., (2009), Drug Seizures In Frankfurt Spark Fears Of EU-Wide Pattern, http://www.ip-watch.org/weblog/2009/06/05/drug-seizures-in-frankfurt-spark-fears-of-eu-wide-pattern/

27 Stiglitz, J. E., (2006), Scrooge and intellectual property rights, http://www.bmj.com/content/333/7582/1279

Eastern European countries are emerging economies as well. Gross domestic products per person are comparable with those in non European emerging economies. Eastern European countries suffer from low-volume high-prices strategies as well. The European AIDS Treatment Group reports: *"The newer European Union member states (2004 and 2007), as well as candidate and potential candidate countries to EU accession, which have limited health budgets and increasing patient co-payment requirements for both treatment and diagnostics, must adhere to the same intellectual property regulation and are subject to the same level of reference pricing for brand name medicines as the wealthier old member states."* [28]

Reuters reports: *"German pharmaceuticals firm Merck KGaA is no longer delivering cancer drug Erbitux to Greek hospitals, a spokesman said on Saturday, the latest sign of how an economic and budget crisis is hurting frontline public services."* [29]

Stiglitz and others propose solutions to solve pressing problems. ACTA is a step in the wrong direction, it makes these problems worse.

The Greens / EFA group in the European Parliament commissioned a study on ACTA and Access to Medicines. Flynn and Madhani conclude that ACTA increases the risks and consequences of wrongful searches, seizures, lawsuits and other enforcement actions for those relying on intellectual property limitations and exceptions to access markets, including the suppliers of legitimate generic medicines. This, in turn, is likely to make affordable medicines more scarce and dear in many countries. [30] NGOs also report serious access to medicine problems. [31]

ACTA aggravates existing problems or at least creates a real risk of doing this.

4.2 Access to music, movies, games, and software

In this subsection, we will explain that emerging economies, including European, experience serious problems regarding access to affordable legal music, movies, games, and software. ACTA aggravates the problems or at least creates a real risk of doing this.

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28 EATG, (2012), Access and Innovation

29 Reuters, (2012), Germany's Merck halts supply of cancer drug to Greek hospitals, http://mobile.reuters.com/article/idUSBRE8A205Z20121103?irpc=932

30 Flynn, S. and Madhani, B., (2011), ACTA and Access to Medicines, http://rfc.act-on-acta.eu/access-to-medicines

31 Health Action International, (2012), ACTA and Access to Medicines: A Flawed Process, Flawed Rationale and Flawed Agreement, http://haieurope.org/wp-content/uploads/2012/02/27-Feb-2012-HAI-Europe-Policy-Brief-ACTA-and-Access-to-Medicines.pdf;

Médecins Sans Frontières, (2012), A Blank Cheque for Abuse, The Anti-Counterfeiting Trade Agreement (ACTA) and its Impact on Access to Medicines, http://www.msfaccess.org/sites/default/files/MSF_assets/Access/Docs/Access_Briefing_ACTABlankCheque_ENG_2012.pdf;

Oxfam, (2011), Oxfam Statement regarding ACTA and Public Health, http://www.oxfamsol.be/fr/IMG/pdf/Oxfam_ACTA_analysis_FINAL.pdf;

Public citizen, (2011), Letter to Members of the Committee on Legal Affairs on the ACTA, http://www.citizen.org/documents/Letter-to-Members-of-the-Committee-on-Legal-Affairs-on-the-ACTA.pdf

The low-volume high-profit strategies also play a role in CD and DVD markets. Relative to local incomes in Brazil, Russia, or South Africa, the price of a CD, DVD, or copy of Microsoft Office is five to ten times higher than in the United States or Europe, the Media Piracy in Emerging Economies report shows. [32] There is no distribution of legal CDs and DVDs outside the capitals. Some 90% of the people in emerging economies can only turn to illegal media copies.

We all know the pictures of big piles of illegal CDs to be destroyed by a bulldozer. We may think: finally country X takes action against piracy. The real story behind these pictures is that these illegal copies are the only way 90% of the people in emerging economies can enjoy software, music, and movies. The costs in social welfare of harsh measures are enormous.

Some 90% of the people in emerging economies are dependent on illegal copies. There is a need to regulate. ACTA does not regulate in order to solve problems, but only to heighten enforcement. Heightened civil and criminal enforcement, beyond the TRIPS agreement, will only hamper access to knowledge and culture.

The TRIPS agreement contains criminal measures against wilful trademark counterfeiting or copyright piracy on a commercial scale. TRIPS leaves commercial scale undefined. In the US versus China case, the WTO dispute settlement panel defined commercial scale as: *"typical or usual commercial activity with respect to a given product in a given market."* [33] This definition leaves countries policy space to find a proportional solution.

ACTA replaces this definition with: *"commercial activities for direct or indirect economic or commercial advantage"* (article 23). This definition does not contain a minimum threshold (de minimis exception). The agreement removes the scale element from the definition of the crime. ACTA does not have a public interest exemption either.

In countries where some 90% of the people are dependent on illegal copies, ACTA criminalises major parts of the population. This may easily lead to arbitrary decisions. For instance, in the US, the founders of Google, owner of YouTube, are seen as entrepreneurs, while Kim Dotcom, the founder of Megaupload, is seen as a criminal. [34] Could there be an "imperialistic bias"? ACTA's criminal measures interfere with access to knowledge and culture rights, but also with civil rights, such as the right to freedom to obtain and disseminate information, the right to freedom from unreasonable search and arrest, and the right to inviolability of the home.

ACTA's retail price damages (article 9.1) will further aggravate the problems. Someone in an emerging economy selling 100 illegal copies of a CD for 2 euro, has a gross revenue of 200 euro. With damages based on retail price, he may have to pay 2000 euro damages (100 x 20), ten times his gross revenue. The actual loss suffered may be zero, as there is no distribution of legal CDs outside the capitals, and

32 Karaganis, J. (ed.), (2011), Media Piracy in Emerging Economies, SSRC books, http://piracy.americanassembly.org/the-report/

33 WTO Panel Report, (2009), China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R (Jan. 26, 2009), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm

34 Kusjanto, M., (2012), Kim Dotcom: Police Cut Way Into Mansion To Arrest Megaupload Founder, http://www.huffingtonpost.com/2012/01/21/kim-dotcom-megaupload-arrest_n_1220491.html

almost none of his clients would have been able to pay the retail price. Under ACTA, the judicial authorities shall have the authority to consider retail price damages. This is clearly a strong threat having a chilling effect.

As noted above, eastern European countries are emerging economies as well. Gross domestic products per person are comparable with non European emerging economies. Euractive.com reports:

"Ivan Dikov writes in an op-ed with the Bulgarian news website Novinite that Bulgaria is a country much poorer than the remaining ACTA signatories and could not in fact assume the same responsibilities.

Torrent sites such as Zamunda and Arena are the most popular websites in Bulgaria. The reason for that is not just the enormous amount of music, films, software, and books that they make available to anybody for free. The sites are not accessible from outside the country.

These torrent sites are technically in violation of all sorts of copyright laws but what they offer has no alternative for the people in Bulgaria for the time being given the country's social and economic development, Dikov argues." [35]

We note that the chilling effect of ACTA's retail price damages, mentioned above in this subsection, is not present in current EU law. ACTA's civil, border, and criminal measures do not contain enough exceptions to allow access to knowledge and culture.

In emerging economies, European and non-European, markets fail in a dramatic way. There is a need to regulate. ACTA only adds heightened enforcement, making the situation more dramatic. ACTA will aggravate existing problems or at least creates a real risk of doing this.

4.3 Green innovation and diffusion of green technology

To fight climate change, green innovation and fast diffusion of green technology is crucial. The Commission did not commission an environmental impact assessment. The lack of an environmental impact assessment is irresponsible.

What impact will ACTA have on green innovation and fast diffusion of green technology? Without an impact assessment, we do not know. Below we will give a short analysis which shows the agreement creates a real risk with regards to green innovation and diffusion of green technology.

4.3.1 General remarks

The United Nations Environment Programme (UNEP), the European Patent Office (EPO), and the International Centre for Trade and Sustainable Development (ICTSD) undertook a joint project on the role of patents in the transfer of climate change mitigation technologies. The study states that *"Climate*

35 Euractive (2012), ACTA activates European civil society, http://www.euractiv.com/infosociety/acta-activates-european-civil-so-news-510533

change is the most pressing challenge of our time. Addressing it requires an unprecedented mobilisation of human and financial resources to alter our patterns of production, consumption and energy use. The large-scale development and diffusion of technologies is the key to making such a transition possible." [36]

Yu notes, regarding climate change: *"Nevertheless, it is worth noting that the debate will implicate such important human rights as the right to health, the right to adequate housing, the right to adequate food, the right to water, and the right to development. Because of the asymmetry in resource endowment, less developed countries with significant population and resources in areas vulnerable to floods, hurricanes, typhoons, tsunamis, severe droughts, desertification, or forest decay will likely suffer more than others if the intellectual property system is not better managed to respond to climate change."* [37]

4.3.2 Diffusion of green technology

The UNEP-EPO-ICTSD study notes: *"On the one hand, many developing countries and some non-governmental organisations (NGOs) have advocated the use and expansion of the flexibilities on IP available within the WTO TRIPS Agreement, such as compulsory licensing, arguing that this will help ensure greater access to climate change technologies. Arguments from the global debate on IP and public health are often referenced in their statements (Abbott, 2009). In contrast, many developed countries and business associations claim that only strengthened IP regimes will encourage the necessary innovation, transfer and diffusion of such technologies."*

Above we saw that strong enforcement led to market failure in emerging economies, that some 90% of the people in emerging economies can only turn to illegal media copies.

Above we saw that strong IP regimes, even combined with the Doha Declaration, did not solve access to medicine issues. In the two markets best researched, strengthened IP regimes are not successful in encouraging transfer and diffusion of knowledge.

Licensing will play an essential role in diffusion of green technology, according to the UNEP-EPO-ICTSD study. Funding will be important. As the study notes, to deal with climate change *"requires an unprecedented mobilisation of human and financial resources."*

Heightened enforcement may make licensing more difficult and costly, as it gives patent trolls (non-practicing entities) a stronger position.

Patent trolls cause problems in the software sector. Many modern products, including clean energy products, contain software. There are also green software and business patents, e.g. on regulating traffic toll fees based on traffic volume/pollution. Diffusion of green technology will (partly) inherit the problems in the software field, including the problems caused by patent trolls.

Bessen et al. find that non-practicing entities' lawsuits are associated with half a trillion dollars of lost

36 UNEP, EPO, and ICTSD, (2010), Patents and clean energy: bridging the gap between evidence and policy, http://ictsd.org/i/publications/85887/

37 As noted in footnote 12, all references to Yu refer to the same document.

wealth to defendants from 1990 through 2010, mostly from technology companies. Moreover, very little of this loss represents a transfer to small inventors. Instead, it implies reduced innovation incentives [38].

Ewing and Feldman write that the patent world is quietly undergoing a change of seismic proportions. They describe entities that have amassed vast treasuries of patents on an unprecedented scale.

It is important to make "trolling" less lucrative. Ewing and Feldman: *"Troll behavior, whether small or aggregated, is fueled by a patent system that lacks a cost-effective method of quickly resolving validity and infringement questions. (...) A copious supply of patents that are only lightly tested at the time of the grant enhances the problem. As long as insufficient information, uncertainty, and high transaction costs reign, troll activity will continue to flourish. We should focus our efforts not only on limiting troubling behavior among mass aggregators but also on making trolling a less lucrative endeavor in the first instance."* [39]

The costs for society will rise. Ewing and Feldman: *"A system that has operated such that the vast majority of patents bring little or no return is shifting to a system in which a substantial number of patents will become traded and monetized, largely through a system of mass aggregators."*

A new market emerges, with its own logic. Ewing and Feldman: *"Most important, the basic business model of mass aggregation is troubling. The successful aggregator is likely to be the one that frightens the greatest number of companies in the most terrifying way. This may not be an activity that society wants to encourage."*

Are we shifting from a knowledge society to a legal society, with lawyers at the top of the "food chain", trading in legal uncertainty?

Developments are troubling enough. There is a real risk that green innovation and diffusion of green technology will be effected by them. There is a need to regulate. We will see below that a human rights approach may put inventors back in the driver's seat.

Stronger enforcement is not a good idea: Strengthened IP regimes will give patent trolls a stronger position. This creates an incentive for companies to behave like patent trolls.

ACTA parties may exclude patents and protection of undisclosed information from the scope of the civil section (footnote 2). Inclusion of patents remains the default position, ACTA invites countries to strengthen the rights of patent trolls. To solve climate change, global solutions are needed. It is not enough if some ACTA parties exclude patents. Patent trolls may take advantage of weakest links (countries with the strongest enforcement). There is a global need to regulate, in the right direction. In ACTA, inclusion of patents and data protection remains the default position.

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38 Bessen, J. E., Meurer, M. J. and Ford, J. L., (2011), The Private and Social Costs of Patent Trolls (September 19, 2011). Boston Univ. School of Law, Law and Economics Research Paper No. 11-45. Available at SSRN: http://ssrn.com/abstract=1930272 or http://dx.doi.org/10.2139/ssrn.1930272

39 Ewing, T. and Feldman, R. (2012), The Giants Among Us, Stan. Tech. L. Rev. 1, http://stlr.stanford.edu/2012/01/the-giants-among-us/

In his report mentioned above, Geist notes: *"In an attempt to resolve ongoing conflicts over several substantive areas, the ACTA negotiators agreed to make many provisions permissive rather than mandatory. Supporters frequently point to the non-mandatory nature of several contentious provisions as evidence that there is little reason for concern with the substantive elements of ACTA. The permissive approach may be a useful mechanism to achieve consensus, but it provides cold comfort to those concerned with the long-term implications of the agreement. The experience with other treaties indicates that flexible, permissive language is gradually transformed into mandatory, best-practice language."* [40]

The Commission's position is to include patents. We can for instance see this in the EU – Canada free trade agreement February 2012 draft, which copies many ACTA provisions without excluding patents. [41]

Strengthened IP regimes are not successful in encouraging transfer and diffusion of knowledge and give patent trolls a stronger position.

4.3.3 Green innovation

Above we saw that many developed countries and business associations claim that strengthened IP regimes will encourage the necessary innovation of green technology. This may be true in some markets. It is not true in a market that becomes pervasive across the economy. The *"Hargreaves Review"* – the UK government-commissioned study on the relationship between intellectual property and growth – notes that for sequential inventions *"higher welfare and more innovation may be more likely to result from the absence of patenting opportunities. Over time, as digital technology becomes pervasive across the economy, this represents a serious concern. (...) Given the pace of change in the digital world and the strongly sequential nature of innovation in computer programs, the problems arising from thickets in this environment are particularly severe and it is essential that changes do not worsen the situation."* [42]

As we saw above, green technology will (partly) inherit the problems in the software field, including the problems caused by patent trolls. Hargreaves concludes that it is essential that changes do not worsen the situation. This is particularly true for green innovation. Strengthened IP regimes will give patent trolls a stronger position, making problems worse.

Strengthened IP regimes are not successful in encouraging transfer and diffusion of knowledge, give patent trolls a stronger position and may threaten innovation, including green innovation. The lack of an environmental impact assessment is irresponsible. ACTA creates a real risk with regards to green innovation and diffusion of green technology and related human rights.

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40 As noted in footnote 18, all references to Geist, except one (the one after this one), refer to the same document.

41 Geist, M., (2012-b), ACTA Lives: How the EU & Canada Are Using CETA as Backdoor Mechanism To Revive ACTA, http://www.michaelgeist.ca/content/view/6580/135/

42 Hargreaves, I., (2011), Digital Opportunity, A review of Intellectual Property and Growth, http://www.ipo.gov.uk/ipreview-finalreport.pdf

4.4 Seeds

No impact assessment is available on the potential effect of ACTA on seeds. ACTA creates a real risk with regards to the availability of seeds.

During a meeting of the Committee of Petitions of the German Parliament, Frank Schmiedchen, official of the German Federal Ministry for Economic Cooperation and Development (BMZ), said the BMZ advises developing countries against signing the Anti-Counterfeiting Trade Agreement. According to Schmiedchen, the potential effect of ACTA on seeds has been beneath the radar of nearly everybody. [43]

The issue is serious enough for the German ministry to advise developing countries not to sign the agreement. Above we saw that access to knowledge issues are also grave in emerging economies, including European.

There is a clear need for an impact assessment. It has to include emerging economies and European countries. ACTA creates a real risk with regards to the availability of seeds and related human rights.

4.5 Growing tensions related to technological developments

Technological developments necessitate reform of the IP system. We need policy space for rethinking and rewriting copyright, patent and enforcement law. ACTA will take away much needed policy space.

According to Kroes, Vice-President of the Commission responsible for the Digital Agenda, copyright reform is the right way to support the creative sector. She said: *"But changes are not limited to the content business, they affect all sectors. Huge changes have taken place in the research area. Today, new scientific discoveries don't just come from new experiments, new drugs, new clinical trials: in fact, now, we can get new results by manipulating existing data. Data and text-mining techniques now lie behind a huge field of research, like human genome projects, potentially life-saving. They could hold the key to the next medical breakthrough, if only we freed them from their current legal tangle. Research activities are not clearly exempted from the copyright rules and there are many different rules in the 27 member states.*

And here's the most important change since 1998. Back then, creation and distribution were in the hands of the few. Now they are in the hands of everyone: democratising innovation, empowering people to generate and exchange ideas, supporting and stimulating huge creativity." [44]

Substantive copyright reform is needed, not heightened enforcement. International treaties may limit or delay our possibilities to reform substantive law, in such cases maximum flexibility in enforcement law is needed.

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43 Ermert, M., (2012), German Ministry Advises Developing Countries Not To Sign ACTA, Intellectual Property Watch, http://www.ip-watch.org/2012/05/08/german-ministry-advises-developing-countries-not-to-sign-acta/

44 Kroes, N., (2012), Copyright and innovation in the Creative Industries, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/592&format=HTML&aged=0&language=EN&guiLanguage=en

We give a few examples of the IP system becoming more intrusive because of technological developments.

First, before people had computers, it took an effort to infringe copyright. One had to make a physical copy. Since people have computers, infringement is often just one mouse click away. Infringements result from everyday computer use, for instance, forwarding an email may already be an infringement.

Second, we saw that in emerging economies, both European and non-European, markets in music, movies, games and software fail in a dramatic way. Computers are perfect copying machines, the Internet a great distribution tool. Citizens and entrepreneurs are able to solve market failure, enable access to music, movies, games and software – at the expense of infringement.

Third, there are many orphaned works. Again, citizens and entrepreneurs could (partly) solve this access problem – at the expense of infringement.

Fourth, computers are creative tools. Artists remix music and movies – at the expense of infringement. It is often impossible to ascertain (affordable) licenses.

Fifth, many people write software. Patent quality is so low, that after a happy weekend of programming, there is a serious chance of violating a patent. Patent law does not allow independent rediscovery.

Sixth, ideas lead to new ideas, follow up inventions. Above we saw that according to the Hargreaves Review, for sequential inventions higher welfare and more innovation may be more likely to result from the absence of patenting opportunities.

Seventh, 3D printing will lead to many IP issues.

Even without changes in law, the IP system becomes more intrusive, as it hampers new possibilities. The IP system treats many beneficial acts as infringements. Adding more enforcement is a step in the wrong direction.

We need policy space for rethinking and rewriting copyright, patent and enforcement law. ACTA will take away much needed policy space and will make the IP system more intrusive.

4.6 Extraterritorial privatised enforcement

Many US Internet companies operate on a global scale and apply US law extraterritorially, on EU companies and citizens. ACTA adds an obligation on the US to stimulate co-operative efforts within the globally operating US business community (article 27.3). The US – and other ACTA parties – can use this to harm EU competition and citizens. The European Convention on Human Rights and the EU Charter of Fundamental Rights do not protect EU companies and citizens against foreign extraterritorial measures.

The European Digital Rights initiative writes: *"Article 27.3 of ACTA places a binding international*

legal obligation on all parties to encourage private companies to police online communications. This binding legal obligation would, for example, require the United States to encourage companies under its jurisdiction to effectively enforce trademark and copyright law.

Who are these companies that would be encouraged to enforce the law? They are Verisign, the company that is the central registry for all .COM websites all over the world. They are global search engines – Bing, Yahoo and Google. They are advertising networks like Google. They are payment service providers like Paypal, Visa and MasterCard. US companies voluntarily and unpredictably enforcing US laws around the globe.

We already know that the United States uses American companies to obtain personal data of European citizens, in breach of our fundamental right to privacy.

They do this via the PATRIOT and FISA Acts. EPP LIBE coordinator Mr Busuttil captured the views of [members of the Parliament] from across the political spectrum during the February plenary debate on this breach of our fundamental rights when he said that 'no law of a third country should be able to short-circuit EU or national law'.

Imagine now adopting an international agreement to place an obligation on the USA to encourage private companies to short-circuit our rights to privacy, freedom of communication and freedom to do business! That this was even suggested by the European Commission is shocking.

Verisign, US company that is the global registry of .COM web domains has already demanded the right to enforce the law online and decide which companies may or may not remain on the Internet. Should we require the US to encourage them to do this? Clearly the answer is 'no' – the European Parliament has already passed two resolutions in the past three years saying that this is unacceptable.

(...) Google already enforces US copyright law globally. When they receive a complaint under US law about a website accused of breaching US law, they remove the site from their global search engine – outside the rule of law and outside due process. Should we require the USA to encourage them to keep doing this and to expand the process to Bing, Yahoo and others?

(...) It is also important to consider the inevitable impact of ACTA on third countries. The European Union also has a Treaty obligation to support democracy and the rule of law in its international relations.

In a developing country, with the ACTA signatory government obliged to encourage privatised enforcement, Internet companies will be coerced into implementing restrictions of freedom of communication and privacy due to the cumulative effect of broad criminal sanctions for aiding and abetting infringements, the threat of excessive damages payments and the high cost of fighting injunctions.

And finally... the so-called safeguards. There is almost no provision in any part of ACTA that would require a party to implement any protective measure.

(...) ACTA does not mention fundamental rights, it refers only to the vague concept of 'fundamental principles'.

ACTA does not mention due process of law, it refers only to the fictional 'fundamental principle of fair process' which exists nowhere else in international law." [45]

Because of the complexity of intellectual property rights law, innovative businesses are often forced to operate in a legal "grey zone". This will make EU companies and their customers vulnerable to foreign extraterritorial measures. The ECHR and the CFR do not protect EU companies and citizens against foreign extraterritorial measures. With its binding international legal obligation on all parties to encourage private companies to police online communications, ACTA makes this problem worse. In our opinion, the agreement undermines the ECHR and the CFR.

5. The ACTA negotiations

In this section, we discuss ACTA's lack of openness and that the negotiations harmed international organizations and developing countries.

5.1 Lack of openness

In his report for the INTA committee, mentioned above, Geist gives an overview of the problems ACTA's confidentiality caused.

Before formal negotiations began, the US asked the other participating countries to agree to a confidentiality agreement. This confidentiality was unwarranted.

Geist notes: *"Yet a closer examination of similar international IP negotiations reveals that ACTA's opaque approach was not 'an accepted practice', but rather was out-of-step with many other global norm-setting exercises. The WTO, WIPO, WHO, UNCITRAL, UNIDROIT, UNCTAD, OECD, Hague Conference on Private International Law, and an assortment of other conventions were all far more open than ACTA. For example, the WIPO Internet treaties, which offer the closest substantive parallel to the ACTA Internet provisions, were by comparison very transparent with full texts made readily available to the public well in advance of the final agreement."*

The confidentiality had a negative effect on the quality of the ACTA text. Geist: *"The damage created by the lack of transparency extends beyond public distrust of ACTA. The failure to include experts throughout the negotiation process has caused significant damage to the substance of the agreement with numerous legal concerns as a result. (...) While the public concern over these provisions appears to have resulted in changes to the ACTA text, the lack of transparency associated the negotiations meant that these cases constituted the rare instance of public feedback having an impact on the final text. Had the negotiations followed more conventional global norms, it is much more likely that the final text would better account for the remaining substantive concerns."*

45 EDRi, (2012), European Digital Rights: Civil Liberties Committee Hearing on the Anti-Counterfeiting Trade Agreement, 16 May 2012, http://www.edri.org/files/LIBE_120514_ACTA.pdf

Geiger concludes ACTA's main weakness lies in the way it was negotiated, i.e. in secret and outside the multilateral intellectual property framework, and without the emerging countries who are its main addressees [46].

ACTA documents were circulated to some in Europe. Love: *"These proposals are formally available to cleared corporate lobbyists and informally distributed to corporate lawyers and lobbyists in Europe, Japan and the U.S."* [47]

5.2 Harm to international organizations

Geist notes in his report that ACTA harms international organizations. He concludes: *"All countries and stakeholders benefit from a well-functioning international intellectual property governance model led by WIPO and the WTO. Ratification of ACTA will undermine the authority of those institutions, causing immeasurable harm to the development of global IP norms."*

5.3 Harm to developing world countries

Geist argues in his report that ACTA will harm developing world countries: *"In the short term, developing countries may find that progress on WIPO Development Agenda issues stall as ACTA partners focus on ratifying their treaty and currying support for additional signatories. Given the skepticism surrounding the Development Agenda harbored by some ACTA countries, they may be less willing to promote the Development Agenda since their chief global policy priorities now occur outside of WIPO. The Development Agenda has emerged as a critically important policy initiative for the developing world since it offers the promise of focusing global intellectual property policy on the specific needs and concerns of the developing world. Should ACTA derail the WIPO Development Agenda, the effect would be felt throughout Africa, Asia, and Latin America."*

According to Geist, the longer-term implications are likely to be even more significant. *"Should ACTA be ratified, the developing world will face increasing pressure to implement it."* He concludes that the agreement *"threatens to create a growing divide between the developed and developing world on international intellectual property policy that could hurt IP rights holders worldwide."*

6. Compatibility analysis

Above we referred to opinions finding ACTA not compatible with fundamental rights and the European Treaties. As explained above, in our opinion, the rebuttals against opinions finding the agreement not compatible with fundamental rights and the Treaties, fail to convince. We also saw above that in our opinion, ACTA is not necessary nor proportional.

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46 Geiger, C., (2012), Anti-Counterfeiting Trade Agreement (ACTA): A Comprehensive Assessment from a European Perspective, European Parliament Policy Department DG External Policies, http://www.europarl.europa.eu/committees/nl/studiesdownload.html?languageDocument=EN&file=73311

47 Love, J., (2009), Details emerge of secret ACTA negotiation, http://www.keionline.org/blogs/2009/02/03/details-emerge-of-secret-acta/

In this section, we will revisit the issues that came up in the sections *"ACTA makes existing problems worse"* and *"The ACTA negotiations"*. We will assess whether ACTA is compatible with international human rights instruments, the European Convention on Human Rights, the EU Charter of Fundamental Rights , and the European Treaties.

We will look at access to knowledge and culture, remix, independent rediscovery, and follow up innovation, the Union's extraterritorial obligations, human rights impact assessments, the Guiding Principles on Business and Human Rights, and the Union's values and principles.

6.1 Access to knowledge and culture

In this subsection we will explain that access to knowledge and culture are human rights. IP systems violate these rights. By heightening enforcement, ACTA violates access to knowledge rights and civil rights.

We saw above that there are serious problems with access to medicine, music, movies, games, and software, both in and outside the EU. Access to knowledge and culture are protected at the level of human rights. The Universal Declaration of Human Rights [48] (UDHR) 27(1) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) [49] article 15(1)(a) and (b), recognize the right of everyone to take part in cultural life; and to enjoy the benefits of scientific progress and its applications.

Under UDHR 27(2) and ICESCR 15(1)(c), authors have the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

To find the proper balance, it is important not to equate IP rights with the human right recognized in ICESCR article 15(1)(c). It is also important that, under article ICESCR 15(1)(c), legal entities are not protected at the level of human rights.

Yu presents a possible starting point for rethinking IP law. [50] He points to the release by the Committee on Economic, Social and Cultural Rights (CESCR) of its authoritative interpretation of ICESCR article 15(1)(c). In General Comment No. 17, January 2006, the Committee made clear that not all attributes of intellectual property rights have human rights status. [51] Yu extensively quotes the General Comment's Introduction and basic premises:

"Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness

48 http://www.un.org/en/documents/udhr/index.shtml
49 http://www2.ohchr.org/english/law/cescr.htm
50 As noted in footnote 12, all references to Yu refer to the same document.
51 UN Committee on Economic, Social and Cultural Rights (CESCR), (2006), General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), http://www.unhcr.org/refworld/category,LEGAL,CESCR,,,441543594,0.html

and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.

2. In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements. [1]

3. It is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c).”

Yu notes that some attributes of intellectual property rights derive from the inherent dignity and worth of all persons, these attributes are protected under the ICESCR (and, most likely, the UDHR).

Yu asks the question: *“Can corporate rights holders possess human rights at all?”* He notes that as a conceptual matter, an expansive view of human rights, giving corporate rights holders human rights protection, is highly problematic. He points to paragraph 7 of CESCR General Comment No. 17:

“The Committee considers that only the “author”, namely the creator, whether man or woman, individual or group of individuals, of scientific, literary or artistic productions, such as, inter alia, writers and artists, can be the beneficiary of the protection of article 15, paragraph 1 (c). This follows from the words “everyone”, “he“ and “author”, which indicate that the drafters of that article seemed to have believed authors of scientific, literary or artistic productions to be natural persons, without at that time realizing that they could also be groups of individuals. Under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However, as noted above, their entitlements, because of their different nature, are not protected at the level of human rights.”

CESCR General Comment No. 17 provides clarification: under ICESCR article 15(1)(c), legal entities are not protected at the level of human rights. The ICESCR does not give the author's right to legal entities.

From a human rights perspective, the right to access to knowledge and culture has to be balanced with authors' rights, but not with the IP rights of legal entities.

Where possible, like with digital products, people will buy or make copies to fulfil their right to access. This makes them, and their providers, infringers and sometimes criminals.

Interference with the right to access to knowledge and culture must be based on law, and must be necessary and proportional. Current IP law routinely favours legal entities holding IP rights over access rights, without testing necessity and proportionality. Current IP law disproportionately interferes with the economic, social, and cultural rights of citizens. With damages, injunctions, and criminal measures, it disproportionately interferes with their civil rights. Current IP law routinely violates human rights.

There is a need to regulate, to stop the violations of human rights. ACTA, on the contrary, heightens enforcement of IP rights.

ACTA creates a real risk of nullifying or impairing the enjoyment of civil, economic, social, and cultural rights.

6.2 Remix, independent rediscovery, and follow up innovation

In this section we will argue that remixing, independent rediscovery, and follow up innovation are human rights. Since the current IP system harms them, the current IP system is not compatible with international human rights instruments. ACTA contains heightened measures to enforce a human rights violating IP system.

6.2.1 Remix is a human right

It is often impossible to ascertain (affordable) licenses for remixing music and movies.

Under UDHR article 27(2) and ICESCR article 15(1)(c), authors have the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Both UDHR article 27(2) and ICESCR article 15(1)(c) do not exclude any author (*"everyone"*). In our opinion, under UDHR article 27(2) and ICESCR article 15(1)(c) remix artists are protected at human rights level.

The rights of authors and remix artists (authors as well) have to be balanced. The rights of both groups of authors have to be balanced with the right to access to knowledge and culture.

Above we saw that under ICESCR article 15(1)(c), legal entities are not protected at the level of human rights. From a human rights point of view, the rights of remix artists do not have to be balanced with the IP rights of legal entities.

Interference with the rights of remix artists must be based on law, and must be necessary and proportional. Current IP law routinely favours legal entities holding IP rights over remix artists, without testing necessity and proportionality. Current IP law disproportionately interferes with the economic,

social, and cultural rights of remix artists. With damages, injunctions, and criminal measures, it disproportionately interferes with their civil rights. Current IP law routinely violates human rights.

Article 17(2) of the EU Charter of Fundamental Rights reads: *"Intellectual property shall be protected"*. CFR article 17(2) should not be interpreted in a way that it violates UDHR article 27 and ICESCR article 15. CFR article 17(2) has to be understood in the light of CESCR General Comment No. 17.

There is a need to regulate, to stop the violations of human rights. ACTA, on the contrary, heightens enforcement of IP rights.

ACTA creates a real risk of nullifying or impairing the enjoyment of civil, economic, social, and cultural rights of remix artists.

6.2.2 Put the inventors back in the driver's seat

Patent law does not allow independent rediscovery. Patent law hampers follow up innovation.

Both UDHR article 27(2) and ICESCR article 15(1)(c) do not exclude any author (*"everyone"*). CESCR General Comment No. 17 clarifies with *"creations of the human mind, that is to 'scientific productions', such as scientific publications and innovations, including knowledge, innovations"* that inventors are included. The General Comment mentions inventors in paragraph 12. In our opinion, *"everyone"* can only be interpreted as including all inventors, including independent rediscovery inventors and follow up inventors.

In our opinion, under UDHR article 27(2) and ICESCR article 15(1)(c) independent rediscovery inventors and follow up inventors are protected at human rights level.

From a human rights point of view, the rights of independent rediscovery inventors do not have to be balanced with the rights of earlier inventors. These rights can exist alongside. The rights of follow up inventors have to be balanced with the rights of earlier inventors. The rights of independent rediscovery inventors and follow up inventors do not have to be balanced with the IP rights of legal entities. The rights of inventors have to be balanced with access to knowledge rights.

Interference with the rights of independent rediscovery inventors and follow up inventors must be based on law, and must be necessary and proportional. Like we saw above with remix artists, current IP law routinely violates human rights of independent rediscovery inventors and follow up inventors.

There is a need to regulate, to stop the violations of human rights. There is a major bonus to this. We saw above that according to Ewing and Feldman, the successful aggregator of patents is likely to be the one that frightens the greatest number of companies in the most terrifying way. Acknowledging the human rights of independent rediscovery inventors and follow up inventors may put inventors back in the driver's seat. This is beneficial for societies.

By heightening enforcement of IP rights, ACTA creates a real risk of nullifying or impairing the enjoyment of civil, economic, social, and cultural rights of independent rediscovery inventors and follow up inventors.

6.3 The Union's extraterritorial obligations

In the two subsections above, we saw that ACTA creates a real risk of nullifying or impairing the enjoyment of civil, economic, social, and cultural rights. ACTA violates EU citizens' human rights.

The Union has extraterritorial obligations. Below we will look at the Union's extraterritorial obligations in the area of economic, social, and cultural rights.

While we will not elaborate this, we note here that extraterritorial obligations also apply to civil rights.

6.3.1 ACTA violates the Union's extraterritorial obligations in the area of economic, social, and cultural rights

In this subsection we will use the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights as a tool-kit. Drawn from international law, the principles aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights. The experts involved *"came from universities and organizations located in all regions of the world and include current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council."* [52] The principles are backed up by extensive commentary. [53]

In this subsection, we focus on ICESCR article 15. We limit ourselves to some of the Maastricht principles.

Maastricht principle 13: *"Obligation to avoid causing harm: States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct."*

We saw that there are serious problems with access to medicine, music, movies, games, and software. We saw IP systems deny remix artists, independent rediscovery inventors, and follow up inventors their economic, social, and cultural rights. We saw that ACTA creates a real risk of nullifying or impairing the enjoyment of economic, social, and cultural rights. No impact assessments on the effect the

52 ICJ, (2011), Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, http://www.ciel.org/Publications/Maastricht_ETO_Principles_21Oct11.pdf

53 Schutter, De, O., Eide, A., Khalfan, A., Orellana, M., Salomon, M., and Seiderman, I., (2012), Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Advance unedited version 29 February 2012, http://danton1066.files.wordpress.com/2012/03/maastricht-principles-commentary.pdf

agreement will have on seeds, green innovation, and diffusion of green technology are available.

Maastricht principle 14: *"Impact assessment and prevention"*. We will look at this principle in the next subsection.

Maastricht principle 24: "*Obligation to regulate: All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect.*"

We saw above that markets in medicine, music, movies, games, and software fail. We saw IP systems deny remix artists, independent rediscovery inventors, and follow up inventors their economic, social, and cultural rights. There is an obligation to regulate. ACTA takes an opposite approach. The agreement does not try to regulate these markets and systems, in order to solve problems, but only heightens enforcement.

Maastricht principle 25: *"Bases for protection: States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances: (a) the harm or threat of harm originates or occurs on its territory; (b) the non-State actor has the nationality of the State concerned; (c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned; (d)where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory; (...)"*

Many of the transnational companies active in markets that fail, are registered in ACTA parties or have other relevant ties. The ACTA parties have to regulate to protect economic, social, and cultural rights. With ACTA, they take the opposite approach and protect the transnational companies.

Maastricht principle 29: *"Obligation to create an international enabling environment: States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation. (...)"*

Markets in medicine, music, movies, games, and software fail. Heightened enforcement will not help to create an international enabling environment conducive to the universal fulfilment of economic, social, and cultural rights.

In our opinion, ACTA violates the Maastricht principles and the pre-existing international human rights norms and standards the principles are based on.

6.4 Human rights impact assessments

In this subsection, we will assess whether ACTA complies with guiding principles on human rights impact assessments.

Maastricht principle 14 reads: *"Impact assessment and prevention: States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies."*

The 2012 Report of the Special Rapporteur on the right to food, Olivier De Schutter, contains the Addendum *"Guiding principles on human rights impact assessments of trade and investment agreements"*. [54]

Paragraph 6 of the Introduction notes: *"The guiding principles' normative contribution lies not in the creation of new international legal obligations, but in elaborating the implications of pre-existing international human rights norms and standards for States when negotiating trade and investment agreements."*

The document contains seven guiding principles:

"1. All States should prepare human rights impact assessments prior to the conclusion of trade and investment agreements."

"2. States must ensure that the conclusion of any trade or investment agreement does not impose obligations inconsistent with their pre-existing international treaty obligations, including those to respect, protect and fulfil human rights."

"3. Human rights impact assessments of trade and investment agreements should be prepared prior to the conclusion of the agreements and in time to influence the outcomes of the negotiations and, if necessary, should be completed by ex post impact assessments. Based on the results of the human rights impact assessment, a range of responses exist where an incompatibility is found, including but not limited to the following:
(a) Termination of the agreement;
(b) Amendment of the agreement;
(c) Insertion of safeguards in the agreement;
(d) Provision of compensation by third-State parties;
(e) Adoption of mitigation measures."

54 Schutter, De, O., (2011), Report of the Special Rapporteur on the right to food, Addendum: Guiding principles on human rights impact assessments of trade and investment agreements, (A/HRC/19/59/Add.5), http://www.ohchr.org/EN/Issues/Food/Pages/Annual.aspx

"4. Each State should define how to prepare human rights impact assessments of trade and investment agreements it intends to conclude or has entered into. The procedure, however, should be guided by a human rights-based approach, and its credibility and effectiveness depend on the fulfilment of the following minimum conditions:
(a) Independence;
(b) Transparency;
(c) Inclusive participation;
(d) Expertise and funding; and
(e) Status."

"5. While each State may decide on the methodology by which human rights impact assessments of trade and investment agreements will be prepared, a number of elements should be considered:
(a) Making explicit reference to the normative content of human rights obligations;
(b) Incorporating human rights indicators into the assessment; and
(c) Ensuring that decisions on trade-offs are subject to adequate consultation (through a participatory, inclusive and transparent process), comport with the principles of equality and non-discrimination, and do not result in retrogression."

"6. States should use human rights impact assessments, which aid in identifying both the positive and negative impacts on human rights of the trade or investment agreement, to ensure that the agreement contributes to the overall protection of human rights."

"7. To ensure that the process of preparing a human rights impact assessment of a trade or investment agreement is manageable, the task should be broken down into a number of key steps that ensure both that the full range of human rights impacts will be considered, and that the assessment will be detailed enough on the impacts that seem to matter the most:
(a) Screening;
(b) Scoping;
(c) Evidence gathering;
(d) Analysis;
(e) Conclusions and recommendations; and
(f) Evaluation mechanism."

The guiding principles come with commentary. The commentary on principle 3 mentions the precautionary principle placing the burden of proof on the governments negotiating the agreement.

The commentary on principle 4 notes the human rights impact assessment has to assess whether the process of negotiation was participatory, inclusive, and transparent, and whether it was conducted with appropriate parliamentary oversight.

The commentary on principle 4 also notes that the initial assessment should, ideally, be debated in parliament; and courts may also have a role to play, for instance in hearing claims, based on the conclusions of the human rights impact assessment, as to whether the Executive may sign the agreement or should obtain further improvements, or as to whether it should denounce it.

The commentary on principle 4 also notes that the human rights impact assessment should be based on sources of information that are made public. It should work on the basis of a clear methodology, defined in advance of the process and made public. And it should be open to receiving submissions, in order to ensure that its information basis will be as broad as possible; and for participation to be meaningful, those consulted should be provided with all the available information on the potential impacts, and the assessment should refer explicitly to their concerns and how these concerns could be addressed.

ACTA is not a normal trade agreement, ACTA is an enforcement treaty. Not all guiding principles may apply. On the other hand, as a norm setting enforcement treaty, openness is all the more important.

There are many assessments and opinions on ACTA. None of them complies with all the guiding principles, with regards to status, methodology, inclusive participation, availability of documents, and openness. While together they discuss many issues, we note three serious flaws.

First, not all information was available during the negotiations. We have seen that a more transparent path would have led to a better result. It would have led to better assessments and a better end result.

Second, we have seen that there is no impact assessment on the effect ACTA may have on green innovation and diffusion of green technology. Such an impact assessment would have provided essential input for a human rights impact assessment. It should have been in time to influence the outcomes of the negotiations. We note that, due to the nature of climate change, it may be hard or even impossible to take effective measures to mitigate the effects ACTA will have. A proper ex ante impact assessment is all the more important.

Third, we have seen that Germany only at a late moment noticed the potential effect of ACTA on seeds has been beneath the radar of nearly everybody. A robust ex ante human rights impact assessment should have noticed this issue much earlier. The potential effect of ACTA on seeds should have been researched and been input for a human rights impact assessment, in time to influence the outcomes of the negotiations.

All information should have been available. There should have been a human rights impact assessment, conform the guiding principles, with debates in parliaments. Legal questions that still remained could have been referred to the Court. The Commission took an other path. It signed ACTA without a proper human rights impact assessment available. After massive protests, while ACTA had already been referred to the Parliament, the Commission referred the agreement to the Court, without waiting for the outcome of the parliamentary process.

The problem that arises now is that for a legal assessment, the important questions regarding the effects ACTA may have on seeds, green innovation, and diffusion of green technology, first have to be researched.

In our opinion, the ACTA process is not compatible with the Maastricht principles and the Special Rapporteur's Guiding principles on human rights impact assessments of trade and investment

agreements, and with the pre-existing international human rights norms and standards the Maastricht principles and the guiding principles are based on. The process created a real risk of nullifying or impairing the enjoyment of human rights.

6.5 ACTA's cooperative efforts and the Guiding Principles on Business and Human Rights

On 6 July 2011, the UN Human Rights Council endorsed the "*Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework"*. [55] The guiding principles do not create new international law obligations, they identify where the current regime falls short and how it should be improved.

We have seen above that low-volume high-profit strategies lead to serious problems with regards to access to medicine, music, movies, games, and software, both in and outside the EU. There is a need to regulate. There is much work to be done, both by states and by business. The Guiding Principles on Business and Human Rights may provide guidance.

ACTA contains an obligation to endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement (article 27.3). The copyright system fails with regards to the right to access to knowledge, and does not respect the rights of remix artists. Online service providers will be faced with the impossible task, to both effectively protect a flawed copyright system, and to apply the Guiding Principles on Business and Human Rights, for instance, deal with human rights grievances early and remediate them directly (guiding principle 29). ACTA obliges countries to try to put an impossible task on online service providers. It is foreseeable that this will go wrong.

It will go wrong locally. It will also go wrong extraterritorially. We saw above, in the section "Extraterritorial privatised enforcement", that US companies apply US law extraterritorially. Many search engines, registrars and payment processors are based in the US and apply US law on European websites and citizens. With ACTA, we put an obligation on the US to endeavour to promote cooperative efforts within the business community. Companies can not solve the conflicts between the copyright and human rights systems, and the "solutions" US companies will find are outside the jurisdiction of European courts, while they will have an impact on EU citizens' rights. We saw above that the ECHR and the CFR do not protect EU companies and citizens against foreign extraterritorial privatised enforcement. Third countries will experience the same problem.

In our opinion, ACTA undermines the ECHR and the CFR. ACTA's cooperative efforts create a real risk of nullifying or impairing the enjoyment of civil, economic, social, and cultural rights, both in the EU and extraterritorially.

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55 Ruggie, J., (2011), Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

6.6 ACTA is not compatible with the European Treaties

In this subsection, we will explain that ACTA is not compatible with the European Treaties.

We saw that there are serious problems with regards to access to medicine, music, movies, games, and software. We saw that IP systems deny remix artists, independent rediscovery inventors, and follow up inventors their economic, social, and cultural rights, both in the EU and in third countries.

We saw that there are no impact assessments on the effect ACTA will have on seeds, green innovation, and diffusion of green technology. There are no human rights impact assessments that comply with the Guiding principles on human rights impact assessments of trade and investment agreements.

We saw that ACTA creates a real risk of nullifying or impairing the enjoyment of civil, economic, social, and cultural rights.

In our opinion, ACTA is not compatible with
- the Union's values as expressed in TEU article 2: respect for human dignity, equality and human rights; justice and solidarity;
- TEU article 3(1): promote its values and the well-being of its peoples;
- TEU article 3(3): combat social exclusion and discrimination, promote social justice,
- TEU article 3(5): in its relations with the wider world, the Union shall uphold and promote its values, contribute to the protection of its citizens, contribute to solidarity, eradication of poverty and the protection of human rights, strict observance and the development of international law, including respect for the principles of the United Nations Charter;
- TEU article 5: proportionality;
- TEU article 21: the Union’s action on the international scene shall be guided by the principles which have inspired its own creation, respect for human dignity, the principles of equality and solidarity; promote multilateral solutions to common problems, in particular in the framework of the United Nations; safeguard its values, eradicating poverty; promote an international system based on stronger multilateral cooperation and good global governance.

We saw above that the ACTA negotiations lacked openness. The Union's openness expressed in Treaty on European Union article 1 is not a value, as the TEU introduces the values in article 2. Nor is openness formulated as mandatory (*“shall”*). Openness is formulated as an inextricable characteristic of the Union in TEU article 1: *“an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”*.

Article 1 of the TEU implies the Union can not take a path that leads to confidentiality, if a path leading to openness is available. We saw that the Union could have taken an open path and that taking that open path would have led to a better result.

In our opinion, ACTA violates TEU article 1.

The confidentiality made impossible meaningful
- citizen participation in the democratic life of the Union (TEU 10(3)),
- citizens and representative associations' public exchange of views in all areas of Union action (TEU article 11(1)),
- open, transparent and regular dialogue with representative associations and civil society (TEU article 11(2)),
- and broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent (TEU article 11(3)).

In our opinion, ACTA violates TEU articles 10(3), 11(1), 11(2), and 11(3).

We saw that ACTA documents were informally distributed to corporate lawyers and lobbyists in Europe. Other citizens did not have access to these documents. This created inequality.

In our opinion, ACTA violates TEU article 9.

We saw above that ratification of ACTA will undermine the authority of WTO and WIPO, causing immeasurable harm to the development of global IP norms.

In our opinion, causing immeasurable harm to the development of global IP norms is not compatible with TEU articles 3(5), 5, and 21.

We saw above that should ACTA derail the WIPO Development Agenda, the effect would be felt throughout Africa, Asia, and Latin America. We saw above that ACTA threatens to create a growing divide between the developed and developing world on international intellectual property policy that could hurt IP rights holders worldwide.

In our opinion, ACTA is not compatible with TEU articles 3(3), 3(5), 5, and 21.

We saw above there are no impact assessments on the effect ACTA will have on seeds, green innovation, and diffusion of green technology. There are no human rights impact assessments that comply with the Guiding principles on human rights impact assessments of trade and investment agreements.

In our opinion, ACTA is not compatible with TEU articles 2, 3(1), 3(3), 3(5), 5, and 21.

The Union's power to negotiate criminal measures in trade agreements is not unlimited. The criminal measures in trade agreements are limited by the same rules that limit the power to make internal EU legislation (Treaty on the Functioning of the European Union (TFEU) article 207(6)). Criminal IP measures have to be based on TFEU article 83(2), the criminal measures have to be proven essential. This proof is missing. The Union can not leave negotiating criminal measures to the member states and ratify ACTA, without complying with the European Treaties. In our opinion, ACTA is not compatible with TFEU article 83(2) and TEU 3(6).

7. Conclusion

In our opinion, ACTA is not compatible with international human rights instruments, the European Convention on Human Rights, the EU Charter of Fundamental Rights, or the European Treaties.