Dear Honourable Member of the European Parliament,

By the end of June, you will be asked whether you support or do not support the ratification of the Anti-Counterfeiting Trade Agreement (ACTA).

This is an important issue deserving of your close attention.

All that we ask is that before you cast your vote you ascertain the facts, listen to the views of all stakeholders, ask them questions if you need further information or clarification, and make the decision that you feel is right in all the circumstances.

The Internet Society’s perspective

The Internet Society previously expressed its opinion regarding ACTA after the final version of the text was released to the public. For your convenience, a copy of the Internet Society’s statement on ACTA (February 2011) is attached to this letter. We hope that you will take the time to read this statement.

Our over-arching concern is with the procedure.

We consider there was insufficient transparency and participative engagement with all stakeholders throughout the negotiation process.

We strongly believe that policies and legal norms regarding the Internet and its use (including the enforcement of intellectual property on the Internet) should be developed with the full and active participation of all stakeholders in an open and transparent manner, consistent with paragraph 8 of the Tunis Agenda for the Information Society. We also believe that supporting the ratification of an internationally binding agreement on matters of “Internet governance” that was not developed in an open, transparent and inclusive manner sets a bad precedent and risks undermining confidence in the European political system.

Opinions appear divided on whether or not ACTA goes beyond the EU acquis communautaire. This may be in part because some of the provisions could be open to different interpretation or different approaches regarding implementation. We are concerned about the consequences that may result if some countries take an overly broad interpretation of the agreement, thereby limiting Internet access, legitimate use and innovation. Further details regarding some possible implications of the agreement are set out in the attached statement (Annex B).

We are also concerned about the closed nature of the proposed ACTA Committee. Such a committee should, by default, be truly multi-stakeholder and responsible for ensuring the fair, proportionate and appropriate implementation of the agreement across all participating countries.

As we stated this time last year, the Internet Society believes that further and more inclusive discussions are needed on these complex issues before binding agreements are made. Further, our concern is that without the combined insight, experience and expertise of all stakeholders, it is
difficult to ensure that the appropriate balance will be struck between all interests, and unintended and negative consequences may remain unforseen.

For the current status on ACTA, please refer to Annex A.

**Some factors to consider**

As you review the text of ACTA and consider the possible implications for European citizens and residents if the European Parliament ratifies the agreement, you may find it useful to reflect on these questions:

- Are you satisfied that ACTA was developed and negotiated in a sufficiently open, transparent and inclusive manner?
- Are you satisfied that there was sufficient and effective public consultation throughout the process?
- Are you satisfied that the perspectives of all interested persons have been taken into account?
- Are you satisfied that legal obligations that would be imposed on Europe by the provisions of ACTA are clear and appropriate?
- Are you satisfied that ACTA would not harm the open and proper functioning of the Internet?
- Are you satisfied that ratifying ACTA is in the best interests of Europe, and of your country?

If you have any doubts, we urge you not to support ratification of ACTA.

We would be pleased to discuss these issues with you further. In this regard, please do not hesitate to contact Mr. Frédéric Donck, Director, European Regional Bureau

Frédéric Donck
donck@isoc.org
ANNEX A

The current status of ACTA

As at the date of this letter, we understand that Australia, Canada, the Republic of Korea, the EU and 22 member states, Morocco, New Zealand, Singapore, and the United States have signed ACTA. Mexico and 5 EU member states have not signed.

The Second Standing Commission of the Mexican Congress, after undertaking consultations with local stakeholders, unanimously approved a resolution urging the Mexican Executive not to sign ACTA.iii

The European Parliament’s Special Rapporteur on ACTA, Kader Arif MEP resigned on 27 January 2012 stating:

“… 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, reject of Parliament’s recommendations as given in several resolutions of our assembly. …”iv

On 31 January 2012, Slovenian Ambassador Helena Drnovšek Zorko said:

“… I signed ACTA out of civic carelessness, because I did not pay enough attention. Quite simply, I did not clearly connect the agreement I had been instructed to sign with the agreement that, according to my own civic conviction, limits and withholds the freedom of engagement on the largest and most significant network in human history, and thus limits particularly the future of our children. …”v

Bulgarian Prime Minister Boyko Borisov is reported to have agreed on 2 February 2012 to ratify ACTA with a reservation to the effect that Bulgaria will not amend its legislation concerning the Internet.vi

On 3 February 2012, Polish Prime Minister Donald Tusk announced that he was suspending Poland’s ratification of ACTA. The principal reason cited for this decision is that Prime Minister Tusk considered that there had not been sufficient public consultation.vi

We also note that the Directorate-General for External Policies Policy Department published an assessment of ACTA in July 2011 with the following primary recommendation:

“unconditional consent would be an inappropriate response from the European Parliament given the issues that have been identified with ACTA at it stands”.viii
ANNEX B – Internet Society’s statement on ACTA

Calling for an open and international dialogue

The Internet Society's statement on the text for the proposed Anti-Counterfeiting Trade Agreement (ACTA)

Introduction

The Internet Society would like to formally thank the governments engaged in the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA) (“the ACTA participants”) for releasing the text dated 3 December 2010.

We encourage each country to make the text available to its citizens in their language/s so that they may have an opportunity to consider the terms of the proposed agreement and its potential implications.

The Internet Society, a member of the broader Internet community, wishes to take this opportunity to provide our preliminary perspective on those parts of the proposed agreement which pertain to the Internet, Internet governance, Internet technologies, Internet intermediaries and/or Internet users. In general, while the proposed ACTA text has improved over the April 2010 version, the Internet Society remains concerned about its potential impact on the development and legitimate use of the Internet. We also repeat our call for greater transparency and true multistakeholder participation, including at the level of local implementation of the ACTA agreement.

The Internet is an extraordinary platform for innovation. It has benefitted from broad participation in both the development and use of Internet technology, services, applications and policy. The Internet’s openness has been critical to its development and continued success. Openness is the key to continued innovation and investment in the Internet and all the associated social, economic, and cultural benefits it brings.

The history of the Internet’s development demonstrates that technology can be used for beneficial, and sometimes unforeseen, purposes. The Internet Society believes, therefore, that legal frameworks should support the open and unrestricted development of Internet technologies and should not limit the development and use of technologies for legitimate purposes.

The process

The public release of the proposed text of a multi-national trade agreement is a milestone on the path to greater transparency in governmental decision-making. However, this is no ordinary trade agreement as it contains matters which fall within the scope of Internet Governance. According to the World Summit on Information Society (WSIS), the fundamental principle of Internet governance is that it be multistakeholder. Paragraph 68 of the Tunis Agenda for the Information Society states:

... We also recognize the need for development of public policy by governments in consultation with all stakeholders.¹

Many international and inter-governmental organisations have formally recognised the value of direct multistakeholder participation in the development of principles, guidelines etc. that affect the Internet.

¹ www.itu.int/wsis/docs2/tunis/off/6rev1.doc
As one particularly good example at the global level, we would point to the steps taken by the Organisation for Economic Cooperation and Development (OECD) to include the Internet technical community and civil society in their Internet related policy work since the June 2008 Seoul Ministerial Meeting on the Future of the Internet Economy. The Internet Governance Forum (IGF) is another good example.

In this regard, we note that a number, if not all, of the ACTA participants held public consultations and meetings with some stakeholders. However, there was limited scope for interactive discussion and direct contribution to the development of the text for the proposed agreement as is envisaged by the WSIS principles.

We are disappointed that the ACTA participants only released two versions of the agreement under negotiation throughout the eleven formal rounds of negotiations - one after the eighth round and one after the final round. We are also disappointed that the ACTA participants did not adopt a truly open, transparent and inclusive multistakeholder approach to the development of the substance of the proposed agreement at least with respect to those terms which pertain to the Internet.

Deciding how to appropriately enforce intellectual property rights (IPR) in an online environment is an important and relevant issue for many stakeholders, not just governments. The combined insight, experience and expertise of all stakeholders – government, business, content owners, online service providers, content distributors, civil society, Internet users, the Internet technical community, academia and others – is needed to develop appropriate and measured solutions to address the challenging issue of online IPR infringement while also ensuring that the Internet continues to grow, evolve and reach new users.

**Enforcement of IPR in the Digital Environment**

While it appears that the proposed ACTA does not require parties to the agreement to impose Internet-focused IPR enforcement measures such as suspension of Internet access, traffic shaping, blocking, content identification and filtering, it does require that:

“enforcement procedures are available ... so as to permit effective action against an act of infringement of intellectual property rights which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements” (article 27(1)).

Yet, the proposed agreement makes no attempt to articulate what is not an appropriate IPR enforcement measure other than to say that such measures must be implemented in a way that is consistent with each party’s law, preserves fundamental principles such as freedom of expression and privacy, and avoids the creation of barriers to legitimate activity (article 27(2)).

We believe that ACTA was a missed opportunity for countries with strong legal frameworks and leading digital economies to take a leadership position in this controversial area by specifying what enforcement measures would not be appropriate. We are concerned about the consequences that may result if some countries take an overly broad interpretation of the agreement, thereby limiting Internet access and innovation.

We assume the role of assessing whether parties’ IPR enforcement measures are consistent with ACTA will fall to the proposed ACTA Committee, but under the proposed agreement only parties to ACTA (governments) will be represented on the Committee. Other affected stakeholders will have no right of representation and no guarantee that their expertise and advice will be sought. Further, unless

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2 Article 36(3)(c) states “The Committee may decide to make recommendations regarding implementation and operation of this Agreement, including by endorsing best practice guidelines related thereto”

3 Article 36(3)(b) states “The Committee may decide to seek the advice of non-governmental persons or groups” (emphasis added)
the Committee decides otherwise by consensus, all decisions of the Committee must be taken by consensus\(^4\), so it may prove difficult for parties that disagree with a party’s approach to reach a decision that that party’s IPR enforcement measures are not appropriate.

**Injunctions against third parties**

We are also concerned that the proposed agreement may encourage parties to use injunctions against third parties (i.e. non-parties) as an enforcement tool with very little guidance as to their appropriate use. Indeed, the provision (article 8(1)) has a broadly stated purpose, namely “to prevent goods that involve the infringement of an intellectual property right from entering the channels of commerce” that is only qualified with “where appropriate” which is undefined. Further, such injunctions may have the effect of imposing penalties, financial or otherwise, on those third parties.

**Cooperative efforts within the business community**

We caution against any measures which would have the effect of transferring the responsibility for enforcement to private entities. For example, article 27(3) states:

> “Each party shall endeavor to promote cooperative efforts within the business community to effectively address … copyright or related rights infringement …”.

The business community is neither equipped nor the appropriate group of entities to be determining culpability and the appropriate remedies for online copyright infringement. Due process and judicial oversight must remain paramount.

**Widespread distribution**

The inclusion of the phrase “the unlawful use of measure of widespread distribution for infringing purposes” as a possible category of IPR infringement in article 27(2) combined with the statement in the preamble “…[n]oting that the proliferation of counterfeit and pirated goods as well as of services that distribute infringing material …” seems to indicate that the ACTA participants intend to extend enforcement measures to tools which allow infringement.

Enforcement measures which focus on methods of infringement (e.g. peer-to-peer protocols) rather than infringement itself risk adversely affecting the development and use of technologies for legitimate purposes.

**Online service providers**

The proposed agreement would permit parties to provide their competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement (see Article 27(4)).

We note that “online service provider” is neither defined nor limited to particular classes of providers. We also note that the subscriber may or may not be an infringer.

In any enforcement of IPR in the online environment, it is imperative that non-infringers (e.g. Internet subscribers, Internet users, online service providers and others) are not adversely affected by those enforcement measures.

**Technological measures**

\(^4\) Article 36(4) states “All decisions of the Committee shall be taken by consensus, except as the Committee may otherwise decide by consensus. The Committee shall be deemed to have acted by consensus on a matter submitted for its consideration, if no Party present at the meeting when the decision is taken formally objects to the proposed decision ....”
Technology can be used for beneficial, and sometimes unforeseen and surprising, purposes. That is the essence of innovation in the Internet environment. We believe that legal frameworks should support the open and unrestricted development of Internet technologies.

**Institutional arrangements**

Should ACTA proceed, we strongly urge all parties to adopt mechanisms for active, timely and direct multistakeholder participation in the local implementation of its terms. In this regard, we consider that article 28(4) is insufficient.

Further, under the category of transparency in article 30, we encourage the negotiating parties to add measures for the provision of assistance to wrongly accused persons.

As a general point, we question the merits of establishing a new international forum on international IPR issues (“the ACTA Committee”), particularly one which does not by default provide for direct and active multistakeholder participation. Furthermore, the forum is sought to be established after the substantive discussions have taken place and terms have been agreed. Should ACTA proceed outside the World Trade Organization (WTO) or the World Intellectual Property Organisation (WIPO), we call upon the parties to adopt a truly multistakeholder mechanism responsible for ensuring the fair, proportionate and appropriate implementation of the agreement.

**Going forward**

No doubt the discussions the negotiating parties have had in the formal rounds of negotiations have been useful in exploring these complex and controversial issues. However, the Internet Society believes that further and more inclusive discussions are needed on these complex issues before binding agreements are reached, not least because the solutions proposed may become precedents for mechanisms dealing with other Internet governance issues. We recommend that the World Intellectual Property Organisation (WIPO) be invited to play a role in leading these further discussions to ensure a more open, transparent and inclusive approach to these issues.

**About the Internet Society**

The Internet Society is an independent non-profit organisation, founded in 1992 to provide leadership in Internet related standards, education and policy. It is a principles-based organisation, dedicated to ensuring the open development, evolution and use of the Internet for the benefit of people throughout the world.

The Internet Society is the organisational home of the Internet Architecture Board (IAB) and the Internet Engineering Task Force (IETF) - an open consensus-based group responsible for defining Internet protocols and standards.

The Internet Society is accredited with Consultative Status with the United Nations Economic and Social Council and Observer Status with WIPO. It has formal and strong working relationships with other UN organisations such as UNESCO, UNECA and the ITU, as well as governmental and inter-governmental organisations, for example, the OECD, CITEL and APEC.

The Internet Society has more than 100 organisational members, more than 40,000 individual members and over 80 chapters around the world. To better serve the regional Internet community, the Internet Society has created regional bureaus in Africa, Latin America, Asia, North America and Europe. Further, the Internet Society has established a Next Generation Leaders Programme to nurture future Internet leaders to address the critical technology, policy, business, and education challenges that lie ahead.

This global and diverse community continues to deploy efforts in a wide range of areas, working to enhance their contribution to the development of Internet-related public policy solutions around the
world. Through its sponsored events, developing-country training workshops, tutorials, public policy, and regional and local chapters, the Internet Society serves the needs of the growing global Internet community.

For more information see www.InternetSociety.org

Date: 14 February 2011

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i [www.itu.int/itsis/docs2/tunis/off/6rev1.doc](http://www.itu.int/itsis/docs2/tunis/off/6rev1.doc)


iii [DICTAMEN CON PUNTO DE ACUERDO POR EL QUE POR EL QUE SE EXHORTA AL TITULAR DEL PODER EJECUTIVO FEDERAL PARA QUE INSTRUYA A LAS SECRETARÍAS Y DEPENDENCIAS NEGOCIADORAS DEL ACUERDO COMERCIAL ANTI FALSIFICACIÓN, A NO FIRMAR DICHO ACUERDO](http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=9376&lg=61)


v [http://metinalista.si/why-i-signed-acta/](http://metinalista.si/why-i-signed-acta/)

