

# The role of European civil society in stopping the Anti-Counterfeiting Trade Agreement



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## Executive Summary

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The successful policy intervention of the Anti-Counterfeiting Trade Agreement was the result of a combination of public and institutional advocacy. ACTA aimed to harmonise the combating of copyright infringements in the digital environment, which are believed to have been left out by the former agreements. The opaque nature of the conferences and the lack of public input made the agreement target to criticism of civil society organizations. EU citizens were concerned that this agreement would restrict the internet and violate their free speech and privacy. Another cut of their online liberties found the protesters in the criminalization of the circumvention of digital security technologies and the resulting multi-million file sharing lawsuits against individuals. This agreement then turned into a chance for the European Parliament to prove that citizen's voices are heard and represented with their newly gained institutional strength after the Lisbon Treaty. The culmination of a month long effort by advocacy groups to keep the issue in the public consciousness rendered ACTA politically dead.

This report will shed new light on the issue by bringing together separately examined issues by academics. In addition this dissertation endeavours to investigate the events leading up to the growing momentum. Furthermore it will show the concerns raised by the civil society. A clear overview of the flaws in the negotiation of the agreement, including the secrecy and the content will be shown. It will try to analyse and illustrate the degree of differences between ACTA and the existing EU Intellectual Property laws.

**Key words:** ACTA, civil society, European Parliament, horizontal networks, advocacy

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## Abbreviations

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ACTA.....	Anti-Counterfeiting Trade Agreement
CS.....	Civil society
CSO.....	Civil society organization
DDoS.....	Distributed denial of service
EDPS.....	European Data Protection Supervisor
EP.....	European Parliament
EU.....	European Union
IP.....	Intellectual property
IPR.....	Intellectual property rights
ISP.....	Internet Service Providers
LQdN.....	La Quadrature du Net
MEP.....	Member of the European Parliament
MS.....	Member states
NGO.....	Non-governmental organizations
OECD.....	Organisation for Economic Co-operation and Development
PIPA.....	PROTECT IP Act
SOPA.....	Stop Online Piracy Act
TFEU.....	Treaty of the Functioning of the EU
TRIPS.....	The Agreement on Trade-Related Aspects of Intellectual Property Rights
USA.....	United States of America
WIPO.....	World Intellectual Property Organisation
WTO.....	World Trade Organisation

## Methodology

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In order to construct a comprehensive analysis of the role of European networked advocacy in rejecting ACTA, significant amount of secondary research was conducted. Desk research allowed narrowing down the scope of the problem and finding the aspects of the issue that were not covered sufficiently by other academic papers. Primarily, the desk research covered academic papers of Information policy experts such as James Losey, Peter Yu, Eva Heidbreder and Michael Geist. In addition, separate attention has been paid to the official publications of European Institutions, i.e. European Trade Commission, Directorate General for External Policies, European Parliament and the European Data Protection Supervisor. Furthermore were the statements and analyses of NGOs and online collaborations of the Electronic Frontier Foundation, La Quadrature du Net, Anonymous and the Foundation for Free Information Infrastructure e.V. part of the research

Primary research was conducted for this work in form of qualitative research. Two interviews were organized. The first one was with the political science researcher and expert in Information Policy expert James Losey and the second was with the Vice-President of the European Economic and Social Committee Anna Maria Darmanin. These interviews allowed for a detailed questioning focusing on the uniqueness of the anti-ACTA protests. The interviews followed a semi-structured format. For semi-structured the interviewer is free to pick up on different points of the conversation that emerge over the course of the interview. Therefore, interviews are adequate tools for gaining detailed information.

## I. Introduction

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The European public rarely debates over the voting sessions of the European Parliament. One newsworthy exception was the lengthy debate on the Anti-Counterfeiting Trade Agreement, which was eventually rejected on July 4<sup>th</sup> 2012. ACTA was an international trade agreement which aimed to harmonise the combating of copyright infringements in the digital environment and in the tangible market as well as the protection of intellectual property rights (Tirapani, 2012).

Its negative fame gained the agreement through the fear of internet users and human rights watchers this treaty would turn into a tool for western governments to introduce internet censorship. These points, as well as the controversies with the secrecy and its substance formed an opposition which showed their frustration through street protests and online activism. In the course of the debate the European Parliament has proven itself to be the “defender the democratic defender of citizens’ rights (Tirapani, 2012). With the help of the anti- ACTA’ s momentum the EP was the centre of mainstream media. What is more, the debate attracted the attention of young people and tackled the general political apathy in European politics. The role of the European Parliament was crucial as ACTA could not enter into force in the EU without the Parliament approving it. Since the Lisbon Treaty the strength of the EP increased. One of the new gained powers is the right to veto most of the international agreements negotiated by the European Commission (EP, 2012). The Parliament was not able to amend the agreement, it is only empowered to approve or reject proposals.

The public acknowledged the changes in the Brussels power balance. Many online activists and Non-governmental organizations concerned with data protection and the protection of internet users’ privacy targeted the institution to channel their frustrations and worries of the impact that the agreement would have. Through extensive lobbying and the mobilization of citizens to street protests and petitions, the civil society achieved the rejection of the Anti-Counterfeiting Trade Agreement in the European Parliament.

The main goal of this dissertation is to examine the role of European networked advocacy in rejecting the Anti-Counterfeiting Trade Agreement. How did the momentum of the anti-ACTA protests impact the decision of the European Parliament? This report will shed new light on the issue by bringing

together separately examined issues by academics. In addition this dissertation endeavours to investigate the events leading up to the growing momentum. Furthermore it will show the concerns raised by the civil society. A clear overview of the flaws in the negotiation of the agreement, including the secrecy and the content will be shown. It will try to analyse and illustrate the degree of differences between ACTA and the existing EU Intellectual Property laws.

Part one will present a short overview of the goals and vision of the negotiating parties with this agreement. It will also include the concerns of NGOs and the public in general. The analysis of the final text of the Anti-Counterfeiting Trade Agreement and the existing EU laws will be presented in part two. The question if ACTA is compatible with the *acquis communautaire* will also be answered. The third part will provide an illustration of the events leading up to the rejection. In addition, part three will include analyses of the varying methods and means how the European Parliament was targeted by civil society. Part four will look into the internal debate of the European Parliament and its committees.

## **II. The concerns raised by the civil society**

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### **2.1 Background**

The Anti-Counterfeiting Trade Agreement is a trade agreement that deals with intellectual property and anti-counterfeiting laws. This agreement set out to harmonise existing IP laws and create new enforcement standards for the participating countries (EFF, 2009). Initiated by Japan and the USA, the eleven negotiating parties- the US, the EU, Switzerland, Canada, Australia, New Zealand, Mexico, Singapore, Morocco, Japan, and South Korea,- aimed to globally tackle more efficiently IP infringements.

These international efforts were seeking to cover the infringements found in the digital environment such as trademarks and copyright enforcement, which are believed to have been left out by the former Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1996 (Illias, 2012). The Anti-Counterfeiting Trade Agreement establishes a legal framework for enforcing intellectual property rights with regards to provisions on civil enforcement, border measures, criminal enforcement and applications in the digital environment for copyright and infringements.

The European Commission stated in their Fact Sheet for ACTA that the European Union was supportive of the agreement to “ensure the EU’s already high standard of protection for intellectual property goes global” (EC, 2009). According to the statistics of the OECD from 2000 to 2009, the international trade of counterfeited goods doubled from USD 100 billion to USD 250 billion (OECD, 2009). Therefore the European Commission highlights the benefits of the agreement to safeguard the competitiveness, the innovations and the jobs of European companies.

### **2.2 Issues**

Even though the agreement caught the attention of many trade and policy watchers, one of the first internet advocates to express his concerns regarding ACTA was Michael Geist. Dr. Michael Geist is a law professor at the University of Ottawa where he holds the Canada Research Chair in Internet and E-commerce Law. Geist is involved with the Electronic Frontier Foundation, as well as Canadian



Internet Registration advisory board. In his summary “The trouble with the Anti-Counterfeiting Trade Agreement” he outlines the concerns and the controversy of the agreement since the beginning of the negotiations in 2007 (Geist,2010). The two major issues were the secrecy and the substance.

The opaque nature of the conferences and the lack of public input made the agreement target to criticism of civil society organizations. At the same time politicians demanded more transparency. The accusations were saying the agreement was negotiated under the “public radar” (Hintz,2012). The first five rounds of negotiations were held with little information given about the locations and participants (Geist, 2010). The vague press releases of the negotiating parties fuelled the steady stream of concerns and calls for greater public feedback, which left the participating countries in a dilemma between pleasing the public and keeping their negotiating strategies secret.

In November of 2009 the parties responded with a joint statement defending the secrecy:“ However, it is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation” (Trade EC, 2009). This statement was refuted by digital activists by using the examples of the IP agreements of the World Intellectual Property Organization. The WIPO Copyright treaty and the WIPO Performances and Phonogram treaty, known as the Internet treaties were both transparent in nature with full texts made available in advance of final agreement (WIPO, 2002). That is why the ACTA negotiations turned out to be on a new level of secrecy.

The second major issue was the content of ACTA. The opponents of the agreement accused ACTA to have the possibility to extend to “regulate global internet traffic” (Katz&Hinze, 2009). Furthermore, it proposes criminal enforcement provisions that had been rejected during European debates, which lead the public to believe that this was “back door law making and policy laundering” ( Losey, 2012). One of the main motives for the protests was the news that the parties agreed to terminate the user’s internet access if they or someone else was using their IP address, or has been accused of copyright infringement three times. Another cut of their online liberties found the protesters in the criminalization of the circumvention of digital security technologies. However, neither of these rumours are found in the final version of the agreement. The mentioned organization which would overlook the enforcement was also changed and watered down after the public outcry. It was adjusted into an ACTA committee, which “shall not oversee or supervise domestic or international enforcement or criminal investigations of specific intellectual property cases “( Art. 5.1 (7) ACTA).

Article 2.2 of the agreement left the public and online activists outraged due to the mandatory statutory damages, which might lead to multi-million file sharing lawsuits against individuals. The article says that the participating countries shall sentence the infringer to pay the copyright holder the damages to compensate. This may “include the lost profits, the value of the infringed good or service, measured by the market price, [or] the suggested retail price” ( Art 2.2 ACTA). *The Economist* classifies this article as potentially “draconian”. The infringer would be liable for the total loss of potential sales. However, *The Economist* argues that not everyone who acquires a pirated good would have bought “ the real thing” (Economist, 2012).

The access to private information of alleged copyright infringers to copyright holders in civil procedures was another concern (Geist, 2010). This issue worried European data protection authorities as well:

“such information may include information regarding any person or persons involved in any aspect of the infringement and regarding the means of production or distribution channel of such goods or services, including the identification of third persons involved in the production and distribution of the infringing goods or services or in their channels of distribution.” ( Art. 2.4 ACTA )

In general, civil society organizations, online activists and all internet users were worried that this agreement would restrict the internet and violate the right of free speech and privacy. The Electronic Frontier Foundation rounded up the concerns of the public and stated that the fear of a “copyright police”, which could filter and block any content for alleged infringements would go “beyond international law” (EFF, n.d). This is why ACTA was dubbed “Internet Censorship Treaty”.

### **2.3 Chapters of ACTA**

The new legal framework created by the final text of ACTA is segmented into six chapters. The first chapter lists the previous decisions made in the TRIPS agreement, whereas the second chapter creates new standards for IP enforcement, civil procedures for copyright holders, border control and criminal enforcement mechanisms. In section three the parties agree on sharing information related to intellectual property enforcement, such as statistics and best practices. In the following chapter, the details for enforcement practices are given and in chapter five a new governing body outside of existing international bodies is proposed to oversee the enforcements. In the last section, chapter six, it is stated that the agreement will come into effect after it has been ratified by the first five countries (ACTA final text, 2012)

### **III. Compatibility of ACTA and EU laws**

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#### **3.1 Directive 2004/48/EC**

During the negotiations the European Parliament Committee on International Trade requested a study to determine if ACTA would be compatible with the *acquis communautaire*. This study was conducted by the the Directorate-General for External Policies. The research group was commissioned to give an objective assessment of the probable impact of ACTA. Focusing on the compatibility with EU law and the European Union's international obligations the researchers outlined the legal and economic implications.

The study showed that ACTA was in fact compatible with EU law. However, there were several issues with respect to the ambiguity of the agreement. The protection of the IPs is more extensive than in the EU law, enshrined in the Directive 2004/48/EC. This means that the implementation of ACTA would lead to actual modification of EU law and therefore contradicts the claims of the Trade Commission ( Sanders et al, 2011). Directive 2004/48/EC covers infringements of both copyright and industrial property. This has been harmonised within the EU and thus helps “to foster legitimate trade and the development of the information society” (Press release, 2003). The directive demands for all MS to stop selling counterfeit or pirated goods, through seizing of “suspected offenders’ bank accounts, evidence-gathering powers for judicial authorities and powers to force offenders to pay damages to right holders to compensate for lost income”( Press release, 2003). The directive furthermore states that the infringement has to be treated as a criminal offence and imprisonment could be applied.

The Directive also bans machinery used for the forgeries, especially for security devices that could mislead customers into thinking they are buying authentic goods. Trade associations and right holders also have the right to initiate legal proceedings. In case of a trial the infringer can now be forced to disclose where the counterfeited goods have been produced, the amounts of it and anyone associated with the forgery ( Directive 2004/48, 2004). It is evident that this directive already implements most of the concerns that the NGOs and citizens brought forward.

### 3.2 Study by European Parliament

The mentioned study of the Directorate General for External Policies shows that there are indeed conflicting clauses with EU legislation. In case of the Civil enforcement, the researchers found fault with the articles of the Injunctions. ACTA would have required the signing parties to give judicial authorities the power to issue injunctions against the infringer so the counterfeit goods will not enter the market (p. 25). The Directive 2004/48 offers similar language, however also provides the alternative to compensate with pecuniary measures rather than acting on the injunction. In the case of damages ACTA created “different criteria for the quantification of the compensatory damages”. The agreement would allow judicial authorities to order compensatory damages and damages equivalent to the infringers’ profits from the violations and the estimated profit (p.26). These criteria do not appear to fully match the Directive’s wording of “ appropriateness of the damage to the actual prejudice suffered” (p.26). In the case of Border Measures, Articles 13 to 22 of ACTA , show complications with the scope of the protection of intellectual property. The agreement would potentially broaden the scope of intellectual property which is depending on border protections with respect to what is already existing under EU law.

The European Data Protection Supervisor issued an opinion about ACTA. The EDPS focused on the digital chapters of the agreement and problems that come along with it. Chapter 2, Section 5 of ACTA includes a number of measures to facilitate IP rights in the digital environment. The Supervisor finds these problematic, because Articles 27(3) and (4) of ACTA would involve a sort of monitoring to see if the content is lawful or not. The monitoring would be done by the right holders or be delegated to ISPs. This generalised monitoring is “highly invasive of the individuals’ private sphere. They are usually carried out unnoticed and may affect millions of individuals or even all users, irrespective of whether they are under suspicion”(EDPS, 2012). They may involve the monitoring of electronic communications exchanged over the Internet and the review of the content of individuals' Internet communications, the systematic recording of data, including the IP address of users.

The Supervisor states that this monitoring interferes with individuals’ fundamental rights and freedoms such as the rights to privacy, to data protection, and to the confidentiality of communications, protected in Article 8 of the European Convention on Human Rights and Articles 7 and 8 of the Charter of Fundamental Rights of the EU ( EDPS, 2012). The European Data Protection Supervisor concluded his analysis stating that the results of the ACTA negotiations lacked precision and is therefore open for interpretations by the signing parties: “Such lack of precision is regrettable as the Agreement does not lay out with sufficient legal certainty the types of mechanisms that could be put in place as a result of

entering into ACTA and the safeguards against the misuse of personal data or to protect the right of defence” (EDPS, 2012).

After analysing the final text of ACTA’s final text and the existing EU IP law it is evident that there are three things that differ. First, intermediaries, such as internet service providers can be required under ACTA to block files at the request of the holder. This can be the holder of any trademark, patents or other form of intellectual property. ISPs would have to act on the request without a court case. Second, ISPs can be forced to disclose information of internet users that are accused of infringement, also without a court order. Last, with ACTA, circumventing or removing of “ technological protection mechanisms” becomes illegal (SWPAT, n.d).

The criminalisation of circumvention or removing of technological protection mechanisms was one of the greatest concerns with internet users, who enjoy streaming or downloading movies, music or books. Technological protection measures means the controlled access to copyright content through specialized technologies. It furthermore prevents users from copying its protected content. Circumvention devices are “technologies that are used to remove, disable or circumvent technological protection measures” (Smartcopying, n.d). This criminalisation is exaggerated, considering that file sharing is welcomed by most artists and content producers. A study by the Pew Internet& American Life Project asked around three thousand musicians and songwriters their views on file sharing. More than one third said that file sharing was “not necessarily bad”, as it helps to distribute their work and therefore boosted their reputation. A total of 83% said they had deliberately put free samples of their music online (Mason, 2009).

### **3.3 Analysis of ACTA’s legal framework**

The Anti-counterfeiting Trade Agreement is unable to find the right balance between the enforcements of IP protection and the rights to privacy and data protection. The strengthening of IP rights in the international context cannot come at the expense of fundamental rights and freedoms of individuals. The monitoring of internet users behaviour of their electronic communication online is, as mentioned priorly, highly intrusive to citizens and if not implemented in the right way may interfere with their confidentiality of their communication. The small-scale, non-profit infringers would also suffer disproportionately, because ACTA does not clarify if it only targets large-scale violations ( EDPS, 2012). As the Foundation for a Free Information Instructor e.V points out “ACTA includes criminal measures, without excluding small scale infringements and public interest infringements (FFII, 2014).

## **IV. Events that lead to the growing momentum against ACTA**

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### **4.1 Definition of civil society**

Civil society is a “public sphere between the state, the market and the ordinary household, in which people can debate and tackle action” (BBC, 2001). The term civil society is a commonly used but complex concept. In this study the definition by the BBC is used, because it allows to argue the role of the civil society to “tackle action”. Although contemporary theories on civil society are diverse and vary in their approach, they are all based on civil society being positioned as a third sector alongside with the first sector, the state, and the second sector, i.e market ( Laratta, 2012). This includes all voluntary collective activity ,when people join to achieve change on a particular issue This does not include political parties, even though civil society has a political dimension (BBC,2001).The classical view of the theory dates back to the city-states, i.e polis, of Athens 400 BC, where male citizens were engaged in public debates, in the election of magistrates and in sharing the burden of the political decisions. Varying definitions can then be found after the Enlightenment by political thinkers such as John Locke, Charles de Montesquieu, Georg Friedrich Hegel and Alexis de Tocqueville. These early notions of civil society vary in how they describe the relationship between society and the state as either “competing or cooperative”(Heidebreder, 2012). John Locke identified autonomous and distinct spheres of state and civil society, thus positioning civil society opposite to the state. Neo-liberals on the other hand emphasize the autonomy of the economy from the state, whereas neo-Marxists focus on the existence of an independent public sphere .

In the modern debate the concept helps to explain modern western societies, where the components interact and fit with each other in “an open system which combines a liberal polity, a market economy and a plural society” (Pérez-Díaz, 2011). The concept is deliberately kept vague and political scientists offer intuitive and ostensive accounts of it rather than something “more rigorous” (Heidbreder, 2012). From a political sociological point of view, the concept describes a certain type of society. This type is marked by

“the attitudinal capability of its members, that is, citizens, to actively organize themselves to pursue certain (common) goals, within a framework of specific formal institutions. In detailed definitions, depending on particular research goals, civil society may therefore be defined in either attitudinal or institutional terms” (Wnuk-Lipinsk, Bukowska, 2011).

The political thinker Charles Taylor states that CS exists where “there are free associations, not under tutelage of state power” (Müller, 2006). Therefore CS can only be, when it can arrange itself and be active through associations and can influence state policy. Taylor claims that the issue of CS is a relationship between the public and the private spheres.

## **4.2 Civil Society in the EU**

In Europe the term civil society was hard to find in the agenda in the first decades of the EU integration. The process of integration was seen as “elite-driven” (Heidebreder, 2012) where citizens gave their silent consensus to. Until the late 1990s the term civil society could not be found in EU documents and treaties. The softening of the boundaries between public authority and private actors across the multi-level governance resulted in a strongly perceived democratic deficit. That is why efforts were made to introduce an “input-oriented dimension of democratic legitimacy, calling for authentic participation and governance by the people” (Heidebreder, 2012). In the academic world research on civil society in the EU was also motivated to find alternative short cuts for democratizing the EU. There were three dynamics which are interrelated. The first was civil society as a new decision-making actor. The second was the shift to governance and third was the shortcomings in legitimacy and accountability (Heidebreder, 2012).

Nowadays, the initiative of civil society organizations is seen as a measure to tackle the democratic deficit and boost legitimacy. With the introduction of the Lisbon Treaty of 2009, the Citizens Initiative was included in order to foster participation and a more direct democracy. This was supposed to guarantee a more representative input (Heidebreder, 2012, p.9). A European citizens’ initiative is the right of EU citizen to propose legislations to the European Commission on matters within EU competences. At least one million EU citizens have to sign the proposal and have to be from at least 7 out of the 28 member states. If the proposal is backed up by at least 1 million people the Commission will meet the organisers, who will then present their initiative at a public hearing in the European Parliament. The Commission then decides if it will further the initiative and start the legislative procedure (EC, n.d)

### **4.3 Advocacy in the EU**

The idea of involving civil society was to bridge the gap between Europe and its people. The organized expression of views is one of the cornerstones of European democracy (Losey,2013). However, this resulted in sponsoring Brussels-based civil society organisations rather than grass roots groups. The difference between direct lobbying and grass roots lobbying is that in direct lobbying advocates attempt to influence a legislative body through communication with a staff member who participates in formulating legislation. Grass roots lobbying rather attempts to mobilize the public to take action with respect to the legislation (IRS, 2015). Professional Brussels activists, who are trained in lobbying and advocating perform a balancing act between two fields of interests. They have to remain deeply rooted in their diverse national, regional and local stakeholder context, as well as in the EU institutions (Heidebreder,2012). In the case of the anti-ACTA campaigns these organisations were not the driving force, but rather worked as [lymph] nodes (Losey,2013,p.56). As Losey concludes, the CSOs “strategically bridged these efforts for the debate inside the European Parliament.”

The successful policy intervention was the result of a combination of public and institutional advocacy. The street protests alongside the lobbying in the EP contributed to and multiplied the voices against ACTA. This helped to highlight the concerns of the citizens to the MEPs about “civil liberties, reintroduced previously rejected provisions through an undemocratic side-channel, and [...] help prevent future copyright reforms” (Losey, 2013). While civil society organisations in Europe functioned as glue for the interventions, they were not the initiators.

### **4.4 The online events**

The events leading up to the rejection of ACTA commenced in the US. The online protests then targeted the US copyright legislation proposals Stop Online Piracy (SOPA) and the Protect IP Act (PIPA). These served as role models for the following Anti-ACTA hit. In order to show their disapproval of SOPA and PIPA, several popular websites decided to “go dark” and to participate in a blackout, where the website’s hosts voluntarily restricted their usual content (Huffington Post,2012). Wikipedia, Google, Reddit and Firefox participated in the announced blackout and either shut down their website all together or decided to educate their users about the legislation by showing important facts and analyses on their homepage (Savov, 2012).

The protests on the internet were the binding force for this transatlantic activism. The forum that



emerged online was a cooperation of individuals working alone, which then formed into a loose corporation. Activists gave the internet an important role as the dominant tool for the protests. Starting with explaining the agreement to a broad audience, the hacking of official government websites, the organizing of street protests and the lobbying of the MEPs was all done online. This shows that the internet networks allowed access for civil society without the help from any institutional powers in raising their voice. The benefit of digital media protesting is that “individuals can selectively engage with issues with varying degrees of commitment” (Losey, 2014).

The example of the protests in the US guided the European online networks to address the Anti-Counterfeiting Trade Agreement immediately. However, the protest movement lacked media-attention and followers due to its low profile as a political debate and hardly newsworthy online protests. The opposition in Europe against the agreement first gained momentum when several documents of the ACTA negotiations were leaked in 2010. The documents leaked were working papers of the EU Trade Commission showing the European counter-proposals for agreement (Geist, 2010). Online activists such as Anonymous, La Quadrature du Net and Electronic Frontier Foundation published these documents, in addition to analyses of the agreements (EFF, 2012). These organisations and other activists to create wikis and blogs about ACTA, which educated the public and raised awareness of ACTA's potential impact.

#### **4.5 Definition of horizontal networks**

Horizontal networks are unified by an event or a common interest. People who join such networks are interested in the topic and using the ideas and people they meet to make a “better world”. The organizers connect people in their network, even though the networks are not always focused on a specific goal (Bassil, 2012). These networks are a new semi-political system emerging from the process of the formation of “global civil society” (Castells, 2008). The contemporary public sphere uses global communication media systems, such as internet, print press and television. This media system includes what Castells has conceptualized as “mass self-communication, that is, networks of communication that relate many-to-many in the sending and receiving of messages in a multi-modal form of communication that bypasses mass media and often escapes government control” (Castells, 2007). Rossier elaborates on this point saying the emerging organized networks are “horizontal, collaborative and distributed in character offering a distinct social dynamic and transformational potential” (Rossier 2006).

As Losey points out, the networked public sphere is better to understand as a “complex interconnection between civil society and individuals around common political points of intervention such as a national legislative body”(Losey, 2013). The networked public sphere is open, accessible, and supported by the participatory discourse of individuals sharing and creating content across a range of different means (Benkler, 2006). This includes especially Wikis, email lists, social media, and chat channels. The horizontal networked public sphere encourages a debate that questions the political decision making process and its outcome.

The loosely coordinated group “Anonymous” was the most noted horizontal network in Europe. They launched several distributed denial-of-service attacks on government websites. DDoS attacks make a network resource unavailable for its intended users and therefore temporarily suspend its service. The hackers employ several attacking computers from different sources to overwhelm the target with fake traffic (InfoSec, n.d). The European Parliament fell under a DDoS attack in January 2012 initiated by Anonymous with wide support from Internet users. The organization created a web tool that allowed any layman to participate in the cyber attacks (Kirk, 2012).

In the Czech Republic hackers attacked various official websites, such as the Czech Association of Copyright protection. Anonymous also sent a threatening letter to the Czech and Polish parliaments issuing: ” - we are more powerful than you. We have a lot of your files and personal information. We warn you to exercise caution” (Khan,2012). Even though the debate was bound to social media, several MEPs already picked up on the frustration of their constituencies and started supporting the movement. The opposition to ACTA was especially evident in Central and Eastern Europe due to the past of the surveillance of the former communist regimes (Arthur,2012). The protesters have compared it to the “Big Brother-style surveillance used by communist regimes” (Eick, 2012). Many young Central and Eastern European see downloading films and music as a common practice and there was a fear of being sentenced to prison for downloading and file-sharing. At the same time the door for massive online surveillance would have been opened. The protesters held banners saying:”Thus far we were under Moscow’s lash, now Brussels is going for it”. (Eick,2012).

#### 4.6 The street protests

The internet activists and the organisations such as La Quadrature du Net also mobilized against ACTA and organized several protests via social media across Europe. In over 200 cities the opposition demonstrated against ACTA and for the protection of their privacy and liberties online. In January 2012 about 15.000 people protested in Krakow and more than 5000 in Warsaw (Euractiv, 2012). These protesters were mostly teenagers and mid-twenties who took to the street for the first time. Here the demonstrations were focused on national politics rather than the European counterpart. This is because the national parliaments of the MS were ratifying the agreement before the European Parliament voted on it. The protests targeting the MS' parliaments was therefore more pressing. The CSOs here again functioned as binding forces by organizing permits for the demonstrations and keeping the protests non-violent (Losey, 2013).

These protests sparked national and international media attention with the result that Polish prime minister Donald Tusk promised a meeting with delegates of the protest movement. During the session, Tusk claimed that the agreement would not be signed by the Polish government. However, a month later the Polish ambassador signed the treaty in Tokyo, which led to an outcry not only in Poland but all over Europe. That is why more protests in February were organized in over 200 cities simultaneously. The organizers were, amongst others Anonymous, LQdN, but also political parties such as the Pirate Party and the Greens (Losey, 2013).

What grabbed the attention of the media and the politicians the most was, besides the turnout of more than 100 000 people in Germany alone (EDRi, 2012), the Guy Fawkes mask turning into the symbol of the movement. Used by Anonymous mainly, the mask was now visible in every protest. Guy Fawkes was a 17<sup>th</sup> century British catholic terrorist, whose biography was adopted in a 1980's comic and a movie (Economist, 2014). Even the Polish parliament's group Pakilto's Movement wore the mask to protest the signing of ACTA on 26 January 2012. This political stunt and others alike helped to support the momentum of the movement (Euractiv, 2012).



Figure 1. Guy Fawkes Mask,  
Retrieved on 13.04.2015  
from [http://imgkid.com/  
anonymous-mask-drawing.sh  
tml](http://imgkid.com/anonymous-mask-drawing.shtml)

The other memorable event was the second pan-European demonstration on 9 June 2012. The culmination of a month long effort by advocacy groups to keep the issue in the public consciousness was awarded with many MEPs and Committees in the EP saying that the treaty was politically dead (Neubauer, 2012). The date was chosen by the core of the networks, because it was closer to the voting in the European Parliament. In an interview with online magazine *Techpresident* the German main organizer Markus Beckedahl stated:

“Our main goal has been to create a broad coalition of organisations and people protesting against ACTA for different arguments, to communicate the criticism against ACTA in a comprehensive way as well as to connect protests taking place online and offline. We have tried hard to keep the protests alive and thriving from February until June with a small team of people working on a voluntary base” (Neubauer, 2012).

In Germany the turnout for the second event was lower than expected. This was due to fewer mobilizations of protesters and the fading media attention. However, this time the demonstrators were fully engaged in the opposition. The biggest demonstration was in Munich, where the organizers were university students who demanded a fundamental reform of the European IP laws. One of the organizers stated: “Intellectual property- this term is complete nonsense. I want an information society, where everyone has access to everything” ( Peters, 2012). The bystanders joined in demanding free file sharing, as well as no legal consequences for downloading music and movies.

The second protest was named “European Action Day Against ACTA”. Prior to the demonstration the CSOs appealed to the public and to the European Parliament that it is crucial for the EP to show “courage to stand up for its democratic role in the decision-making process”( EDRi,2012). Furthermore the organizations urged the MEPs to stand their ground against the European Commission and the European Council in order to protect fundamental rights and democracy, consequently not giving their approval to the treaty. This agreement then turned into a chance for the parliament to prove to the citizens that their voices are heard and represented with their newly gained institutional strength from the Lisbon treaty.

#### **4.7 The petition**

Another major player in the lobbying campaign was the civil society organization Avaaz. The organization launched a petition against ACTA with more than three million people signing it. This was the largest online petition ever brought before the European Parliament (Avaaz, 2012). The power of the petition signed by three million people was acknowledged by the politicians of every political

group. The European Parliament's president Martin Schulz endorsed it saying:

“The debate on ACTA showed the existence of European public opinion that transcends national borders. I was very impressed by Avaaz's petition with massive 3 million person signing, which was addressed to the European Parliament. Citizen's concerns have been taken seriously by the European Parliament” (Avaaz, 2012).

The Avaaz petition was not the only advocacy effort to connect the opposition with the European Parliament. The vertical dimension of the protests targeted the EP by lobbying, consulting policy makers and working as nodes. The NGOs educated the protesters and the public in general on how to contact their MEP, at the same time providing talking points. This peer-production built a vertical bridge by also organizing panels, public debates and the sharing of information about the ACTA evolution( Losey,2013).

## **V. The internal debate of the European Parliament**

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### **5.1 European Parliament's powers after Lisbon**

ACTA was the first trade agreement that the European Parliament could vote on. This became the most prominent example of the EP's increased strength. That is why the raising of the profile of the debate became most important for the NGOs and for the protesters. In a personal interview with Information and Cyber Law expert James Losey, he explained the significance of the agreement by calling it an unprecedented example of European democracy:

“There have been protests in Europe before that were larger than the [anti] ACTA protests, but what was really interesting about ACTA, was this was the first time that the EP would be looking at a trade agreement post-Lisbon. So previously trade agreements were negotiated and approved by the European Commission, before it would go to the member states. So this was a new step in European democracy when representatives of the European citizens to the EP would actually have a voice, whether or not a trade agreement is approved before it goes back to the MS. This created a new opportunity for citizens” (Losey, personal interview, 2015).

The European Parliament had to either accept or reject the Anti-Counterfeiting Trade agreement. Under Article 289 (2) TFEU the consent procedure gives the parliament the right to veto or to give its consent, without being able to further amend the proposal of the Commission. Additionally, the EP must, by a simple “yes” or “no” majority, approve the conclusion of agreements with third parties, such as association and trade agreements with non-member states. If the Parliament does not give its consent, such agreements cannot enter into force (Archick, 2014). The Council is unable to overrule the Parliament's decision. This “take it or leave it” decision led to a 50-50 chance of the MEPs vetoing and then consequently killing ACTA (Kreiling, 2014).

### **5.2 The impact of civil societies' input**

Even during the demonstration the the EU institutions reassured that they were in favour of harmonising and strengthening the international IP laws. However after the civil society started to suspect the infringement of their liberties online and the EU institutions criticised the non-transparency,

the debate started catching fire (ICTSD, 2010). The protests went viral and spiralled into an uproar that made the MEPs aware of the concerns. The legislator could not escape the debate, which showed the flaws of the agreement. Before the anti-Acta debate it was common practice to sweep legislation through, but the demonstrations stalled the process. The MEPs changed their communication strategy with the public and gave it their full attention. In an interview the Vice-President of the European Economic and Social Committee, Anna Maria Darmanin said:

“The debate on ACTA made the Parliament, not only the MEPs, but the Parliament as an institution, start listening more carefully than it did before. If you asked me why [the protests against] ACTA worked, it is because it was a combination of the web and the street action, but the web driving the momentum and raising the awareness. For other protests, the media was not interested in picking it up. The media obviously plays a major role, if you don’t have your foot in the internet you rely on the traditional media, as many MEPs do” (personal interview, Darmanin, 2015)

### **5.3 The hearings**

Not only the external, but also internal pressure against ACTA continued to mount when the Written Declaration 12 was passed (Geist, 2010). A Written Declaration is a tool of the EP where MEPS can suggest holding a debate on a certain issue. Rule 123 of the EP rules of procedure allows at least 10 members from at least three political groups to address a matter falling within the competences of the EU (Directive 2011/2058). The Written Declaration 12 was signed by 387 MEPs which shows a “clear admonition” (Ramalho, 2010). It draws attention to the lack of transparency, the disproportion of criminal sanctions, liability of internet service providers and the border measures. Furthermore does it claim that there is no need for a harmonization of IP protection at the European level, but rather use the principle of subsidiarity.

After the Declaration there were several hearings and debates on ACTA. The MEPs had the chance to submit questions to the Trade Commission. The Trade Commissioner Karel de Gucht responded to the concerns raised about the substance and the phrasing. He admitted that even though ACTA is compatible with the *acquis communautaire* there were disparities with the corresponding EU law. He further stated that international agreements are drafted in more general terms, so that the signatory parties could adjust it to their legal code. Gucht stressed that ACTA fully respects EU’s fundamental rights and data protection (Gucht, 2011).

In a second meeting, on March 28 2012 the MEPs could address the Commissioner directly. The MEP Doris Aschenbrenner asked why there was not a different way to approach enforcement matters in the material world and in a digital world and why there was no legal distinction. This was also an issue that many NGOs raised concerns about. The Director General of Trade, Pedro Velasco Martins answered that in the EU, as well as in “international legislation (WTO and WIPO treaties) there is no distinction made between IPR infringements in the physical and the digital environment. To do otherwise in ACTA would not be compatible with EU legislation. What is illegal on the internet also needs to be enforced” (Minutes of Meeting, 2012).

#### **5.4 The parliamentary procedures**

The Anti-Counterfeiting Trade Agreement was debated in five parliamentary committees. The Committees of Industry, Civil Liberties, Development, Legal Affairs and International Trade addressed in depth the consequences of the agreement with respect to their committee’s framework. The Concern about the secrecy of the debates and the lack of input from, not only civil society but also MEPs motivated the European Parliament to vote on March 10, 2010 with 633 to 13 votes in favour of a resolution condemning ACTA secrecy and restrictions on consumer and civil rights (KEI,n.d)

The committee on International Trade was the leading chamber for the analysis of the treaty. On October 25 2010 the MEPs met for the first time. The rapporteur for ACTA Kader Arif resigned in protest after 22 of the 27 member states signed ACTA on January 26 2012. Arif stated :

"I condemn the whole process which led to the signature of this agreement: no consultation of the civil society, lack of transparency since the beginning of negotiations, repeated delays of the signature of the text without any explanation given, rejection of Parliament's recommendations as given in several resolutions of our assembly” (Euractiv,2012)

The Committees on Civil Liberties, Development, Industry and Legal affairs rejected ACTA during their internal voting on May 31 2012. Overall the Committees took a negative stance on the agreement. Civil Liberties MEPs claimed the agreement failed to respect the EU’s fundamental rights. That is why they voted 36 votes to one, with 21 abstentions to reject ACTA. Legal Affairs also declined their consent with 12 votes to 10. The Development Committee however voted, almost in consensus to reject ACTA with 19 votes to one, and three abstentions. The Committees’ opinions



however are non-binding, were sent to the Key Committee (EP Press release, 2012).

The new rapporteur David Martin and the shadow rapporteur Christofer Fjellner drafted a report with the decision to reject ACTA giving the reason:

“The intended benefits of this international agreement are far outweighed by the potential threats to civil liberties. Given the vagueness of certain aspects of the text and the uncertainty over its interpretation, the European Parliament cannot guarantee adequate protection for citizens' rights in the future under ACTA. Your rapporteur therefore recommends that the European Parliament declines to give consent to ACTA” (Martin, 2012).

## 5.5 the final voting

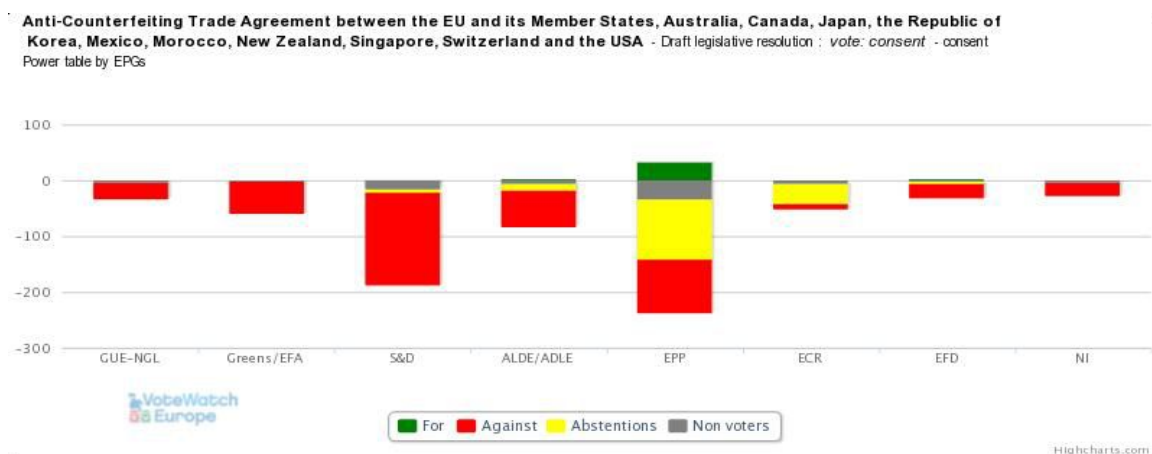


Figure 2. The voting outcome by parties, Retrieved on 14.04.2015 from <http://term7.votewatch.eu/en/anti-counterfeiting-trade-agreement-between-the-eu-and-its-member-states-australia-canada-japan-the--2.html>

In the beginning of July 2012 the European Parliament finally voted on ACTA. The Anti-Counterfeiting Trade Agreement was rejected and therefore did not become law. 478 MEPs voted against and 39 in favour. 165 MEPs abstained from the vote. (Press Release, 2012). The two figures depict the outcome of the vote. The first one shows the voting behaviour by parties and the second one illustrates the voting outcome in general.

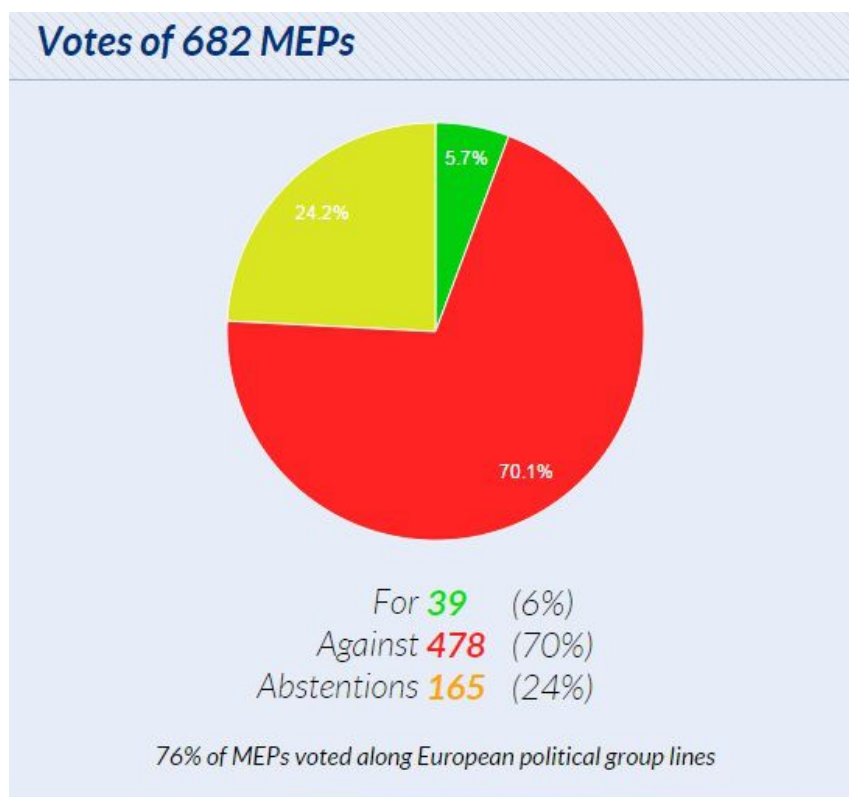


Figure 3. Voting outcome. Retrieved on 14.04.2015 from <http://term7.votewatch.eu/en/anti-counterfeiting-trade-agreement-between-the-eu-and-its-member-states-australia-canada-japan-the--2.html>

## **VI. Conclusion**

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After the European Parliament rejected an international trade treaty for the first time, the “power of the EU’s legislative branch has been clearly reinforced” (TACD, 2012). The anti- ACTA protests’ momentum was the centre of mainstream media. The lengthy debate attracted the attention of young people and tackled the general political apathy in European politics. This report investigated the events leading up to the growing momentum. Furthermore it outlined the concerns raised by the civil society. A clear overview of the shortcomings in the negotiation of the agreement, including the secrecy and the content was presented. It analysed and illustrated the degree of differences between ACTA and the existing EU Intellectual Property laws. What is more, this report found that there are lessons to be learned from ACTA.

There are three lessons that the EU can draw from the anti-ACTA protests for future trade agreements and for the general legislation procedure. The importance of an active European civil society and its role as a powerful actor cannot be disputed. There has been a fruitful collaboration between the advocacy network to lay the groundwork for a massive anti-ACTA response; EU civil society has given an unprecedented example on how to “organize a positive European identity across borders, using social networks, in defence of the European values of democracy, open culture and global justice” (TACD,2012). The Internet activists and the normal community of users defended its space. The ACTA fight showed that most people want an uncensored, neutral, open and decentralized Internet. The inclusion of civil society is crucial in order to “achieve political progress in a modern and democratic society, so that current challenges facing the EU, and their growing complexity are tackled by the EU institutions alongside civil society organisations. Therefore “it is no longer business as usual, where you can keep on sweeping legislation and not take into consideration what the public thinks” (Darmanin, personal interview, 2015)

The second lesson to be learned from ACTA is the need for transparency of negotiations. The fight against the opacity, i.e the non-disclosure of documents and the negotiating behind closed doors was one of the major motives of the civil society organisations. What is more, ACTA could have been negotiated with greater transparency. This would have mitigated public concerns. The secrecy throughout the negotiations led to a spread of rumours that stayed in the publics’ awareness. Even

though most of the controversial points such as the “three strikes provision which had in fact been watered down subsequently or deleted from the final text altogether”(Matthews, 2012). Furthermore the vague wording of the legal provisions caused high uncertainty and concerns. The absence of a clear definition for many of the legal terms could have been addressed in a straightforward way and contributed to a more open dialogue between the public and the negotiators.

Another lesson from ACTA for civil society to be learned is that their voices are heard. The amount of public outcry and the effort put in the lobbying to the MEPs and other EU institutions shows that it takes a high degree of organisation, educating and mobilizing of citizens not only for street protests, but also to voice their concerns online. The internet is a tool that has not yet been exhausted by civil society organisations. Public engagement with the help of the internet, such as wikis, blogs, social media, etc. is already used by activists and groups in social and political protest. The Internet does not only “facilitate mobilisation and participation in traditional forms of protest, such as national street demonstrations, but also to gives these protests a more transnational character by effectively and rapidly diffusing communication and mobilisation efforts”(Van Aelst&Van Laer,2010).

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